



**RIGA
GRADUATE
SCHOOL OF
LAW**

International consequences of the activation of Title III of the Helms Burton Act

MASTER'S THESIS

AUTHOR:

Carlos Jalil
LL.M 2019/2020 year student
student number M019045

SUPERVISOR:

Antonio, Pastor

PhD

DECLARATION OF HONOUR:

I declare that this thesis is my own work, and that all references to, or quotations from, the work of others are fully and correctly cited.

(Signed)

RIGA, 2020

Abstract

In May 2019 the U.S. government activated the Title III of the Helms Burton Act. Title III grants U.S. nationals whose property was expropriated in Cuba after the 1959 revolution a private right of action against those who *traffic* in their property. The purpose of the thesis is to analyze the legal, political, economic and social consequences of the activation and its incompatibility with international law. The study therefore examines expropriation rights, state immunity from jurisdiction and the extraterritorial application of U.S. laws.

Analytical and applied legal research has been conducted by evaluating primary and secondary sources of law such as national legislation, treaties, international jurisprudence and legal opinions. Such sources are applied in lawsuits against companies including Meliá, Expedia and Booking that use property expropriated from U.S. nationals. The main findings reveal that Title III property claims will have jurisdictional problems in national courts because expropriation disputes are intergovernmental. The thesis, however, not only demonstrates that the Helms Burton Act aggravates Cuba's economic crisis and undermines international law, but also proposes possible approaches for resolving property claims.

Summary

After the 1959 Cuban revolution, the new socialist Cuban government led by Fidel Castro assumed power. Its ideology situated Cuba as an ally of the Soviet Union. Amid the Cold War, this caused problems with the United States and after several disputes, Cuba proceeded to expropriate properties owned by U.S. nationals and foreigners. Years later, the United States introduced the Helms Burton Act wherein Title III granted U.S. citizens the right to sue individuals who *trafficked* in properties expropriated from U.S. nationals in Cuba.

Trafficking refers to the action of knowingly and intentionally engaging in property-related activities. The Act gives the term a broad definition by which individuals using expropriated property may incur liability. For example, Spanish company Meliá was sued for operating hotels in Cuba in a joint venture with Cuban state-owned companies formerly owned by Cuban American citizens. The Act was criticized by the international community which claimed its illegality for being contrary to international law.

Their argument is based on the fact that Title III provisions violate laws and cause legal effects inconsistent with international law. The latter recognizes the right of states to expropriate since it is an act emanating from state sovereignty. This right is subject to conditions of public use, non-discrimination and compensation, otherwise that state would incur international responsibility for expropriating property of a national of another state. However, even if these conditions are not met, the right of a state to expropriate is not impaired.

As a state act, expropriation disputes must be intergovernmental. The United States, by conferring the right to sue on its citizens, transforms a state dispute into a domestic claim against individuals using the properties. This raises jurisdictional issues in national courts because for determining whether individuals trafficked in the property, it is necessary to assess the legality of the expropriation and the nature of the property. Therefore, national courts may decline jurisdiction in accordance with international law norms, in particular jurisdictional immunities of states and their property.

National courts could also interpret claims in their ordinary sense. That is, claims for trafficking against private individuals and not against the Cuban government. Nevertheless, the absence of prior practice in international law regarding the act of trafficking in expropriated property complicates the determination of a breach. To prevent a violation of property rights, the United States could espouse its citizens' claims against the Cuban government in accordance with the principles of diplomatic protection.

Despite this, the major criticism against the Act is the extraterritorial application of Title III. By allowing claims against individuals trafficking in expropriated property, it also includes nationals of third states. This is inconsistent with international law since state jurisdiction, or the capacity of a state to exercise its powers, is rooted in territory. International law allows exceptions for the exercise of extraterritorial jurisdiction particularly when an action has a substantial connection between the matter in dispute and the state's sovereign authority.

In the absence of such a connection, the United States is precluded from exercising its laws extraterritorially. In response, the European Union and certain countries have adopted blocking statutes prohibiting the enforcement of foreign court judgments in their territories with respect to Helms Burton Act disputes. Therefore, not only do the provisions, which are contrary

to international law, create jurisdictional problems for claimants in national courts, but also any prospective ruling will be difficult to enforce beyond U.S. territory.

The Helms Burton Act extends the political dispute between Cuba and the United States to companies engaging in lawful international trade with Cuba. Companies offering tourism services have been most affected. For example, Meliá, Booking, Expedia and Trivago are being sued for using property expropriated from Cuban American citizens. The rationale of this is that the tourism industry represents the largest source of revenue for Cuba as it is the sector where companies mostly invest. Thus, the United States uses Title III to strengthen economic and political pressure on Cuba.

The lawsuits have led several companies to suspend or terminate their business activities in Cuba. This seriously affects the Cuban economy which depends on foreign investment. Nonetheless, other companies have decided to remain operating in Cuba based on the illegality of the Act and the protection of their respective countries. Given the risk of being sued under Title III, these companies should adopt protective measures and potential legal defenses.

Along with the economic problems posed by the Act, the Cuban economic crisis has exacerbated with the Covid-19 pandemic. Ideally, the conflict would be resolved through peaceful settlement mechanisms. A possibility would be the establishment of a claims tribunal. Unfortunately, this is unrealistic due to political unwillingness. Perhaps if the Democratic Party wins the November 2020 presidential elections there could be a rapprochement. Still, the resolution of property claims is necessary for normalizing their relations and for Cuba to achieve stability.

TABLE OF CONTENTS

Table of Contents.....	3
List of abbreviations and definitions	4
1. Introduction	5
2. Title III of the Cuban Liberty and Democratic Solidarity (Helms Burton) Act of 1996..	10
2.1. Provisions and legal effects	10
2.2. Applicable norms and non-compliance with international law	16
3. Extraterritoriality, limits of jurisdiction and international competence in national courts... ..	27
3.1. Extraterritorial application and state jurisdiction	27
3.2. Limits of jurisdiction and international competence in national courts	32
4. Political dispute and potential legal defenses	38
Conclusion.....	44
Bibliography	46

LIST OF ABBREVIATIONS AND DEFINITIONS

CERDS	Charter of Economic Rights and Duties of States
Cuban national	Any Cuban citizen or legal entity organized under the laws of the Republic of Cuba
EC	European Commission
ECHR	European Convention of Human Rights
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
EU	European Union
FCSC	Foreign Claims Settlement Commission
Foreign national	Any individual, corporation or juridical entity not organized under the laws of the United States nor the Republic of Cuba
Helms Burton Act	The Act
ICJ	International Court of Justice
ICSA	International Claims Settlement Act
ILC	International Law Commission
PCIJ	Permanent Court of International Justice
U.S.	United States of America
U.S. national	Any United States citizen or legal entity organized under the laws of the United States
UN	United Nations
USSR	Union of Soviet Socialist Republics
WTO	World Trade Organization

1. INTRODUCTION

In May 2019, the United States government announced that it will no longer suspend the application of Title III of the Helms Burton Act.¹ Title III is the section which confers on U.S. nationals, whose property was nationalized by the Cuban government after the 1959 revolution, a right of action against individuals who profit from that property.² Thus, it aims at protecting property rights of U.S. nationals and strengthening sanctions against the Cuban government by preventing third parties from engaging in economic activities in the disputed properties.

Following the announcement by the U.S. government, its nationals have initiated legal proceedings against companies based in Cuba, the United States and third countries, which currently operate in their expropriated property. For example, companies such as, *inter alia*, Meliá Hotels International, Expedia, Booking and Trivago, have been sued under Title III based on the fact that they operate hotels, resorts and tourist attractions that are nationalized property from Cuban American citizens.³

Title III of the Helms Burton Act produces legal effects which affect norms of international law. In particular, transforms disputes between states, derived from a sovereign act such as land nationalization, into a private civil claim contended by U.S. nationals against others. This includes nationals of third states conducting business activities in Cuba. Thus, it attributes liability to private individuals and entities for acts committed by a foreign state. In addition, since land nationalization is an act *jus imperii* of the state, such claims should not be enforced in national courts as states are generally immune from jurisdiction.

The Helms Burton Act is also extraterritorial because it does not consider norms of state jurisdiction and regulates acts committed by third parties abroad. Consequently, complaints against hotel operators will encounter legal challenges in domestic courts due to Title III's non-compliance with international law. For example, in Spain, the Court of First Instance of Palma de Mallorca declined jurisdiction on a claim brought against Spanish company Meliá Hotels for the use of expropriated property from a U.S. citizen in Cuba.⁴

The EU and countries such as Canada, Mexico and Argentina, have been particularly reluctant to comply with the Helms Burton Act. Accordingly, they have adopted legislative acts, referred to as *blocking statutes*, for protecting private companies based in their countries that engage in international trade with Cuba. In parallel, in 1996 the former European Communities requested consultations against the United States at the WTO arguing that the Helms Burton Act is inconsistent with U.S. obligations under the WTO Agreement.⁵

As I mentioned, the United States seeks to strengthen economic sanctions against Cuba. In doing so, it impacts companies from other countries affecting political and economic interests. Together with the context in which the nationalizations occurred, the Helms Burton

¹ U.S. Department of State. Bureau of Western Hemisphere Affairs, available on: <https://www.state.gov/cuba-title-iii-faqs-libertad/>. Accessed May 29, 2020.

² Cuban Liberty and Democratic Solidarity (Libertad) Act, 22 U.S.C § 6021-6091 (1996).

³ *Mata, Hernandez and others v. Meliá Hotels International, Expedia, Trivago, Booking and others*, 19-cv-22529-FAM (S.D. Fla. 2019).

⁴ *See Juzgado Primera Instancia núm 24 de Palma de Mallorca, de 2 de Septiembre 2019 (procedimiento ordinario 542/2019)* [Court of First Instance No. 24 of Palma de Mallorca, of 2 of September 2019 (ordinary procedure 542/2019)].

⁵ *United States - The Cuban Liberty and Democratic Solidarity Act - Request for Consultations by the European Communities*, WT/DS81/1, G/L/71, S/L/21 (13 May 1996).

Act assumes the lengthy political dispute between Cuba and the United States which influences international relations. As a consequence, it could cause bilateral disputes against the United States with repercussions on international law.

Such is the case with Spain, which expressed its inconformity with the its extraterritoriality and announced that it will protect its companies based upon Spanish and EU law.⁶ Despite countries adopting legislations with the aim of protecting private entities engaging in international trade with Cuba, companies, along with their subsidiaries and affiliates, still face legal challenges. Now, they must analyze their business interests with their investors for deciding on whether to confront the lawsuits for continuing operating in Cuba or cease their activities.

The legal issues arising from Title III are relevant for international and EU law for several reasons. As enshrined in the U.S. Constitution, the United States is entitled to protect the property rights of its nationals.⁷ However, through the Helms Burton Act the United States causes legal effects which are contrary to norms and principles of international law. As a result, claims filed under Title III encounter legal challenges in national courts within the European Union, as in the *Central Santa Lucia L.C. v. Meliá Hotels International S.A.* case.⁸

Still, European companies can be sued in U.S. courts for the use of the expropriated property. If this occurs and the lawsuits succeed, then disputes as to whether U.S. judgements should be enforced in Europe are likely to arise. This could be a challenge for the effectiveness and applicability of EU law, especially for Council Regulation 2271/96 which protects European companies against the extraterritorial application of legislation adopted by a third state.⁹

It is also an issue for EU Member States. For protecting European companies engaging in lawful international trade with Cuba, Member States will have to oppose United States' actions which could imperil their international relations. Nevertheless, jurisprudence on this subject is insufficient and therefore is difficult to assess how courts will interpret international and EU Law. For example, *Meliá's* judgement was not only the first since the activation of Title III but also the first rendered by a European court.¹⁰

Regarding the research question, I will essentially examine what are the legal, economic, political and social consequences caused by the activation of Title III. However, due to the complexity of legal issues, I will also address other research questions. First, I will discuss the provisions of Title III and their legal effects. Second, I will review the applicable rules in

⁶ El País. *España rechazará las reclamaciones de EE UU contra empresas con intereses en Cuba* [Spain will reject US claims against companies with interests in Cuba], available on: https://elpais.com/economia/2019/11/06/actualidad/1573073454_157823.html. Last modified November 7, 2019. Accessed May 29, 2020.

⁷ U.S. Const. amend. V and XIV § 1.

⁸ *Meliá* case, *supra* note 4.

⁹ Regulation (EC) No 2271/96 of the Council of the European Union of 22 November 1996 on protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom, *OJ L* 309, 11 November 1996, p. 1-6. Available on: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31996R2271>. Accessed May 29, 2020.

¹⁰ Antonio Pastor. Herbert Smith Freehills. Spanish Court Decision Following End of Suspension of the US Helms-Burton Act: Jurisdiction Declined in Claim concerning Assets Nationalized by Cuba, available on: <https://hsfnotes.com/publicinternationallaw/2019/11/14/spanish-court-decision-following-end-of-suspension-of-the-us-helms-burton-act-jurisdiction-declined-in-claim-concerning-assets-nationalized-by-cuba/#page=1>. Accessed May 29, 2020.

respect to property rights of nationals and assess whether they comply with international law. Third, I will analyze the extraterritoriality of the Act by interpreting the rules of state jurisdiction. Finally, I will explain the jurisdictional problems of Title III claims in national courts and the impact of these claims on Cuba.

Besides the legal issues, property claims also entail the political dispute between Cuba and the United States. Thus, for discussing Title III legal issues it is necessary to explain their dispute. After the 1959 Cuban revolution, the Cuban government abolished private property through nationalizations. This was consistent with its Constitution as well as with agrarian reforms introduced after the revolution.¹¹ These reforms occurred amid the Cold War which, due to favorable geopolitical location and similar ideology, situated Cuba as an ally of the former USSR.

During the Cold War, Cuba received support from the USSR and both agreed on trading sugar products and petroleum.¹² In 1960, due to the strategic threat posed to the United States, the Eisenhower administration cancelled all Cuban sugar imports, which amounted for half of Cuban crop, and advised its oil companies to refuse refining petroleum purchased from the USSR.¹³ Accordingly, U.S. companies with oil refineries in Cuba, such as Exxon Mobil Corp, denied refining petroleum.¹⁴

In response, Cuba introduced Law 851, or Nationalization Law, which allowed Cuba to nationalize private property, including those refineries.¹⁵ This resulted in the expropriation of all properties owned by U.S. nationals as well as from other countries. Subsequently, the dispute between Cuba and the United States aggravated since the nationalizations strongly affected the rights and interests of property owners in Cuba. Thus, in 1962 the Kennedy administration placed a trade embargo on Cuba on almost all goods except for food and humanitarian supplies.¹⁶

The embargo was strengthened by other laws such as the Cuban Democracy Act of 1992. Also referred to as Torricelli Law, it prohibited foreign-based subsidiaries of U.S. companies from trading with Cuba.¹⁷ The dispute worsened in 1996 after Cuba downed two U.S. aircrafts claiming the violation of its airspace.¹⁸ Pressured by domestic politics, the Clinton administration signed into law the Cuban Liberty and Democratic Solidarity Act of 1996 (Libertad Act), or Helms Burton Act, codifying the dispute of property claims.

Controversially, Title III of the Helms Burton Act allowed the extraterritorial application of U.S. law by permitting its nationals to sue third parties. The Act also contains a

¹¹ See *Ley Fundamental de Cuba de 1959, Sección Primera, Artículos 96 y 196* [Cuban Fundamental Law of 1959, First Section, Articles 96 and 196]; *Ley de Reforma Agraria de 1963* [Agrarian Reform Law of 1963].

¹² Gary Clyde Hufbauer, Jeffrey J. Schott, Kimberly Ann Elliott and Milica Cosic, "Case Studies in Economic Sanctions and Terrorism", *PIIE, Peterson Institute for International Economics, Case 60-3 US v. Cuba (1960- : Castro)* (2011): p. 1.

¹³ *Ibid.*

¹⁴ Reuters. Exxon Mobil sues Cuba for \$280 million over expropriated property, available on: <https://www.reuters.com/article/us-usa-cuba-lawsuit/exxon-mobil-sues-cuba-for-280-million-over-expropriated-property-idUSKCN1S91YQ>. Last modified May 3, 2019. Accessed May 29, 2020.

¹⁵ CounterPunch. The Cuban Nationalization of US Property in 1960: the Historical and Global Context, available on: <https://www.counterpunch.org/2019/03/29/the-cuban-nationalization-of-us-property-in-1960-the-historical-and-global-context/>. Last modified March 29, 2019. Accessed May 29, 2020.

¹⁶ PIIE, *supra* note 12, p. 2.

¹⁷ See Cuban Democracy Act, 22 U.S.C. § 6001-6010 (1992).

¹⁸ PIIE, *supra* note 12, p. 8.

provision which authorizes the U.S. president to suspend its application. Such suspension was implemented by all U.S. administrations until May 2019 when the Trump administration decided to cease the suspension of Title III. As a result, there are currently 5,913 claims valued at nine billion USD. Hence, it is necessary to analyze the legal effects of Title III for examining potential legal challenges to these claims.¹⁹

The dispute between Cuba and the United States is complex and there are many legal issues to be resolved. I have chosen the Helms Burton Act because it not only undermines basic principles of international law, but also encompasses much of the dispute between the two countries now involving private individuals. Being a conflict of more than 60 years, I had to delimit the scope of the research which focuses on the application of international public, private and European law.

The research covers claims filed as of June 2019, immediately following the activation of Title III by the U.S. government. Among those claims I have primarily focused on those concerning tourism companies as they include several European firms and it constitutes Cuba's largest economic sector, facilitating the analysis of the political conflict. I have also referred to other lawsuits under the Act such as against Amazon. Yet, I have not discussed them in detail as they mainly concern U.S. companies and not third parties.

Although I mention different legal systems, I focus on Cuban, U.S., European and Spanish jurisdictions. This is due to the fact that hotel operators being sued are based in these territories. Still, the rules and principles of international law described are binding on all states. The study seeks to define what are the international consequences of the activation of Title III of the Act and evidence its illegality. This implies the legal, political, economic and social consequences of the Act on states, private individuals and international law.

The reason for focusing on European firms is that the EU has adopted a blocking statute against the Helms Burton Act which renders claims against them problematic. Companies based in other countries not adopting such statutes have also been sued. In not discussing such cases it would be interesting to evaluate how Title III affects private individuals in countries which have not adopted protective laws in future research.

I do not intend to justify the acts committed by the Cuban government nor to ascertain whether they are unethical. Neither do I advocate for the actions of companies on expropriated property nor to establish a mechanism of redress for claimants. I simply want to evidence the illegality of the Helms Burton Act based on law and explain potential issues for claims by identifying the consequences that Title III has on states and individuals with respect to the protection of property rights of nationals and the rules of state jurisdiction.

In regard to the methodology, I followed analytical and applied legal research. This means that I have critically evaluated the provisions of Title III of the Helms Burton Act by arguing their inconsistency with international law. Specifically, I analyzed Title III's non-compliance by addressing norms of individuals property rights; state rights of expropriation; third party liability; and state jurisdiction and extraterritoriality. Accordingly, I researched and gathered legal norms from these areas of law for applying them to Helms Burton Act lawsuits and suggesting potential court judgments.

¹⁹ U.S.-Cuba Trade and Economic Council, Inc. Title III - lawsuits may be filed. Available on: <https://static1.squarespace.com/static/563a4585e4b00d0211e8dd7e/t/5ccae50eeef1a1c18fe7b14d/1556800782374/TitleIIIOfLibertadActPotentialImpactByTrumpAdministrationInMarch2019.pdf>. Accessed May 29, 2020.

I followed these methods because Title III claims are relatively novel and there are no court rulings yet. Even though I am not able to compare courts' reasonings, I have used primary sources such as Cuban, U.S., EU and Spanish law, UN conventions and international jurisprudence to identify the applicable law in these claims and jurisdictional challenges for the claimants. Still, it is difficult to assess how the courts will interpret Title III provisions. Nevertheless, the sources I mentioned refer to rules of international law that should be applied in Helms Burton Act claims.

The thesis is structured in three sections. The first section clarifies the difference in terms used in the Act, particularly between confiscation, expropriation and nationalization. It then describes the provisions of Title III of the Helms Burton Act and the legal effects they cause. For example, *inter alia*, transforms a state dispute between Cuba and the United States deriving from nationalization into civil claims and disregards Cuba's right to expropriate and immunity. In addition, it explains the conditions under which individuals are liable and the compensatory value.

Following the explanation of the provisions and their consequences, their infringement with international law is detailed by identifying applicable norms. Thus, Cuba's right to expropriate; the conditions for conducting such expropriations as public use, non-discrimination and compensation; and the rules of diplomatic protection and state responsibility with regard to property rights are analyzed. It also explains the absence of trafficking in expropriated property regulations in international law.

The second section criticizes the extraterritorial application of U.S. law. Applied research is conducted on the laws of state jurisdiction and its analogy to the notion of territory. It also discusses exceptions that would allow the U.S. to apply its laws extraterritorially such as objective and subjective jurisdiction and their relation to U.S. sovereign authority. The previously analyzed regulations are subsequently applied in hotel operators' lawsuits for assessing potential jurisdictional limits in national courts. This includes the blocking statutes and the lack of international competence when the immovable property is located in Cuba.

The third section reviews Cuban American international relations and how their political dispute reached third jurisdictions and private individuals. It explains how Title III complaints have aggravated Cuba's economic crisis following the decision of certain companies to withdraw from Cuba and the economic consequences of the Covid-19 pandemic. For companies that decide to continue operating in Cuba, the section also suggests possible legal defenses. Finally, it aims at setting a future outlook after the 2020 U.S. presidential elections and the prospects for a peaceful U.S.-Cuba resolution.

2. TITLE III OF THE CUBAN LIBERTY AND DEMOCRATIC SOLIDARITY (HELMS BURTON) ACT OF 1996

2.1. Provisions and legal effects

The Helms Burton Act comprises four titles. Title I strengthen international sanctions against Cuba. Title II establishes U.S. assistance policies to a free and independent Cuba. Title III provides U.S. nationals with a right of action against individuals profiting from expropriated property. Lastly, Title IV prohibits the entry into the U.S. to individuals who expropriated property from U.S. nationals or who profit from such property. Nonetheless, I will explain the provisions established in Title III and their legal effects.

To begin with, it is worth mentioning that Title III uses the term *confiscated* to refer to acts of *expropriation* or *nationalization* conducted by the Cuban government. Similarly, the complaints against Meliá, Expedia, Booking, Trivago and others, also use the term *confiscated*.²⁰ Therefore, it is necessary that these terms are clarified for understanding the legal effects that such terminology causes.

Confiscation is a term used in U.S. laws in all aspects related to the Cuban nationalizations. It refers to a form of nationalization but because the property does not comply with domestic law and therefore is seized, as a sanctioning measure, without compensation. In contrast, nationalization and expropriation refer to when a state acting in its sovereign capacity seizes private property based on a special law or a pre-existing law while offering compensation.²¹

Title III uses the term confiscation because U.S. nationals did not receive compensation for their property. However, when this occurred, the Cuban government offered such compensation as it was recognized in Article 5 of the Law 851. Under Article 5, Cuba offered the United States to pay with government bonds “which would amortize in not less than 30 years from the date of expropriation and with an interest rate of not less than two percent”. This was also consistent with international practice and Cuba’s economic situation.²²

Even though Article 5 established a payment system, U.S. nationals were still not compensated. I will explain the reasons why this did not occur in section 2.2. Nevertheless, because the Cuban government seized the properties under Law 851 and Article 58 of its Constitution as well as the recognition by international law of the right of the state to expropriate, I will use the terms nationalization and expropriation for referring to the measures adopted by Cuba against U.S. nationals’ properties.²³

²⁰ *Mata case, supra* note 3.

²¹ Rolando Anillo-Badia. “Outstanding Claims to Expropriated Property in Cuba”, *ASCE, Association for the Study of the Cuban Economy* (2011): p. 83. *See also* Mark W. Friedman, Dietmar W. Prager and Ina C. Popova, “Expropriation and Nationalisation”, in *The Guide to Energy Arbitrations - Second Edition*, ed. Doak Bishop *et al.* (London: Global Arbitration Review, 2017). *Texaco Overseas Petroleum Company v. The Government of the Libyan Arab Republic* (19 January 1977, unreported). Available on: https://www.trans-lex.org/261700/_/texaco-overseas-petroleum-company-v-the-government-of-the-libyan-arab-republic-yca-1979-at-177-et-seq-/#head_0. Accessed May 29, 2020.

²² CubavsBloqueo. *La indemnización por nacionalizaciones* [The compensation for nationalizations], available on: <http://www.cubavsbloqueo.cu/es/genesis/la-indemnizacion-por-nacionalizaciones>. Accessed May 29, 2020.

²³ *La Constitución de la República de Cuba, Artículo 5* [The Constitution of the Republic of Cuba, Article 5] (10 April 2019). Available on: <http://www.granma.cu/file/pdf/gaceta/Nueva%20Constitución%20240%20KB-1.pdf>. Accessed May 29, 2020. *See also* *La Constitución de la República de Cuba* [The Constitution of the Republic of

The Act establishes that Cuban nationals who obtained U.S. citizenship and whose property was expropriated before March 12, 1996²⁴, are allowed to file complaints. Therefore, it grants property claims to individuals who were not U.S. nationals at the time of the injury.²⁵ For example, if in 1995 a Cuban national obtained U.S. citizenship and that individual owned property which was expropriated by the Cuban government before March 12, 1996, then that individual is entitled to file a claim under Title III.

However, it is likely that the United States regards the latter as consistent with its Constitution. Under the Fifth Amendment, U.S. citizens enjoy a fundamental right to possess their own property which cannot be taken for public use, without due process of law and compensation.²⁶ This is reinforced by the Fourteenth Amendment which not only extends property rights to all persons naturalized in the United States but also affords equal protection of laws to any person within its jurisdiction.²⁷ For these reasons, the United States justifies private judicial remedies to protect the rights of its citizens.²⁸

Title III also has the legal effect of transforming intergovernmental disputes into domestic legal claims. These claims are governed by U.S. law and are by U.S. citizens against individuals who may be nationals of third states.²⁹ Yet, property claims must be settled at state level by applying international law. This is because international law acknowledges acts of nationalization and expropriation as sovereign acts that are not subject to judgment in national courts.

The recognition of expropriation and nationalization measures as sovereign acts is endorsed by international courts and arbitral tribunals, particularly by the PCIJ and the arbitral tribunal in the *Libyan American Oil Co. v. Libya* case.³⁰ Both cases demonstrate that “nationalization and expropriation are considered sovereign rights, unless there are explicit international obligations that have been violated by a state”.³¹ In their rulings the courts have therefore considered these measures as sovereign and recognized the right of states to nationalize and expropriate.

The PCIJ in the *Factory at Chorzów (Germany v. Poland)* case ruled on this subject.³² After the First World War, followed by the Treaty of Versailles (1919), Germany concluded an agreement with Poland named the Convention concerning Upper Silesia (Geneva Convention). In the agreement, Germany agreed to transfer the control of Upper Silesia to Poland. In return, Poland agreed not to forfeit German property belonging to German nationals situated in the

Cuba] (1 July 1940). Available on: <https://archivos.juridicas.unam.mx/www/bjv/libros/6/2525/36.pdf>. Accessed May 29, 2020.

²⁴ This is the date in which the Helms Burton Act was signed into law by former President Clinton.

²⁵ Inter-American Juridical Committee. *Opinion of the Inter-American Juridical Committee in Response to Resolution AG/DOC.3375/96 of the General Assembly of the Organization, entitled “Freedom of Trade and Investment in the Hemisphere”*. Washington D.C. (1996). p. 37.

²⁶ U.S. Const. amend. V § 1.

²⁷ U.S. Const. amend. XIV § 1.

²⁸ Libertad Act, *supra* note 2, § 6081.

²⁹ Inter-American Juridical Committee, *supra* note 25.

³⁰ *Libyan American Oil Company (Liamco) v. the Government of the Libyan Arab Republic* (12 April 1977, unreported). Available on: https://www.trans-lex.org/261400/_liamco-v-the-government-of-the-libyan-arab-republic-yca-1981-at-89-et-seq/. Accessed May 29, 2020.

³¹ Guiguo Wang, *International Investment Law: A Chinese Perspective* (London and New York: Routledge, 2015). p. 397.

³² *Factory at Chorzów (Germany v. Poland)*, Judgement (1928), P.C.I.J. Series A, No. 17.

area. A few years later, Poland violated the agreement because it expropriated two German companies from German nationals located in Upper Silesia.³³

Germany instituted proceedings against Poland before the PCIJ. The Court was asked to rule on whether there was a violation of the agreement by Poland and if such expropriations were lawful. In its judgement, the PCIJ decided that Poland has indeed breached the agreement and that it must pay compensation for the expropriated property. In the question on whether the expropriations were lawful, the PCIJ held that they were unlawful because Poland violated its international obligation under the Geneva Convention.

Interestingly, the PCIJ did not rule on whether the act of expropriation itself was unlawful but on whether the circumstances in which Poland seized the property were. The PCIJ was cautious in determining the lawfulness of the measure but since there was an international obligation which was breached by Poland, the Court found such expropriation to be unlawful. Therefore, even though the PCIJ considered Polish expropriations unlawful because it disregarded the agreement with Germany it did not question Poland's right to expropriate.

In the *Libyan American Oil Co. v. Libya* arbitration, the tribunal also ruled on this matter. In 1955, with the aim of improving its economic conditions, Libya enacted Petroleum Law No. 25 where it established a framework for exploration and production of petroleum within the country. Law No. 25 provided a concessionary system for the exploitation of petroleum products. The Libyan American Oil Co. (Liamco) was among those granted concessions.³⁴

In 1969, Colonel Muammar el Qadhafi seized power and introduced Law No. 1966, nationalizing 51 percent of the concession rights. Years later, the Government introduced Law No. 1974 which nationalized the remaining concession rights without compensating for the first nor the second measure. Pursuant to the Concession Agreement, Liamco initiated arbitral proceedings. Liamco claimed that Libyan nationalizations were politically motivated, discriminatory and an unlawful breach of contract contrary to principles of Libyan and international law.³⁵

The tribunal observed that concession rights did not constitute property, as long as those rights had a monetary value.³⁶ Since monetary values were involved in the property dispute, the tribunal decided that Libya breached the Concession Agreement because it disregarded its commitments. Nevertheless, the tribunal went further than the PCIJ by recognizing the right of a state to nationalize as sovereign because it is considered an expression of its territorial sovereignty but subjected such right to non-discrimination and compensation principles.³⁷

Both cases subordinated the right to expropriate to certain conditions. Still, they assert expropriation as an expression of a state's sovereign capacity. This means that property claims arising from Title III should be settled between the United States and Cuba, not by U.S. nationals. In the absence of this, Title III would confuse a claim for damages or restitution

³³ Law Help BD. Case Note on The Chorzow Factory (*Germany v. Poland*, 1928), available on: https://lawhelpbd.com/international-law/case-note-on-the-chorzow-factory-germany-v-poland-1928/#_ftnref15. Last Modified May 23, 2020. Accessed May 29, 2020.

³⁴ *Libyan American Oil Company v. The Libyan Arab Republic* (12 April 1977, unreported). p. 2. Available on: https://www.biicl.org/files/3939_1977_liamco_v_libya.pdf. Accessed May 29, 2020.

³⁵ *Ibid.*, p. 3.

³⁶ *Ibid.*, p. 4.

³⁷ *Ibid.*

arising from nationalization with an action *in rem* and *in personam* against individuals who benefit from the property.³⁸

Additionally, Title III uses the term *traffic* to refer to the activities for which an individual is liable under the Helms Burton Act.³⁹ These activities virtually encompass any business operation in relation to expropriated property, including business done through subsidiaries and affiliates.⁴⁰ Therefore, it provides liability to U.S. companies as well as third parties that are currently operating in Cuba. Specifically, the term refers to:

a[ny] person (...) that knowingly and intentionally: (i) sells, transfers, distributes, dispenses, brokers, manages, or otherwise disposes of confiscated property, or purchases, leases, receives, possesses, obtains control of, manages, uses, or otherwise acquires or holds an interest in confiscated property, (ii) engages in a commercial activity using or otherwise benefiting from confiscated property, or (iii) causes, directs, participates in, or profits from, trafficking (as described in clause (i) or (ii)) by another person, or otherwise engages in trafficking (as described in clause (i) or (iii)) through another person, without the authorization of any United States national who holds a claim to the property.⁴¹

The definition implies that companies physically using expropriated property in Cuba are liable under Title III. Though, it also includes companies which engage in these activities without using expropriated property. For example, in the *Mata and Hernandez v. Trivago and others* case, several defendants, some of which are based in the European Union, were accused not for using expropriated property but for providing online booking services for hotels in Cuba.⁴² As a result, Title III has the legal effect of providing liability for *trafficking* even if individuals do not physically use expropriated properties.

Resultantly, the Helms Burton Act enables U.S. nationals to initiate legal proceedings against *traffickers*, including those from third countries. In turn, the Act allows the extraterritorial application of U.S. law. This means that Title III has the legal effect of regulating activities of third parties operating in Cuba by providing liability to those who use properties expropriated from U.S. nationals. Nevertheless, as a measure deriving from Cuba's sovereign state capacity, such as nationalization, the dispute should be governmental and not through the regulation of acts of aliens.⁴³

For justifying the extraterritorial application of the Helms Burton Act, 22 U.S.C. § 6081 of Title III mentions that international law recognizes that the United States can provide for rules of law for conducts outside its territory if it has or intended to have an effect in its territory.⁴⁴ While international law recognizes such jurisdictional norm, it is unclear how such expropriation measures may have an effect on U.S. territory. In addition, since international law acknowledges state's rights to nationalize as inherent to their sovereignty, individuals using

³⁸ Inter-American Juridical Committee, *supra* note 25, pp. 37-38.

³⁹ Libertad Act, *supra* note 2, § 6023.

⁴⁰ Gowling WLG. Cuba Update: Helms Burton Act Title III Activated, available on: <https://gowlingwlg.com/en/insights-resources/articles/2019/cuba-update-helms-burton-title-iii-activated/>. Last modified May 8, 2019. Accessed May 29, 2020.

⁴¹ Libertad Act, *supra* note 39.

⁴² *Mata* case, *supra* note 3, p. 16. paras. 65-68.

⁴³ Inter-American Juridical Committee, *supra* note 25.

⁴⁴ Libertad Act, *supra* note 2, § 6081.

those properties are not violating legal norms because their actions are consistent with international and Cuban law.⁴⁵

By recognizing state's rights to expropriate, international law ascertains that the expropriating state enjoys freedom for using such property. Thus, the expropriating state may grant rights to third parties for operating in the expropriated property. Third parties are also lawfully engaging in business activities because Cuban law authorizes expropriation within its territory.⁴⁶ This means that their actions are legitimate under Cuba's national law. Therefore, Title III has the legal effect of providing liability for nationals of third states even when the use of those properties is lawful within Cuban jurisdiction.⁴⁷

In relation to the liability, 22 U.S.C. § 6082 of Title III establishes the value of the claims for which private defendants are responsible. Specifically, 22 U.S.C. § 6082 determines that a *trafficker* is liable to a U.S. claimant for the value of the claim, plus interest, reasonable attorney's fees and court costs.⁴⁸ Though, 22 U.S.C. § 6082 also stipulates that the amount for which individuals are liable may vary under three circumstances, but in all of them the greater amount has to be applied.

The first circumstance enumerated in Title III distinguishes between certified and non-certified claims. Certified claims are from those plaintiffs who were U.S. nationals at the time of the expropriation; whereas non-certified claims are from those plaintiffs who were Cuban nationals at the time of the expropriation but who later became U.S. nationals.⁴⁹ Both categories must be reviewed by the Foreign Claims Settlement Commission (FCSC). If a claim is certified by the FCSC, 22 U.S.C. § 6082 provides that the defendant is liable for the amount established by the FCSC under the International Claims Settlement Act (ICSA) of 1949 plus interest.⁵⁰

The second circumstance allows U.S. courts to determine the amount of a claim under a Title III action if the claim has not been certified by the FCSC.⁵¹ For assigning value to claims, U.S. courts are entitled to appoint a *special master*, including the FCSC, to determine the value of the claim.⁵² However, any determinations on value by the FCSC do not constitute certified claims under Subchapter V of the International Claims Settlement Act of 1949.⁵³

The third circumstance calculates the amount by the market value of the property according to its current value or the value of the property when expropriated plus interest, whichever is greater.⁵⁴ The interest is calculated from the date of expropriation until the date on which the action is brought.⁵⁵ This means that the interest is accumulative. Nonetheless, Title III also establishes that if a U.S. national holds a certified claim by the FCSC, a person

⁴⁵ Cuban Constitution, *supra* note 23, Article 58. *See also* José Bell, Delia Luisa López and Tania Caram, *Documentos de la Revolución Cubana 1960* [Documents from the Cuban Revolution 1960] (La Habana: Instituto Cubano del Libro, 2007) [Cuban Book Institute].

⁴⁶ *Ibid.*

⁴⁷ Inter-American Juridical Committee, *supra* note 25, p. 38.

⁴⁸ Libertad Act, *supra* note 2, § 6082.

⁴⁹ Gowling WLG, *supra* note 40.

⁵⁰ International Claims Settlement Act, 22 U.S.C. Subchapter V - Claims Against Cuba and China § 1643-1643m.

⁵¹ Libertad Act, *supra* note 2, § 6083.

⁵² *Ibid.*

⁵³ International Claims Settlement Act, *supra* note 50.

⁵⁴ Libertad Act, *supra* note 48.

⁵⁵ *Ibid.*

who traffics in expropriated property would be liable for triple of the overall amount determined by 22 U.S.C. § 6082, which is also called increased liability.⁵⁶

These circumstances create three legal effects. First, for determining the amount, Title III does not consider the value of the benefit obtained from the expropriated property nor the loss caused to the original owner. Thus, it creates liability for a private defendant for the total value of the expropriated asset.⁵⁷ Second, in relation to increased liability, Title III determines compensation in a manner that could increase to three times the loss caused by the act of expropriation.⁵⁸ Third, in addition to allowing claims against nationals of third states, Title III does not endow them with effective means to contest the claims' values calculations.⁵⁹

Besides, 22 U.S.C. § 6082 includes the economic reasons for the implementation of the Act. The United States holds that that the Cuban government obtains financial benefit from expropriated property belonging to U.S. nationals, specifically hard currency, oil and investment, undermining the commitment among nations, freedom of commerce and economic development.⁶⁰ It also indicates that it aims at protecting property rights and increasing its economic pressure on Cuba.⁶¹ For obtaining such financial benefits Title III explains that the Cuban government:

(...) is offering foreign investors the opportunity to purchase an equity interest in, manage, or enter into joint ventures using property and assets some of which were confiscated from United States nationals.⁶²

These practices are followed by most travel and tourism-related companies. For example, Cuban state-owned companies Gran Caribe, Cubanacán and Gaviota operate in joint ventures with Spanish company Meliá in properties expropriated from U.S. nationals.⁶³ Therefore, through Title III the United States reinforces its pressure against Cuba by targeting tourism, the industry that accounts for Cuba's major source of revenue.⁶⁴ Consequently, the dispute between Cuba and the United States affects foreign tourism companies as they have to decide whether to discontinue their transactions or confront lawsuits for trafficking.

⁵⁶ *Ibid.*

⁵⁷ Inter-American Juridical Committee, *supra* note 47.

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

⁶⁰ Libertad Act, *supra* note 28.

⁶¹ Exercising economic pressure on a foreign state with the attempt to change its government and institutions is contrary to the principle of non-intervention recognized under international law. Article 2.4 of the UN Charter refers to this principle by establishing that all Members shall refrain from the threat or use of force against the territorial integrity or political independence of any state. Consequently, the International Court of Justice in the *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* case clarified the principle by holding that "the principle of non-intervention prohibits a State to intervene, directly or indirectly, with or without armed force, in support of an internal opposition in another State". This was reiterated in 2005 by the International Court of Justice in the *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* case. See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgement, I.C.J. Reports. 1986 (June 27), p. 108. para. 206. and *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Merits, Judgement, I.C.J. Reports. 2005 (December 19), p. 227. para. 164.

⁶² Libertad Act, *supra* note 28.

⁶³ *Mata* case, *supra* note 3, p. 13. para. 61.

⁶⁴ Revenue from tourism surpassed that of sugar exports. In 2018, revenue from tourism accounted for 3.3 billion USD. See Xinhua. Feature: Cuba seeks to increase quality of its tourism industry by holding in'1 fair, available on: http://www.xinhuanet.com/english/2019-05/31/c_138106208.htm. Last modified May 31, 2019. Accessed May 29, 2020.

2.2. Applicable norms and non-compliance with international law

The Helms Burton Act in 22 U.S.C. § 6023 defines the term *United States national* as any U.S. citizen or legal entity organized under the laws of the United States, commonwealth, territory or possession.⁶⁵ The Fourteenth Amendment of the United States Constitution defends property rights and endows individuals within U.S. jurisdiction to equal protection of laws.⁶⁶ However, Title III allows individuals who were not U.S. nationals at the time of the expropriations to submit claims.

Basically, when the expropriations occurred these individuals were Cuban citizens and were not within the United States jurisdiction as defined by 22 U.S.C. § 6023 of the Helms Burton Act and the Fourteenth Amendment of the United States Constitution. Considering norms of international law relative to the protection of property rights, it is a condition that at the time of the injury until the settlement of the claim the owner of the property must have been a U.S. national without interruption and not have the nationality of the expropriating state.⁶⁷

This was discussed in the United Nations Administrative Decision V from the differences arising among members of the United States-Germany Mixed Claim Commission. The Administrative Decision V declared that there is certainly a “general practice not to espouse private claims unless in the point of origin they possess the nationality of the claimant State”.⁶⁸ Hence, Title III does not conform international law because the United States does not have the right to espouse claims by persons who were not under its jurisdiction at the time of the injury.⁶⁹

Still, the United States is entitled to safeguard the rights of whom were U.S. nationals at the time of the expropriations for avoiding breach of property rights. The norms of diplomatic protection established by the ILC provide that if an individual is unable to obtain effective redress in accordance with international law, a state is entitled to espouse the claim through an official intergovernmental dispute.⁷⁰ Considering this principle, the U.S. government could espouse the claims of its nationals and agree with Cuba to resolve the claims through a dispute settlement mechanism of their choice.

Due to the nature of the dispute such espousal is improbable. Nevertheless, it has been exercised by both countries before in the *Walter Fletcher Smith Claim (Cuba v. United States)* case of 1929.⁷¹ In this case, Mr. Smith was an U.S. citizen and Cuban resident. He owned all the stock of Marianao Beach Company which in turn possessed properties at Marianao Beach. In 1919, he signed a contract with Playa Company in which he sold all the stock except for two parcels of land which were under his personal name. The contract of sale specifically excluded these two parcels.

Later that year, the municipality of Marianao granted a concession to Playa Company for urbanizing the district around Marianao Beach. This included the properties bought from

⁶⁵ Libertad Act, *supra* note 2, § 6023.

⁶⁶ U.S. Const., *supra* note 27.

⁶⁷ Inter-American Juridical Committee, *supra* note 47.

⁶⁸ *Administrative Decision No. V. (United States of America v. Germany)*, Arbitral Award, U.N., 1924, (II), (October 31), p. 119.

⁶⁹ Inter-American Juridical Committee, *supra* note 47.

⁷⁰ *Ibid.* See also Report of the International Law Commission, GAOR, 61th Session Supplement No. 10, at 16, U.N. Doc. A/61/10 (2006).

⁷¹ Reports of International Arbitral Awards. *Walter Fletcher Smith Claim (Cuba v. USA)*, Volume II pp. 913-918 (1929).

Mr. Smith as well as the two parcels of land which were in principle excluded. The municipality tried to buy the two remaining parcels but were unable to reach an agreement on the price. Shortly after, people who were interested in buying the two parcels threatened Mr. Smith with destroying them.

The Mayor of Marianao instituted proceedings in the Court of First Instance of Marianao for expropriating the parcels. The court gave preliminary possession to the municipality and a few hours after the decision the buildings located in the parcels were demolished. Mr. Smith appealed the expropriation in a higher Cuban court, but its petition was dismissed. In consequence, the U.S. government espoused Mr. Smith's claim and reached an agreement with the Cuban government to submit the dispute to arbitration through diplomatic channels.

Finally, the arbitral tribunal decided in favor of Mr. Smith arguing that the expropriation proceedings were not in good faith and for public utility. Again, the lawfulness of the measure tantamount to expropriation was not challenged. Therefore, The *Walter Fletcher Smith Claim* not only demonstrates that the United States could espouse certified property claims but that the United States also implicitly recognizes expropriation as a sovereign act since the U.S. government was compelled to raise the dispute against the Cuban government because Mr. Smith could not obtain effective redress in Cuban courts.

As in the *Factory at Chorzów* and *Liamco* cases, the arbitral tribunal in the *Walter Fletcher Smith Claim* also subjected expropriation to certain conditions. This relates to another applicable but contested norm in international law. Under such norm, any state that expropriates or nationalizes property owned by foreign nationals must respect the following rules: public use, non-discrimination and accompanied by fair and adequate compensation.⁷²

Article 1 (right to property) of Protocol No. 1 to the European Convention on Human rights (ECHR) refer to these rules. The ECHR establishes that individuals are entitled to the peaceful enjoyment of his possessions and that no one shall be deprived from them. However, it also mentions this shall not impair the right of a state to enforce laws to control the use of property in accordance with the public interest and subject to the conditions provided for by law and by the general principles of international law.⁷³

These expropriation rules have also been included in UN resolutions. The most significant resolutions are 1803 (XVII) of 1962⁷⁴ and 3281 (XXIX) of 1974⁷⁵, both adopted by the UN General Assembly. Both are generally cited as customary international law and have adopted expropriation rules while recognizing the right of a state to nationalize and expropriate. For example, Resolution 1803 asserts that:

Nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest (...). In such cases the owner shall be paid appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law. In any case where the question of compensation gives rise to a controversy, the national jurisdiction of the State taking such measures shall be exhausted. However, upon

⁷² Inter-American Juridical Committee, *supra* note 47.

⁷³ Protocol 1 Article 1 ECHR.

⁷⁴ G.A. Res. 1803, U.N. GAOR, 17th Sess., U.N. Doc. A/RES/1803 (XVII 1962).

⁷⁵ G.A. Res. 3281, U.N. GAOR, 29th Sess., U.N. Doc. A/3281 (XXIX 1974).

agreement by sovereign States and other parties concerned, settlement of the dispute should be made through arbitration or international adjudication.⁷⁶

Resolution 1803 also mentions that in a controversy the national jurisdiction of the expropriating state shall be exhausted. It adds that upon agreement by sovereign states, settlement of the dispute should be made through arbitration or international adjudication. It is unclear whether U.S. nationals exhausted local remedies in Cuba. If they did, the Resolution evidences that the United States government could espouse the claims of its nationals by agreeing with the Cuban government to refer the matter to a dispute settlement mechanism as in *Walter Fletcher Smith Claim*.

Regarding Resolution 3281, the UN General Assembly mandated the adoption of the Charter of Economic Rights and Duties of States (CERDS) which embodies principles of customary international law.⁷⁷ Similarly to Resolution 1803, the CERDS includes the rule of compensation. Yet, it also denotes the right of a state to nationalize and expropriate emphasizing that in the event of a dispute it shall be settled in the courts of the expropriating state unless agreed by the states concerned that other means are to be sought. Particularly, Article 2 of the Charter expresses that:

(...) [each state has the right to] nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent. In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals, unless it is freely and mutually agreed by all States concerned that other peaceful means be sought on the basis of the sovereign equality of States and in accordance with the principle of free choice of means.⁷⁸

International jurisprudence has also recognized these rules. For example, the rule of non-discrimination was noted in the *Liamco* arbitration where the company claimed that the nationalizations effectuated by the Libyan government were discriminatory.⁷⁹ Similarly, the arbitral tribunal in the *BP v. Libya* case also referred to the non-discrimination principle by deciding that nationalization measures which are discriminatory or politically motivated unrelated to the internal stability of the state are illegal and invalid.⁸⁰

The non-discrimination rule was also examined in U.S. courts amid Cuban nationalizations. The most relevant case was *Banco Nacional de Cuba (National Bank of Cuba) v. Sabbatino*.⁸¹ The issue in dispute was that due to nationalization measures the Cuban government seized sugar products owned by *Compañía Azucarera Vertientes-Camaguey de Cuba (C.A.V.)*, a Cuban company owned by U.S. stockholders. Before it was expropriated, another U.S. company called *Farr, Withlock & Co.* contracted for buying sugar from C.A.V. and because it was seized in the midst of the transaction, *Farr, Withlock & Co.* bought the products directly from the Cuban government.

After receiving the sugar, *Farr, Withlock & Co.* did not pay the Cuban government but a representative of C.A.V. named *Sabbatino*. In representation of the Cuban government, the

⁷⁶ G.A. Res. 1803, *supra* note 74, p. 2, para. 4.

⁷⁷ G.A. Res. 3281, *supra* note 75.

⁷⁸ *Ibid.*, p. 4, Article 2(c).

⁷⁹ *Liamco* case, *supra* note 34, p. 3.

⁸⁰ *BP Exploration Company (Libya) Limited v. Government of the Libyan Arab Republic (BP v. Libya)*, Arbitral Award, 1973, (October 10), pp. 14-15, para. 56.

⁸¹ *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

National Bank of Cuba lodged a complaint in the U.S. District Court of New York which decided in favor of the defendant ordering the National Bank of Cuba to pay compensation. The court held that the nationalization measure was contrary to standards of international law because “the act classifies United States nationals separately from all other nationals and provides no reasonable basis for such a classification”.⁸²

The National Bank of Cuba appealed the decision to the U.S. Supreme Court. Judge John Marshall Harlan shared the opinion of the U.S. State Department that Cuban measures manifestly violated principles of international law and in essence were “discriminatory, arbitrary and confiscatory”.⁸³ Nonetheless, the Supreme Court applied the Act of State doctrine⁸⁴, meaning that it upheld the legality of the expropriations because it was an official act of Cuba which cannot be adjudicated by U.S. courts.

The *Sabbatino* case also examined the rule of compensation. The U.S. District Court of New York ruled that if compensation is not paid, the nationalization is unlawful.⁸⁵ Nevertheless, the Supreme Court overturned the decision and upheld Cuba’s sovereign right to nationalize. It would seem, then, that the failure of the expropriating state to comply with these rules does not jeopardize the legality of the act unless the action is expressly forbidden by a treaty as in the *Factory at Chorzów* and *Liamco* cases. This was supported by the former Special Rapporteur on State Responsibility Francisco Garcia-Amador, who argued in his fourth report to the ILC that:

According to a generally accepted principle, an expropriation is not necessarily “unlawful” even when the action imputable to the State is contrary to international law. (...) an expropriation can only be termed “unlawful” in cases where the State is expressly forbidden to take such action under a treaty or international convention.⁸⁶

As for the rule of public use, it has not been uniformly applied in international jurisprudence. For example, it was applied by the arbitral tribunal in the *Walter Fletcher Smith Claim* by holding that “the expropriation proceedings were not, in good faith, for the purpose of public utility”.⁸⁷ In parallel, in the *Certain German Interests in Polish Upper Silesia* and *Factory at Chorzów* cases, the PCIJ made a similar reasoning by affirming that international law allows expropriation of property from foreigners as long as it is for public utility.⁸⁸

In contrast, other courts and tribunals have had a different interpretation of the rule of public use. For example, in *James and others v. United Kingdom*, a case concerning property expropriation under English Land Law, the European Court of Human Rights (ECtHR) decided that it is at discretion of the national authorities to determine what constitutes reasons of public interest.⁸⁹ Similarly, the United States-Iran Claims Tribunal held in the *Amoco* case that:

⁸² *Banco Nacional de Cuba v. Sabbatino*, 193 F. Supp. 375 (S.D. N.Y. 1961).

⁸³ Opinion of Mr. Justice Harlan. *Banco Nacional de Cuba v. Sabbatino*, available on: <https://www.iilj.org/wp-content/uploads/2016/08/Banco-Nacional-de-Cuba-v.-Sabbatino.pdf>. Accessed May 29, 2020.

⁸⁴ The Act of State doctrine establishes that measures adopted by other states in relation to their internal affairs cannot be challenged in United States courts. This doctrine is related to the principle of state immunity which is recognized under international law.

⁸⁵ *Sabbatino (S.D.N.Y.) case*, *supra* note 82.

⁸⁶ Yearbook of the International Law Commission (1959), Vol. II, 13, para. 50.

⁸⁷ *Walter Fletcher Smith Claim award*, *supra* note 71, p. 915.

⁸⁸ *Case concerning certain German interests in Polish Upper Silesia (Germany v. Poland)*, Judgement (1926), P.C.I.J. Serie A, No. 7, p. 22.

⁸⁹ *James and others v. The United Kingdom*, no. 8793/79, Commission Report of 11 May 1984, DR 56, p. 43.

A precise definition of the “public purpose” for which an expropriation may be lawfully decided has neither been agreed upon in international law nor even suggested. It is clear that, as a result of the modern acceptance of the right to nationalize, this term is broadly interpreted, and that States, in practice, are granted extensive discretion.⁹⁰

As demonstrated, the application of the rule of public use varies among international jurisprudence. Though, it seems that there is an inclination to leave the criteria at discretion of the expropriating state. In relation to the Cuban expropriations, it could be argued that they are not for public use because commercial activities are being conducted in the properties by private entities. Nevertheless, this is not applicable because Title III lawsuits are not only based on commercial transactions between businesses but also on Cuba’s land nationalization, for which national courts have no jurisdiction.⁹¹

With regard to the non-discrimination rule, Cuban expropriations are not discriminatory as argued by the U.S. District Court of New York in the *Sabbatino* case. When the expropriations occurred Cuba negotiated bilateral settlements claims with other states such as Canada, Great Britain, France, Spain and Switzerland.⁹² Demonstrating that the measures were not discriminatory since the expropriated properties belonged to U.S. and Cuban nationals, including those who later obtained U.S. citizenship, as well as nationals from other countries.⁹³

In regard to compensation, U.S. nationals did not receive compensation for their property. Arguably, Cuba offered compensation as it was established in Article 5 of Cuban Law 851 which created a payment system financed from the profits Cuba realized from sugar sales in the U.S. market.⁹⁴ Even so, the system was deemed to be illusory because by 1960 the United States cancelled all sugar imports by 95 percent.⁹⁵ Consequently, the United States rejected Cuba’s payment system and due to the embargo U.S. nationals were not able to receive their payments.

The inclusion of a compensation system in Law 851 was an acknowledgment by Cuba of its obligations to indemnify U.S. property owners.⁹⁶ However, payments cannot be enforced in national courts because the legality of the nationalizations and the nature of the properties must be assessed for proving whether individuals have trafficked in the properties. Hence, national courts may dismiss the claims because they cannot judge governmental actions and the expropriated assets would be considered state property, both being granted immunity from jurisdiction under customary international law.

As national courts are not competent for adjudicating cases involving foreign states, Title III does not comply with international law because domestic courts are not the appropriate

⁹⁰ *Amoco International Finance Corporation v. The Government of the Islamic Republic of Iran, National Iranian Oil Company, National Petrochemical Company and Kharg Chemical Company Limited (Amoco v. Iran)*, Partial Arbitral Award, 1987, (July 14), p. 31, para. 145.

⁹¹ Pastor, *supra* note 10.

⁹² M. W. Gordon, *The Settlement of Claims for Expropriated Private Property Between Cuba and Foreign Nations Other Than the United States*, 5, Miami Inter-Am L. Rev. 457 (1973), p. 457. See also Richard E. Feinberg, “Reconciling U.S. Property Claims in Cuba”, *Latin America Initiative at Brookings* (2015).

⁹³ But see David Kaye, *The Helms-Burton Act: Title III and International Claims*, 20 Hastings Int’l & Comp. L. Rev. 729 (1997).

⁹⁴ Antonio Lázaro, “Cuba: Las Leyes Cubanas de la Revolución” [Cuba: The Constitutional Laws of the Revolution], *Instituto de Estudios Políticos* [Institute of Political Studies] (1961): p. 213.

⁹⁵ Determination of Cuban Sugar Quota to Supplement the Quota Established by Proclamation, No. 3383, 75 Stat. 1041-1043 (1961).

⁹⁶ Anillo-Badia, *supra* note 21.

forum for resolving disputes between states.⁹⁷ Additionally, several expropriated properties are operated by Cuban state-owned companies, as for example in joint ventures with Meliá. However, the UN Convention on Jurisdictional Immunities of States and Their Property (2004 UN Convention) as well as the Draft Articles on Responsibility of States consider state-owned companies as organs of the state, which are also immune from jurisdiction in national courts.⁹⁸

National courts prohibition on ruling against foreign states was upheld by the International Court of Justice (ICJ) in the *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* case.⁹⁹ Followed by crimes committed by Germany during World War II, Italian courts awarded damages to victims and enforced a Greek judgement in which Germany was ordered to pay compensation for crimes committed in Greece.¹⁰⁰ As a result, German state property located in Italy was forfeited.¹⁰¹

After the Italian court's decision, Germany instituted proceedings against Italy before ICJ. Germany claimed that Italy violated international law because Italian courts disregarded Germany's jurisdictional immunity. Conversely, Italy claimed that by committing the crimes Germany violated *jus cogens* norms and thus has no immunity. The ICJ asserted that the crimes infringed *jus cogens* norms, but that Germany cannot be deprived from its jurisdictional immunity awarded under customary international law.¹⁰²

Regarding the forfeited German property, the ICJ applied Article 19 of the 2004 UN Convention. Such Article establishes that “no post-measures of constraint (...) against property of a State may be taken in connection with a proceeding before a court of another State”.¹⁰³ Hence, the ICJ ruled that Italy breached its obligation to respect immunity owed to Germany. The ICJ's decision, therefore, reiterates that Title III claims should not be resolved in national courts since the Cuban state and its property enjoy immunity from jurisdiction derived from its right to nationalize and customary international law.¹⁰⁴

As I mentioned, the U.S. government could exercise diplomatic protection and espouse claims of its nationals for obtaining compensation. Nonetheless, the U.S. Department of State reported that prior to such espousal claimants must exhaust local remedies in Cuba. It is unclear whether Title III complaints meet this prerequisite but according to U.S. law exhaustion of local remedies is a procedural requirement rather than a substantive element of the claim.¹⁰⁵ The U.S. State Department declared that:

The requirement for exhaustion of legal remedies is based upon the generally accepted rule of international law that international responsibility may not be invoked as regards reparation for losses or damages sustained by a foreigner until after exhaustion of the

⁹⁷ Inter-American Juridical Committee, *supra* note 25, p. 39.

⁹⁸ See United Nations Convention on Jurisdictional Immunities of States and Their Property, Article 2 (New York, 2 Dec. 2004), *not yet in force*. See also Yearbook of the International Law Commission (2001), Vol. III, Parts 1, 2, 3 and 4, pp. 32-143, Articles 4 and 5.

⁹⁹ *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgement, I.C.J. Reports 2012 (Feb. 3), p. 99.

¹⁰⁰ *Prefecture of Voiotia v. Federal Republic of Germany*, N.B., 11/2000 (288933), 513.

¹⁰¹ Asser Institute. Jurisdictional Immunities of the State (*Germany v. Italy: Greece intervening*). Available on: <http://www.internationalcrimesdatabase.org/Case/1231>. Accessed May 29, 2020.

¹⁰² *Jurisdictional Immunities* case, *supra* note 99, pp. 50, para. 107.

¹⁰³ UN Convention on Immunities, *supra* note 98, Article 19.

¹⁰⁴ *But see Ferrini v. Federal Republic of Germany*, Cass. 11 Marzo [March] 2004, n. 5044 and *The Prosecutor v. Max Josef Milde*, Cass. 21 Ottobre [October] 2008, n. 1072.

¹⁰⁵ Christenson, Gordon A., “International Claims Procedure before the Department of State”, *Syracuse Law Review* (1961): p. 537.

remedies available under local law. This, of course, does not mean that “legal remedies” must be exhausted if there are none to exhaust or if the procurement of justice would be impossible (...) Each American national must (...) decide whether to “exhaust legal remedies” in Cuba, either with a view to obtaining restitution or adequate compensation or documentary evidence which could be used to show that justice could not be obtained by judicial proceedings. Generally, unsupported assertions to the effect that it would be useless to exhaust or attempt to exhaust legal remedies would, of course, have less evidentiary value than a court decree or other documentary evidence demonstrating the futility of exhausting or attempting to exhaust legal remedies.¹⁰⁶

Although it is virtually impossible due to political unwillingness from both governments, the United States could agree with Cuba on establishing an international claims tribunal for claimants meeting this procedural requirement. Such tribunal would be similar to those settling disputes of state interference in foreign property rights. In accordance to international practice, such tribunal would probably recognize Cuba’s right to expropriate. However, it could also find Cuba internationally responsible for failing to comply with the rules discussed.

If such a tribunal holds Cuba responsible, the Draft Articles on State Responsibility adopted by the ILC notes that an injured state may obtain from the responsible state “full reparation (...) [in] the form of restitution, compensation and satisfaction”.¹⁰⁷ Accordingly, the tribunal may recognize three methods of redress. Two, restitution and compensation, were set forth in the *Factory at Chorzów* case establishing as reparation a “restitution in kind, or, if that is not possible payment of a sum corresponding to the value which a restitution in kind would bear”.¹⁰⁸

Under restitution, Cuba would be under the obligation to re-establish the situation before the act was act was committed.¹⁰⁹ This method is inconceivable because third parties are using the properties and their rights would be infringed. More feasible is compensation where Cuba shall cover financial damages including loss of profits.¹¹⁰ The third is satisfaction which consists in appropriate modalities of acknowledgement of the breach.¹¹¹ Though, this method is improbable because there is no political initiative and the United States prioritizes compensation since the claims are valued at nine billion USD.¹¹²

Subsequently, Cuba would be under the obligation to restitute the expropriated asset or pay compensation for the damage caused.¹¹³ Although it would be a convenient settlement, it is unrealistic. Both governments have insufficient political will to form an international claims tribunal or to refer the dispute to arbitration. Besides, the United States has no interest in solving the dispute because it aims at strengthening its economic pressure on Cuba through the Helms Burton Act by targeting its major source of revenue.

Other alternatives for paying compensation to claimants could also be pursued. For example, Cuba could use state-issued instruments. These may not be redeemed for cash but can be used as collateral for loans to repay property sold by the state; to purchase property offered

¹⁰⁶ *Ibid.*, p. 538. See also *Interhandel (Switzerland v. United States of America)*, Preliminary Objections, Judgement, I.C.J. Reports 1959 (March 21), p. 27.

¹⁰⁷ YILC (2001), *supra* note 98, p. 95, Article 34.

¹⁰⁸ *Factory at Chorzów (Germany v. Poland)*, Judgement (1928), P.C.I.J. Series A, No. 13. p. 47.

¹⁰⁹ YILC (2001), *supra* note 98, p. 96, Article 35.

¹¹⁰ YILC (2001), *supra* note 98, p. 98, Article 36 (2).

¹¹¹ YILC (2001), *supra* note 98, p. 105, Article 37 (2).

¹¹² U.S.-Cuba Trade and Economic Council, Inc., *supra* note 19.

¹¹³ Inter-American Juridical Committee, *supra* note 47.

for sale by the state; or as investment instruments.¹¹⁴ Another possibility is that Cuba offers economic incentives to invest in the country. This includes giving credits on taxes and duties for all or part of the claim value.¹¹⁵

For these alternatives, the consent of the U.S. government, however, is required. In *Dames & Moore v. Regan*, the U.S. Supreme Court ruled that individual claimants do not have the right to negotiate directly with a foreign state.¹¹⁶ This means that negotiations must be between governments, which is unlikely due to political unwillingness.

Regardless of possible alternatives, Helms Burton Act lawsuits remain being private civil claims against individuals. These individuals include companies from third states liable not for being involved in the nationalization but for *trafficking* in expropriated property. For example, German company Trivago GmbH is being sued for providing online booking services for hotels in Cuba, activity which is not associated to nationalization.¹¹⁷

With the Helms Burton Act, the United States is modifying the juridical bases for liability.¹¹⁸ Instead of attributing responsibility to Cuba for nationalizing, it assigns liability to third parties for using expropriated property, which is unregulated in international law. This means that international law has not previously recognized the wrongful nature of *trafficking* in expropriated property.¹¹⁹ As there is an absence of prior practice on this subject, the use of expropriated property by third parties does not contravene any norm of international law.¹²⁰

In consequence, the United States does not have the right to impose liability on third parties not involved in a nationalization through the creation of liability not linked to the nationalization and unrecognized by international law on this subject.¹²¹ Nor it has the right to attribute liability to nationals of third states for a claim against Cuba.¹²² Thus, Title III does not conform international law because the United States is not entitled to ascribe responsibility to nationals of third states for acts committed by Cuba as an expression of its sovereign authority.¹²³

If U.S. courts decide against private individuals using expropriated properties in Cuba, it may itself constitute a measure of expropriation resulting in the international responsibility of the United States.¹²⁴ This is due to the fact that even though the properties are being used by third parties, they are still Cuba's government assets and the United States would not be respecting the immunity of Cuba and its property.

For the latter, two conditions must be met under the Draft Articles on State Responsibility. First that the act is attributable to the state and second that there is a breach of an international obligation.¹²⁵ Under the first condition, if U.S. courts enforce Title III claims,

¹¹⁴ Anillo-Badia, *supra* note 21, p. 92.

¹¹⁵ *Ibid.*

¹¹⁶ *See Dames & Moore v. Regan*, 453 U.S. 654 (1981).

¹¹⁷ *Mata case*, *supra* note 42.

¹¹⁸ Inter-American Juridical Committee, *supra* note 97.

¹¹⁹ Kaye, *supra* note 93, p. 744.

¹²⁰ Inter-American Juridical Committee, *supra* note 47.

¹²¹ *Ibid.*, p. 39.

¹²² *Ibid.*

¹²³ *Ibid.*

¹²⁴ *Ibid.*

¹²⁵ YILC (2001), *supra* note 98, p. 34, Article 2.

their actions are attributable to the United States government because the conduct of state organs is attributed to the state under international law.¹²⁶

Regarding the second condition, Article 12 establishes that a state breaches an international obligation when such conduct is not in accordance with the requirements of that obligation, regardless of its origin or character.¹²⁷ In this requirement, the United States would be breaching its obligation under customary international law to respect the immunity of Cuba and its property. Therefore, the United States would bear international responsibility for committing an internationally wrongful act with its conduct of ruling against Cuba and third-state nationals in its domestic courts.

Furthermore, I also explained that under 22 U.S.C. § 6082 of Title III a *trafficker* may be subject to treble damages to claimants.¹²⁸ Nevertheless, the United States does not have the right to impose compensation in any amount greater than the effective damages, including interest, resulting from Cuba's measures.¹²⁹ This is thoroughly covered by international practice and jurisprudence which do not recognize treble damages.

In the *Factory at Chorzów* case, the PCIJ evaluated how compensation should be awarded. It stated that if restitution is not possible, the injured state must receive a payment corresponding to the value of the restitution.¹³⁰ It added that:

(...) the award, if need be, of damages for loss sustained which would not be covered by the restitution in kind or payment in place of it—such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.¹³¹

The United States-Iran Claims Tribunal in the *Amoco* case also referred to this matter. The tribunal established that the investor is entitled to compensation equating to the full value of the expropriated asset and *damnum emergens*, or losses suffered upon the date of expropriation.¹³² Consequently, the ILC Draft Articles on State Responsibility seems to codify these customary rules establishing that “compensation shall cover any financially assessable damage including loss of profits insofar as it is established”.¹³³

The practice of the European Court of Human Rights is more instructive. The ECtHR approach is to estimate the reasonable amount related to the fair market value of the expropriated property. This allows states and the ECtHR more discretion in determining a fair amount of compensation by enabling them to consider other circumstances and equitable considerations.¹³⁴ The ECtHR compensation assessment varies depending on the rules involved but it does not include treble damages in its jurisprudence.

¹²⁶ *Ibid.*, p. 40, Article 4.

¹²⁷ *Ibid.*, p. 54, Article 12.

¹²⁸ Libertad Act, *supra* note 48.

¹²⁹ Inter-American Juridical Committee, *supra* note 97.

¹³⁰ *Factory at Chorzów* case, *supra* note 108.

¹³¹ *Ibid.*

¹³² *Amoco* case, *supra* note 90, pp. 48 and 56, paras. 228 and 261. See also Suzy H. Nikièma, “Compensation for Expropriation”, (2013) IISD 1 at 3.

¹³³ YILC (2001), *supra* note 110.

¹³⁴ United Nations Conference on Trade and Development, *Expropriation - UNCTAD Series on Issues in International Investment Agreements II* (New York and Geneva: United Nations, 2012), p. 114.

For example, in *Pincová and Pinc v. Czech Republic* the ECtHR held that the person deprived of his property must obtain compensation reasonably related to its value.¹³⁵ In *Vistiņš and Perepjolkins v. Latvia*, the ECtHR argued that the compensation amount must be calculated based on the value of the property at the date on which the ownership was lost.¹³⁶ The same was decided in *Moreno Diaz Peña v. Portugal* where the court calculated the amount of compensation according to the value of the property upon the date of expropriation.¹³⁷

Similar to the United States-Iran Claims Tribunal, the ECtHR considers that losses suffered must be considered for determining the compensation amount. Among the losses, the ECtHR includes not only the value of the land of the expropriated property but also of business activities taking place on it.¹³⁸ For instance, in *Werra Naturstein GmbH & Co Kg v. Germany*, the court established that the value of the expropriated land and effective loss were due to the applicant.¹³⁹

More importantly, the ECtHR observes that compensation should have a compensatory role as opposed to a punitive or dissuasive one. In *Guiso-Gallisay v. Italy*, the court dismissed the applicant's petition on assessing the losses by the equivalent of the gross value of the buildings erected by the state in expropriated land. The court added that such method leads to disparities in the treatment of applicants because is not necessarily related to the land's original potential.¹⁴⁰

The court concluded that such compensation method assigns a punitive role for the respondent state rather than a compensatory role for the applicants.¹⁴¹ This decision can also be interpreted in Helms Burton Act claims. Since the United States seeks to tighten sanctions against Cuba, it may not be as concerned with compensating its citizens as with adding pressure on Cuba. However, as the *Guiso-Gallisay v. Italy* case explains, the United States cannot assign a punitive role to compensation.

This is reflected in 22 U.S.C. § 6082 of Title III, where it appears that the focus is on the *trafficker* rather than the complainant.¹⁴² It states that:

(...) any person that, after the end of the 3-month period beginning on the effective date of this title, traffics in property which was confiscated by the Cuban government on or after January 1, 1959, shall be liable to any United States national who owns the claim to such property (...).¹⁴³

Therefore, it could be argued that the United States focused less on establishing a cause of action than on establishing liability to those who *traffic* in expropriated property. This is also demonstrated by the power attributed to the U.S. President to suspend the application of Title III. Thus, the possibility of bringing a cause of action is suspended and, through continued

¹³⁵ *Picanová and Pinc v. The Czech Republic*, no. 36548/97, § 53, 05 February 2003, ECHR 2007.

¹³⁶ *Vistiņš and Perepjolkins v. Latvia*, [GC] no. 71243/01, § 11, 25 October 2012, ECHR 2011.

¹³⁷ *Moreno Diaz Peña and others v. Portugal*, no. 44262/10, § 76, 4 June 2015, ECHR 2015.

¹³⁸ Guide on Article 1 of Protocol No. 1 to the ECHR, p. 29, para. 149. See also *Osmanyanyan and Amiraghyan v. Armenia*, no. 71306/11, 11 October 2018, ECHR 2018. But see *Guiso-Gallisay v. Italy*, [GC] (just satisfaction) no. 58858/00, § 103, 22 December 2009, ECHR 2009.

¹³⁹ *Werra Naturstein GmbH & Co. KG v. Germany*, no. 32377/12, § 46, 19 January 2017, ECHR 2017. See also *Azas v. Greece*, no. 50824/99, § 52-53, 19 September 2002, ECHR 2002 and *Athanasiou v. Greece*, no. 2531/02, § 24, 9 February 2006, ECHR 2006.

¹⁴⁰ *Guiso-Gallisay* case, *supra* note 138.

¹⁴¹ *Ibid.*

¹⁴² Kaye, *supra* note 93, p. 733.

¹⁴³ Libertad Act, *supra* note 48.

liability, discourages third parties from engaging in commercial activities on expropriated properties.¹⁴⁴

Furthermore, international practice has not provided for treble damages. This is regulated by U.S. law but as I have argued Title III claims must be governed by international law rather than by U.S. law. Thus, in the absence of established international practice regarding treble damages, the United States does not have the right to impose compensation in a way that damages are tripled. Consequently, the practice determined by jurisprudence in this regard should be followed.

In addition, the Helms Burton Act does not recognize third-country nationals' due process rights.¹⁴⁵ The Fifth Amendment to the United States Constitution expresses that "no person shall (...) be deprived of life, liberty, or property, without due process of law (...)"¹⁴⁶ The principle that the term *person* includes both U.S. citizens and foreigners is recognized in U.S. jurisprudence. However, U.S. courts have disputed whether this is the case or whether only aliens with permanent residence are entitled to such protection.¹⁴⁷

For example, in the *Kwong Hai Chew v. Colding* case, the U.S. Court for the Eastern District of New York held that only foreigners with permanent residence in the United States and who remain physically there, are persons under the Fifth Amendment.¹⁴⁸ Therefore, Kwong Hai Chew, a foreigner with permanent residence in the United States but who worked as a sailor on a U.S. ship, did not enjoy that right. Following the decision, the U.S. Supreme Court adjudicated the case and held that all people enjoy the right to due process of the law.¹⁴⁹

The U.S. Supreme Court made particular reference to this issue in the *Zadvydas v. Davis* case. The Supreme Court established that the right to due process applies to all persons, including foreigners, regardless of their status.¹⁵⁰ For this reason, the United States cannot deprive a foreigner of this right. Even more, if it directly affects their property in Cuba. Such due process right granted to foreigners includes the possibility of contesting the value of the claim and the way in which it is determined by the FCSC, which is not allowed under Title III.¹⁵¹

¹⁴⁴ Kaye, *supra* note 93.

¹⁴⁵ Inter-American Juridical Committee, *supra* note 97.

¹⁴⁶ U.S. Const., *supra* note 26

¹⁴⁷ Jennifer K. Elsea, "Substantive Due Process and U.S. Jurisdiction over Foreign Nationals", *Fordham L. 82* (2014): p. 2080.

¹⁴⁸ *Kwong Hai Chew v. Colding ET AL.*, 344 U.S. 590, 2 (1953), para. 596-597.

¹⁴⁹ *Ibid.*, p. 4, para. 603.

¹⁵⁰ *Zadvydas v. Davis*, 533 U.S. 678, 679 (2001), para. 2 (b). *See also Mathews v. Diaz*, 426 U.S. 67, 77 (1976); *Wong Yang Sung v. McGrath*, 339 U.S. 33, 49-50 (1950) and *Yamataya v. Fisher*, 189 U.S. 86, 101 (1903).

¹⁵¹ Inter-American Juridical Committee, *supra* note 97.

3. EXTRATERRITORIALITY, LIMITS OF JURISDICTION AND INTERNATIONAL COMPETENCE IN NATIONAL COURTS

3.1. Extraterritorial application and state jurisdiction

As I have explained, the Helms Burton Act is an extraterritorial U.S. legislation. This has been the main reason why the European Union, Canada, Mexico and Argentina have criticized the Act and alleged its violation of international law. Therefore, I will describe the rules applicable to state jurisdiction, both territorial and extraterritorial, and the non-conformity of the Helms Burton Act with international law in this matter.

Jurisdiction is defined as the capacity of a state under international law to prescribe and enforce laws. This concept, which derives from state sovereignty, is an essential component of its statehood. Classically, this right has been limited to the territory of the state. Now, this concept of jurisdiction has varied its application and there are exceptions. These exceptions allow extraterritorial jurisdiction in certain circumstances.¹⁵² However, they do not include acts performed abroad by aliens based on *trafficking in confiscated properties*.

There are certain ways by which a state can exercise its jurisdiction. Those used by the United States through the Helms Burton Act are legislative and judicial jurisdiction. Legislative jurisdiction refers to the power of the state to apply its laws in the activities and interests of people either by legislations, executive acts, administrative regulations or determined by courts. While judicial jurisdiction refers to subjecting people or things to the processes of the courts and tribunals, whether through civil or criminal proceedings.¹⁵³

Accordingly, it can be inferred that the Helms Burton Act would result in the exercise of legislative and judicial jurisdiction over foreign nationals. This is because the United States would be applying its laws to actions committed abroad by aliens for conducting commercial activities related to expropriated property. In addition, through judicial jurisdiction the United States subjects these third-state nationals to its domestic courts through civil proceedings. All this based on a broad notion termed *traffic*.¹⁵⁴

In principle, states are free to exercise their jurisdiction. This was established by the PCIJ in the *Lotus* case.¹⁵⁵ In this case, two ships belonging to Turkey and France collided on the high seas and eight Turks aboard the ship died. In 1926, Turkey initiated a trial against the French ship's commander detained after the collision. France protested claiming that the Turkish authorities had no jurisdiction. Thus, the PCIJ had to decide whether there is a norm in international law that prohibits Turkey from exercising its jurisdiction over a conduct that occurred outside its territory.

In the absence of such a norm, in 1926 the PCIJ allowed Turkey to exercise its jurisdiction, both legislative and judicial. The PCIJ noted that as long as there is no rule prohibiting it, states have complete discretion to establish their jurisdiction over an act even when it occurs outside

¹⁵² Cedric Ryngaert, "The Concept of Jurisdiction in International law", in *Research Handbook on Jurisdiction and Immunities in International Law* (Cheltenham: Edward Elgar Publishing Limited, 2015), p. 50. See also Kathleen Hixson, "Extraterritorial Jurisdiction Under the Third Restatement of Foreign Relations Law of the United States", *Fordham L. J.* 12 (1988): p. 129.

¹⁵³ Restatement (Third) of U.S. Foreign Relations Law, § 401 (a). See also John B. Houck, "Restatement of the Foreign Relations Law of the United States (Revised): Issues and Resolutions", *Int'l L.* 20 (1986): p. 1367.

¹⁵⁴ Inter-American Juridical Committee, *supra* note 97.

¹⁵⁵ *SS. Lotus (France v. Turkey)*, Judgement (1927), P.C.I.J. Series A, No. 10.

their territory. Thus, Turkey was able to exercise legislative and judicial jurisdiction over the French commander. However, the PCIJ added:

Now the first and foremost restriction imposed by international law upon a State is that -failing the existence of a permissive rule to the contrary- it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention. It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law. Such a view would only be tenable if international law contained a general prohibition to States to extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, and if, as an exception to this general prohibition, it allowed States to do so in certain specific cases.¹⁵⁶

Therefore, the freedom of states to exercise their jurisdiction must respect the limits imposed by international law. Otherwise, that state will incur international responsibility.¹⁵⁷ Before, the aim of the law of jurisdiction was to defend the sovereignty of states based on negative obligations or prohibitions. This means that states cannot assert their jurisdiction over matters that are the domain of other states as for instance acts taking place extraterritorially. Doing this would mean violating the principles of non-intervention and the sovereign equality of states.¹⁵⁸

In order to defend the state sovereignty against extraterritorial jurisdiction of other states, the PCIJ in the *Lotus* case imposed a significant restriction on the exercise of state jurisdiction. This is that, based on the aforementioned principles, a state cannot exercise its power in any form in the territory of another state except when allowed by a norm of international law. Hence, the basic premise under international law for establishing legislative and judicial jurisdiction was rooted in the principle of territoriality.¹⁵⁹

The concept of jurisdiction in relation to territory has been used in the context of Cuban nationalizations. It was endorsed by Restatements of the Law from the American Institute of Law (AIL) and also by United States jurisprudence.¹⁶⁰ Section 469 (1) of the Second Restatement of the Foreign Relations Law of the United States (Second Restatement) of 1952 declares that:

In the absence of a treaty or other unambiguous agreement regarding controlling legal principles, courts in the United States will generally refrain from examining the validity of a taking by a foreign state of property within its own territory, or from sitting in judgment on other acts of a governmental character done by a foreign state within its own territory and applicable there.¹⁶¹

Such section was consistent with the U.S. Supreme court decision in the *Underhill v. Hernandez* case.¹⁶² This case was about the illegal arrest of Underhill, a U.S. citizen in Venezuela, by

¹⁵⁶ *Ibid.*, pp. 18-19.

¹⁵⁷ Inter-American Juridical Committee, *supra* note 25, p. 40.

¹⁵⁸ Ryngaert, *supra* note 152, p. 52. *See also* U.N. Charter, art. 2, paras. 1 and 7.

¹⁵⁹ Inter-American Juridical Committee, *supra* note 157.

¹⁶⁰ In the United States Restatements of the Law are secondary sources that seek to collect and explain the legal rules constituting the common law in a particular legal area. So far, there are four Restatements of the Law written by the American Law Institute which is a legal organization composed by judges, legal academics and practitioners.

¹⁶¹ Houck, *supra* note 153, p. 1375.

¹⁶² *Underhill v. Hernandez*, 168 U.S. 250 (1897).

General Hernandez who after a revolution in 1892 established a new government. After allowing Underhill to return to the United States, he instituted a legal action for claiming damages for his illegal detention. However, a New York court refused having jurisdiction on the grounds that Hernandez acted in his official capacity and his actions represented those of the Venezuelan government.

Underhill appealed the judgement to the U.S. Supreme Court. Despite this, the Supreme Court upheld the decision of the New York court by reasoning that each sovereign state must respect the independence of other sovereign states and therefore prohibited U.S. courts to decide on foreign state's acts fully executed within their territories. This principle was termed the Act of State Doctrine, which was also applied in 1964 in the *Sabbatino* case.¹⁶³

This demonstrates that both international law and U.S. common law recognize jurisdiction as primarily territorial and that U.S. courts must refrain from adjudicating cases that involve acts committed by other states abroad. This is particularly important because the expropriations occurred abroad, were clearly acts of the state and the immovable property is located in Cuba. Thus, the United States cannot exercise its jurisdiction extraterritorially because it would violate not only its common law but also basic principles of international law.

Under the U.S. Foreign Sovereign Immunities Act (FSIA) there are exceptions that allow the United States to exercise its jurisdiction extraterritorially. Nonetheless, these exceptions do not include acts performed abroad by aliens entirely outside of the territory of the United States. I will describe these exceptions when explaining the limits of jurisdiction in domestic courts of Title III claims.¹⁶⁴ For now, it is important to note that these exceptions also establish that there must be a relationship with the territory of the United States.¹⁶⁵

Furthermore, before examining claims under the Helms Burton Act U.S. courts will first have to assess the legality of the expropriations. This is another problem for U.S. claimants since expropriation is a sovereign act and the properties, as they belong to the state, enjoy immunity from jurisdiction under international law. This would compel U.S. nationals to turn to their government so it could espouse their claims and seek recourse through diplomatic channels such as in *Walter Fletcher Smith Claim*.¹⁶⁶

According to what I have mentioned, jurisdiction is in principle territorial. Pursuant to this principle, acts committed on the territory of a state fall directly within its jurisdiction.¹⁶⁷ However, international law also allows states, in the exercise of their territorial jurisdiction, to regulate acts whose constituent elements may have occurred only in part in their territory. For example, under objective territoriality a state can regulate an act initiated abroad but consummated within its territory. While under subjective territoriality a state can regulate acts initiated within its territory and consummated abroad.¹⁶⁸

This has been applied in European jurisprudence. In November 2008, the European Parliament and the Council introduced Directive 2008/101/EC amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading

¹⁶³ *Sabbatino* case, *supra* note 84.

¹⁶⁴ Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. § 1605.

¹⁶⁵ FSIA, *infra* note 203.

¹⁶⁶ *Walter Fletcher Smith Claim* award, *supra* note 71.

¹⁶⁷ Ryngaert, *supra* note 152, p. 54.

¹⁶⁸ Inter-American Juridical Committee, *supra* note 157.

within the Community.¹⁶⁹ The Directive, which uses objective and subjective territorial jurisdiction, was upheld by the European Court of Justice (ECJ) in the *Air Transport Association of America v. Secretary of State for Energy and Climate Change* case.¹⁷⁰

In this case, U.S. airline operators filed a claim in the ECJ seeking to avoid inclusion in the EU's Emissions Trading System (ETS) as established by Directive 2008/101/EC. U.S. airlines claimed that their inclusion in the ETS was invalid and not justified by international law or a specific agreement between the EU and the United States.¹⁷¹ The court rejected the claim that the ETS could not apply to flights mostly occurring outside of EU territory by arguing that:

In laying down a criterion for Directive 2008/101 to be applicable to operators of aircraft registered in a Member State or in a third State that is founded on the fact that those aircraft perform a flight which departs from or arrives at an aerodrome situated in the territory of one of the Member States, Directive 2008/101, inasmuch as it extends application of the scheme laid down by Directive 2003/87 to aviation, does not infringe the principle of territoriality or the sovereignty which the third States from or to which such flights are performed have over the airspace above their territory, since those aircraft are physically in the territory of one of the Member States of the European Union and are thus subject on that basis to the unlimited jurisdiction of the European Union.¹⁷²

The European Court of Justice was able to determine that the EU had jurisdiction because the activities of the airlines initiated abroad and consummated in the territory of member states and vice versa. Still, the ECJ established that the activities must be related to European territory. In contrast, the Cuban expropriations have no relation to the territory of the United States. The expropriations were conducted by the Cuban government within its territory and the properties are located in Cuba. Therefore, the United States cannot exercise its jurisdiction because the activities do not relate to its territory.

This type of jurisdiction recognized by the ECJ became known as the *effects doctrine*. Under this doctrine, a state may have legislative jurisdiction over a conduct occurring outside its territory but that causes an effect within. The doctrine was also included in Section 18 of the Second Restatement which recognizes it as an applicable norm of international law in respect of the exercise of jurisdiction by states.¹⁷³ However, the Third Restatement of the Law of Foreign Relations of the United States (Third Restatement) of 1987 expanded the basis for exercising legislative jurisdiction.¹⁷⁴

The Third Restatement established that the United States has jurisdiction over activities of its nationals outside as well as within its territory and over certain conducts outside its territory by persons not its nationals that is directed against essential sovereign interests.¹⁷⁵ In

¹⁶⁹ Directive 2008/101/EC of the European Parliament and the Council of 19 November 2008 amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community text with EEA relevance, *OJL* 8, 13.1.2009, p. 3-21. Available on: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32008L0101>. Accessed May 29, 2020.

¹⁷⁰ Judgement of 21 December 2011, *Air Transport Association of America and Others v. Secretary of State for Energy and Climate Change*, C-366/10, EU:C:2011:864.

¹⁷¹ Climate Change Litigation Databases. *Air Transport Association of America and Others v. Secretary of State for Energy and Climate Change*, available on: <http://climatecasechart.com>. Accessed May 29, 2020.

¹⁷² *Air Transport Association* case, *supra* note 170, para. 125.

¹⁷³ Restatement (Second) of U.S. Foreign Relations Law § 18. See Hixson, *supra* note 152, p. 133. See also *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945).

¹⁷⁴ Hixson, *supra* note 152, pp. 128-129.

¹⁷⁵ U.S. (Third) Restatement, *supra* note 153, § 402. See also Hixson, *supra* note 173.

addition, the Third Restatement also broadened certain conditions, originally established by the Second Restatement, that must be met in order for the United States to exercise its jurisdiction by these means.

Under these conditions, the United States state may justify the application of the laws of its territory only to the extent that an act occurring outside its territory causes a direct, substantial and foreseeable effect within its territory and the exercise of such jurisdiction is reasonable.¹⁷⁶ For the latter, it is implied that a state cannot exercise its jurisdiction over persons or activities having connection with other states. Thus, the Third Restatement mentions the criteria for considering the exercise of such jurisdiction unreasonable by enumerating the limitations on legislative jurisdiction.¹⁷⁷

Regarding Cuban nationalizations, it is clear that both the expropriations and the activities conducted by third-state nationals on the properties do not cause a direct, substantial and foreseeable effect within the territory of the United States. For example, if a ship belonging to a Spanish company disembarks at a dock in Cuba that was expropriated property of a U.S. citizen, it evidently has no effect on the territory of the United States, nor it affects its sovereign interests.

As for the reasonableness condition, the limitations for exercising jurisdiction are determined by factors such as nationality¹⁷⁸ and the likelihood of conflict with regulation by another state.¹⁷⁹ In accordance with these limitations, third parties operating in expropriated property do not have a nationality relation with the United States and if their actions are regulated, it will surely create a conflict with their respective states who may have a legitimate interest in regulating their activities.

Evidently, none of the conditions are fulfilled. Therefore, the United States does not have the right to exercise jurisdiction over acts of *trafficking* committed abroad by third-country nationals. Especially when neither the alien nor the conduct in question has a connection to the territory and where there is no apparent connection between the acts and the protection of the sovereign interests of the United States. As a result, the Helms Burton Act does not comply with international law in any of these respects.¹⁸⁰

As I have explained, jurisdiction has been primarily regarded as territorial. Its objective was to defend the sovereignty of the states based on negative obligations because otherwise principles such as non-intervention and sovereign equality of the states would be violated. Nonetheless, in recent times a more positive dimension of the law of jurisdiction has been developed which reflects the evolution of international law towards a law of cooperation.¹⁸¹

¹⁷⁶ Inter-American Juridical Committee, *supra* note 157.

¹⁷⁷ U.S. (Third) Restatement, *supra* note 153, § 403. *See also* Hixson, *supra* note 152, p. 135.

¹⁷⁸ In international jurisprudence courts have rather argued that territoriality is the preferred basis for jurisdiction and not nationality. In *Bankovic and Others v. Belgium and 16 Other Contracting States*, the European Court of Human Rights held in its Application No. 52207/99 § 60, that “a State’s competence to exercise jurisdiction over its own nationals abroad is subordinate to that State’s and other States’ territorial competence”. Moreover, in *Laker Airways Ltd. v. Sabena*, the United States Court of Appeals for the District of Columbia Circuit held that “the purported principle of paramount nationality is entirely unknown in national and international law. Territoriality, not nationality, is the customary and preferred base of jurisdiction”. *See Bancović and others v. Belgium and others* (dec.) [GC], no. 52207/99, § 60, 12 December 2001, ECHR 2001 and *Lake Airways Ltd. v. Sabena, Belgian World Airlines and KLM*, 731 F.2d 909, 90 (D.C. Cir. 1984).

¹⁷⁹ U.S. (Third) Restatement, *supra* note 177. *See also* Hixson, *supra* note 152, pp. 135-136.

¹⁸⁰ Inter-American Juridical Committee, *supra* note 157.

¹⁸¹ Ryngaert, *supra* note 152, p. 53.

The latter implies that instead of states being allowed to exercise jurisdiction they sometimes have an obligation to do so, especially with respect to values owed to the international community. For example, the concept of jurisdiction in international criminal law and international human rights law has acquired an obligatory dimension in which states must, in certain circumstances, exercise their jurisdiction extraterritorially.¹⁸² Despite this, none of these allow establishing extraterritorial jurisdiction for *trafficking* in expropriated properties.

Thus, international law currently allows extraterritorial jurisdiction in cases of territories subject to occupation, activities of state agents operating outside national borders or when a state does not fully control its territory. While it is true that these situations primarily address human rights issues, they also provide evidence of the progress of the law of state jurisdiction in this regard which does not include jurisdiction over third-country nationals for acts committed abroad.¹⁸³

Therefore, considering the applicable norms of international law regarding state jurisdiction, a state can exceptionally exercise its jurisdiction on a different basis than territoriality. Nevertheless, there must be a substantial or significant connection between the matter in dispute and the sovereign authority of the state. As for example in the case of the exercise of jurisdiction over acts performed abroad by its nationals and to safeguard essential sovereign interests; which certainly differs from what Title III regulates.¹⁸⁴

3.2. Limits of jurisdiction and international competence in national courts

Following the activation of Title III by the Trump administration, U.S. nationals have filed lawsuits against third-country nationals. The most prominent claims are those filed against hotel operators in Spanish and U.S. courts. According to the claims, companies such as Meliá, Booking, Expedia and Trivago have illegally enriched by providing tourism services in Cuba which are performed on properties expropriated from U.S. nationals and which now belong to the Cuban state.

Other companies have also been sued under Title III. For example, Visa and MasterCard are being sued for processing payments for properties in Cuba; Amazon for selling on its website goods produced on expropriated property; American Airlines and LATAM Airlines, the latter being a Chilean company, for operating in Cuba's international airport which was expropriated from a Cuban family; and, the Canadian company Teck Resources for conducting mineral extraction on property owned by a Cuban-U.S. citizen.¹⁸⁵

Because of such lawsuits, there are companies that have decided to temporarily suspend or even cease their activities in Cuba. Others have opted to continue operating and will

¹⁸² *Ibid.*

¹⁸³ *E.g., Military and Paramilitary in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgement, I.C.J. Reports 1986 (June 27); *Loizidou v. Turkey*, [GC], no. 40/1993/435/514, 28 July 1998, ECHR 1998; *Ilascu and others v. Moldova and Russia* [GC], no. 48787/99, 8 July 2004, ECHR 2004; *Al-Skeini and others v. The United Kingdom* [GC], no. 55721/07, 7 July 2001, ECHR 2001.

¹⁸⁴ Inter-American Juridical Committee, *supra* note 157.

¹⁸⁵ *Glen v. Visa and Mastercard*, 1:19-cv-01870-LPS (D. Del. 2020); *Gonzalez v. Amazon and Susshi*, 1:19-cv-23988-RNS (S.D. Fla. 2020); Diario de Cuba. American Airlines y LATAM, demandas en EEUU por utilizar el aeropuerto José Martí [American Airlines and LATAM sued in the US for using the José Martí Airport], available on: https://diariodecuba.com/cuba/1569446467_493.html. Accessed May 29, 2020; *Herederos de Roberto Gomez Cabrera v. Teck Resources Limited*, 1:20-cv-21630-XXXX (S.D. Fla. 2020).

eventually be, if not already, sued. It is therefore important to analyze the jurisdictional problems that these lawsuits will encounter in civil courts, taking into account the applicable norms of international law discussed, the blocking statutes adopted by third countries and national legislations.

The first case filed in a European court after the activation of Title III was in Spain. In June 2019, U.S. company Central Santa Lucia L.C. initiated proceedings against the Spanish hotel chain Meliá in the Court of First Instance of Palma de Mallorca. The suit was brought by a Cuban-U.S. family who were heirs of the former owner. They claimed their right to receive fruits of possession in bad faith and to benefit from the confiscated property, as established in Article 455 of the Spanish Civil Code.¹⁸⁶

Meliá asked the court to refrain from exercising jurisdiction and international competence on the grounds that the expropriation of the land had an essential role in the claim; it was an expression of Cuba's sovereign authority; and therefore, the state enjoys immunity from jurisdiction. In contrast, Central Santa Lucia argued that national legislation governing the judiciary and international treaties concluded by Spain entitle the court to exercise judicial functions.¹⁸⁷

Furthermore, Central Santa Lucia added that the claim is against Meliá, a private legal person incorporated in Spain, in connection with commercial transactions of a private nature conducted with Gaviota S.A., a Cuban state company with independent legal personality, and therefore immunity from jurisdiction is not applicable. Consequently, the court proceeded to examine the two legal issues raised: jurisdiction and international competence.¹⁸⁸

The court understood that the claim was based primarily on the illegality of Cuba's nationalization of the land owned by Central Santa Lucia. Thus, the court deemed necessary to evaluate the legality of the nationalization to determine if Meliá had illicitly benefited from the agreement signed with the Cuban state. The court considered that the nationalization is a sovereign act and despite the fact that neither Cuba nor Gaviota S.A. were part of the proceedings, it applied Spanish Law 16/2015 on privileges and immunities of foreign states, which is consistent with the 2004 UN Convention on Immunities ratified by Spain.¹⁸⁹

Central Santa Lucia argued that such law is not applicable because according to Article 9 there is no immunity when there is a commercial transaction.¹⁹⁰ However, the court dismissed the allegation, holding that the claim is not based on commercial transactions but on the nationalization performed by Cuba. As to the nature of the property, the court considered that it is state property which enjoys immunity from jurisdiction. Therefore, it applied Article 21 of

¹⁸⁶ *Central Santa Lucía v. Meliá*, Juzgado Primera Instancia núm 24 de Palma de Mallorca, de 29 de Mayo 2019 [Court of First Instance No. 24 of Palma de Mallorca, of 29 of May 2019]; Art. 455 C.C.; See also Pastor, *supra* note 10.

¹⁸⁷ *Ibid.*

¹⁸⁸ *Ibid.*

¹⁸⁹ *Ibid.* See also *Ley Orgánica (LO) 16/2015, de 27 de Octubre, 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*, BOE 2015 [Organic Law (LO) 16/2015, of October 27, on privileges and immunities of foreign States, International Organizations with headquarters or office in Spain and International Conferences and Meetings held in Spain, BOE 2015].

¹⁹⁰ *Ibid.*, Article 9.

Spanish Organic Law 6/1985 of the Judiciary, which prevents the adjudication of claims with respect to subjects or property that enjoy immunity from jurisdiction and execution.¹⁹¹

As to international competence, the Court referred to Article 22 of the Judiciary which excludes Spanish courts from jurisdiction when the immovable property is in a foreign state.¹⁹² It also referred to the EU Regulation 1215/2012 which provides jurisdiction exclusively to the courts of the member states where the property is located in proceedings defining rights *in rem* in immovable property.¹⁹³ Thus, the court held that the determination of the claimant's right was the basis for obtaining the profits earned by Meliá after operating the hotels.¹⁹⁴

As a result, the court upheld Meliá's contentions and declined jurisdiction and international competence. This was also consistent with the Council Regulation 2271/96 which protects natural and legal persons in the EU against the extraterritorial effects of legislation adopted by third countries.¹⁹⁵ However, Central Santa Lucia filed an appeal which was upheld in April 2020 by the Provincial Audience of Palma de Mallorca. In the appeal, the claimant argued that his right to effective judicial protection recognized in Article 24 of the Spanish Constitution was violated.¹⁹⁶

Accordingly, the claimant stated that he has not directed the lawsuit against the Cuban state but against a Spanish company with domicile in Spain. The Provincial Audience concluded that although Central Santa Lucia does not intend to do so, it cannot be ignored that the claim demands as a fundamental question the legality of the Cuban decision of nationalization of property according to international law. Furthermore, as established, the Spanish jurisdictional bodies are prohibited from making such an assessment.¹⁹⁷

Nonetheless, the Provincial Court considered that the lawsuit should be processed according to its literal configuration since no claim is directed against a foreign state or its assets. The Provincial Court argued that Spanish courts have jurisdiction in the case of a procedure against a company domiciled in Spain in the exercise of a personal action for compensation. Hence, it understood that these consequences should not be confused with the fact that the entire procedure cannot be managed and recognized the right of the plaintiffs to obtain a judgment even if it is dismissed.¹⁹⁸

The Court of First Instance made a valid assessment considering the applicable rules of international law discussed. Surprisingly, the Provincial Court considered that the Court of First

¹⁹¹ *Ley Orgánica (LO) 6/1985, de 1 de Julio, del Poder Judicial, BOE 1985, Artículo 21* [Organic Law (LO) 6/1985, of July 1, of the Judiciary, BOE 1985, Article 21].

¹⁹² *Ibid.*, Article 22.

¹⁹³ 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 judgements in civil and commercial matters, *OJ L* 351, 20.12.2010, p.1, Articles 8 and 24.

¹⁹⁴ Pastor, *supra* note 10.

¹⁹⁵ Council Regulation (EC) No 2271/96 of 22 November 1996 on protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom, *OJ L* 309, 11 November 1996, p. 1-6.

¹⁹⁶ Sentencia Audiencia Provincial (SAN) de Palma de Mallorca, de 18 de Marzo de 2020 (Auto Núm 66/20) [Judgement Provincial Court (SAN) of Palma de Mallorca, dated March 18, 2020 (Order No. 66/20)]; *See also* Art. 24 C.E.

¹⁹⁷ *Ibid.* *See also* Vozpopuli. *Golpe a Meliá: la justicia Española reactiva el pleito por sus hoteles en Cuba en plena crisis* [Blow to Meliá: Spanish Justice reactivates the lawsuit for its hotels in Cuba in the midst of crisis], available on: https://www.vozpopuli.com/economia-y-finanzas/Meliá-pleito-justicia-helms-burton-cuba_0_1349866226.html. Accessed May 29, 2020.

¹⁹⁸ *Ibid.*

Instance confused the claim. Since the case will be referred back to the same court, the latter will probably decide to have jurisdiction and will have to hear the proceedings because under Spanish law, Central Santa Lucia must obtain a judgment. In spite of this, it is plausible that in its judgement the court will dismiss the claim because Spanish courts are not competent to assess whether or not the nationalizations conducted by the Cuban state since 1959 are lawful.

For Meliá the issue is that the procedure itself violates Council Regulation 2271/96. Such Regulation establishes that any judgement of a court located outside the EU giving effect to the Helms Burton Act shall not be recognized or enforceable and bans proceedings against a European national for commercial activities undertaken in a third jurisdiction such as Cuba.¹⁹⁹ This means that under European law the Court of First Instance of Mallorca should not adjudicate the case, otherwise doubts will be raised as to the applicability of the Council's Regulation.

Moreover, Meliá was included in a class action lawsuit filed in the U.S. District Court for the Southern District of Florida against Trivago, Booking, Expedia and Cuban state-owned companies.²⁰⁰ In this lawsuit, Cuban-U.S. families allege, as I have briefly explained, that these entities provide online booking services for hotels in Cuba, including those operated by Meliá. The plaintiffs explain that Meliá operates in joint ventures with Cuban state-owned companies. Therefore, the families assert that they have all trafficked in properties that have been expropriated after the Cuban revolution.²⁰¹

However, in January 2020, the plaintiffs excluded Meliá, Trivago and Cuban state-owned companies from the lawsuit, leaving only Expedia and Booking as defendants.²⁰² Although litigation continues, it is likely that the plaintiffs decided excluding them after observing the decision of the Court of First Instance of Mallorca, the difficulty from U.S. courts to exercise personal jurisdiction and the impossibility of enforcing the judgment in the EU due to regulation 2271/96.

If the Florida court were to apply the same criteria as the Spanish courts, it is probable that the case against Expedia and Booking would be dismissed. Under this rationale, the Florida court would have to evaluate the legality of the nationalization and the nature of the property to analyze whether the defendants have benefited from trafficking in the properties. In this regard, the Florida court would find that it has no jurisdiction since the Cuban state and its property enjoy immunity under U.S. law.

Under this assumption, the court would have to consider whether it can exercise jurisdiction over Cuba in accordance with the immunity exceptions set forth in the FSIA.²⁰³ With respect to expropriation, these exceptions stipulate that a foreign state's immunity does

¹⁹⁹ Garrigues. *Ley Helms-Burton: que implica y de qué mecanismos de defense disponen los particulares y empresas de la UE?* [Helms-Burton Law: what does it imply and what defense mechanisms do individuals and companies in the EU have?], available on: https://www.garrigues.com/latam/es_ES/noticia/ley-helms-burton-que-implica-y-de-que-mecanismos-de-defensa-disponen-los-particulares-y. Last modified May 3, 2019. Accessed May 29, 2020. See also Council Regulation (EC) 2271/96, *supra* note 195, Articles 4 and 6.

²⁰⁰ Trivago and Booking are both European companies. Nevertheless, Booking has subsidiaries in the United States which were also included in the lawsuit.

²⁰¹ *Mata case*, *supra* note 3, pp. 3, 13, 16 and 68.

²⁰² HostelTur. *Demandantes de Miami van a por Expedia y Booking dejando a Meliá y Trivago* [Miami Plaintiffs Go For Expedia And Booking Leaving Meliá and Trivago], available on: https://www.hosteltur.com/133675_demandantes-de-miami-van-a-por-expedia-y-booking-dejando-a-Meliá-y-trivago.html. Last modified January 4, 2020. Accessed May 29, 2020.

²⁰³ FSIA, *supra* note 165.

not apply in cases “in which rights in property taken in violation of international law are in issue”.²⁰⁴ Thus, three elements are established: rights in property, taken and in violation of international law.²⁰⁵

The first element relates to physical or intangible property. The other two elements refer to nationalization or expropriation of property by a foreign state without payment of the compensation required by international law.²⁰⁶ Accordingly, the Florida court, after conducting the respective analysis, may adjudicate the case on the basis that these requirements are not met by Cuba. Nevertheless, in addition to these elements, there is another requirement which is that there must be a commercial nexus.²⁰⁷

According to this commercial nexus, the court would not have jurisdiction. This is because according to such requirement the seized property must be present in the United States in connection with a commercial activity or, if the property is operated by an agency or instrumentality of the foreign state, such agency or instrumentality must be engaged in a commercial activity in the United States.²⁰⁸ Therefore, since both the immovable property and the Cuban state companies operating the properties are in Cuba, the court would not have jurisdiction.

In addition, U.S. courts consider that expropriations or nationalizations of private property by foreign governments are presumptively considered non-commercial. For example, in the *Garb v. Poland* case, the U.S. Court of Appeals Second Circuit held that “expropriation is decidedly sovereign -rather than a commercial- activity”.²⁰⁹ Similarly, the same court in *Hunt v. Mobil Oil Corp.* stated that:

(...) expropriations of the property of an alien within the boundaries of the sovereign state are traditionally considered to be public acts of the sovereign removed from judicial scrutiny.²¹⁰

By this approach, the Florida court would have no jurisdiction because it would be necessary to evaluate the legality of the nationalization and the nature of the property to ascertain whether Booking and Expedia have benefited. However, even though the proceedings are in progress, the court may consider such an assessment unnecessary and understand the complaint against Booking and Expedia in its ordinary meaning: a civil remedy against U.S. based companies for trafficking in expropriated property in contravention of the Helms Burton Act and not against the Cuban state.

As this is a private civil claim the Florida court would have subject matter jurisdiction. Pursuant to 28 U.S.C. § 1331 (federal question jurisdiction) U.S. courts have jurisdiction over all civil actions arising under the Constitution, laws or treaties of the United States.²¹¹ Hence,

²⁰⁴ The Foreign Sovereign Immunities Act: A Guide for Judges, Federal Judicial Center - International Litigation Guide, p. 55 (2013).

²⁰⁵ *Ibid.*

²⁰⁶ *Ibid.*, pp. 55-56.

²⁰⁷ FSIA, *supra* note 164.

²⁰⁸ *Ibid.*

²⁰⁹ *Garb v. Republic of Poland*, 440 F.3d 579, 7 (2d Cir. 2006).

²¹⁰ *Hunt v. Mobil Oil Corp.*, 550 F.2d 68 (2d Cir. 1977). *See also* *Alberti v. Empresa Nicaraguense de la Carne*, 705 F.2d 250, 254 (7th Cir. 1983) (“recognizing that the nationalization of property is a quintessential [g]overnment act”); *Haven v. Republic of Poland*, 68 F. Supp.2d 947, 954 (N.D. Ill. 1999) (“It is obvious that a governmental expropriation of private property under governmental authority ... is the classic type of [sovereign, rather than commercial,] activity...”).

²¹¹ Judiciary and Judicial Procedure, 28 U.S.C. § 1331.

since this action arises under the Helms Burton Act the court does have jurisdiction. Besides, the Helms Burton Act establishes that U.S. courts are obliged to adjudicate and make a determination on the merits, prohibiting the application of the Act of State doctrine.²¹²

Similarly, the court would have personal jurisdiction over Expedia and Booking. According to Florida Statute § 48.193 natural or legal persons, regardless of whether they are residents of Florida, submit to the jurisdiction of Florida courts when they cause injury by certain acts.²¹³ These include operating or conducting business activities or having an office or agency in Florida as well as causing injury to persons within Florida arising out of an act or omission by the defendant outside of Florida.²¹⁴ The latter may occur in two forms, specifically:

- a. The defendant was engaged in solicitation or service activities within this state; or
- b. Products, materials, or things processed, serviced, or manufactured by the defendant anywhere were used or consumed within this state in the ordinary course of commerce, trade, or use.²¹⁵

Accordingly, as the plaintiffs explain, Expedia and Booking maintain contacts, regularly transact business and derive benefits from their presence in Florida.²¹⁶ Therefore, according to Florida Statute § 48.193 (6) they have both caused injury within Florida by committing acts outside while engaging in solicitation within Florida.²¹⁷ In addition, according to the U.S. judicial code the venue is proper because it provides that if there is no district in which an action can be brought, any judicial district where the defendant is subject to personal jurisdiction of the court may adjudicate the case.²¹⁸

The lawsuit also meets the requirement of Title III that the amount in controversy must exceed 50,000 USD.²¹⁹ Thus, the Florida court would have jurisdiction over all aspects of the dispute, both subject matter jurisdiction and over the defendants. If so, Booking and Expedia will likely be charged with liability for trafficking in the expropriated property. This means that they also face treble damages and the amount could increase by three times its value. Nonetheless, the Helms Burton Act seems to have deviated from its original purpose.

²¹² Libertad Act, *supra* note 48.

²¹³ Florida Statutes Title VI. Civil Practice and Procedure § 48.193. Acts subjecting person to jurisdiction of courts of state, Article (1)(a).

²¹⁴ *Ibid.*, Articles (1)(a) 1 and 6.

²¹⁵ *Ibid.*

²¹⁶ *Mata* case, *supra* note 3, p. 8, para 25.

²¹⁷ Florida Statutes Title VI, *supra* note 213.

²¹⁸ Judiciary and Judicial Procedure, *supra* note 211, § 1391.

²¹⁹ Libertad Act, *supra* note 48.

4. POLITICAL DISPUTE AND POTENTIAL LEGAL DEFENSES

In its effort to exert more political and economic pressure on Cuba, the Helms Burton Act was initially intended for preventing foreign companies from investing in Cuba by creating liability for using expropriated property. Nevertheless, the lawsuits have instead primarily resulted in U.S. companies being sued under Title III. It is estimated that U.S. companies represent approximately 50 percent of all defendants including, *inter alia*, Amazon, American Airlines, Expedia, TripAdvisor, Visa and MasterCard.²²⁰

More disappointingly for the Trump administration is that there are only two Cuban companies, Union Cuba-Petroleo and Cimex Corporation, which continue as defendants representing only four percent of all sued companies. About 11 percent of all defendants are based in the EU, most of which are Spanish companies.²²¹ However, it could be expected that cases against them will not proceed due to Council Regulation 2271/96. Other countries such as Canada, Mexico and Argentina have also been affected but have adopted legislations against the Helms Burton Act.

For example, Canada enacted the Foreign Extraterritorial Measures Act (FEMA) which, similar to Council Regulation 2271/96, authorizes the Canadian government to block foreign laws applied extraterritorially against Canadian companies.²²² The FEMA specifically includes the Helms Burton Act among the legislations to be blocked, allowing the free flow of trade between Canada and Cuba. Similarly, Mexico and Argentina have also enacted legislation that protects their companies from the application of the Helms Burton Act.²²³

Due to these protective legislations, judgments against Canadian, Latin American and European companies will probably not be enforceable. This means that only a limited amount of trafficking claims will be effective, and these will be against U.S. companies. Nonetheless, third-state companies may have assets in the United States and could still face potential lawsuits. This, together with the risk of being sanctioned, has caused foreign companies to decide whether or not to continue operating in Cuba.

For example, after the activation of Title III only 15 companies from the Canary Islands (Spain) remain conducting business in Cuba compared to the 56 that had previously operated.²²⁴ In addition, the executives of the companies that opt for remaining in Cuba also confront Title IV of the Helms Burton Act, which prohibits their entry into the United States. As a result,

²²⁰ U.S.-Cuba Trade and Economic Council, Inc. The Trump Administration on 2 May 2019 made operational Title III of the Cuban Liberty and Democratic Solidarity Act of 1996 (known as “Libertad Act”), available on: <https://static1.squarespace.com/static/563a4585e4b00d0211e8dd7e/t/5ea9b8923361221b3862ef91/1588181139307/Libertad+Act+Filing+Statistics.pdf>. Accessed May 29, 2020.

²²¹ *Ibid.*

²²² *Foreign Extraterritorial Measures Act*, R.S.C., 1985, c. F-29.

²²³ *Decreto de la fecha 23 de Octubre de 1996 de la ley de proteccion al comercio y la inversion de normas extranjeras que contravengan el derecho internacional* [Decree dated October 23, 1996 of the law for the protection of trade and investment of foreign norms that contravene international law]; *Ley N° 24.871, E.D.L.A., B.O.: 10/09/97* [Law N° 24.871, E.D.L.A., B.O.: 10/09/97].

²²⁴ *El Día. La política de mano dura de Trump da la puntilla al comercio entre Cuba y Canarias* [Trump’s heavy-handed policy gives the tip to trade between Cuba and the Canary Islands], available on: <https://www.eldia.es/economia/2020/02/12/politica-mano-dura-trump-da/1050236.html>. Last modified February 2, 2020. Accessed May 29, 2020.

Meliá executives have been notified by the U.S. Department of State that they prohibited from entering the United States.²²⁵

Although countries have adopted legislations to protect their companies and claims against them may not be effective due to jurisdictional issues, this has still not prevented companies from leaving Cuba. Other aspects such as the risk of future sanctions and additional lawsuits, including litigation costs, may have contributed to this. While this clearly affects the commercial interests of third parties, it also negatively impacts the already weakened Cuban economy.

Trade between the 56 Canary Islands companies and Cuba was estimated at 40 million euros. After the activation of Title III, and with 15 of those operating in Cuba, trade has considerably decreased to approximately 5.5 million. This means that seven out of 10 companies, or 73 percent, have stopped exporting to Cuba and the amount of trade has collapsed by 86 percent.²²⁶ Financial institutions have also lessened their exposure and other companies have chosen to freeze or abandon their interests, worsening Cuba's economy.²²⁷

Undoubtedly, Helms Burton Act lawsuits have been corrosive for Cuba. Accompanying the impact of these lawsuits are other restrictions adopted by the Trump administration that have also pressured Cuba.²²⁸ Among them are the restrictions on travel, business and financial transactions, remittances and expansive sanctions imposed since 2017.²²⁹ Along with this, Cuba's economy faces severe repercussions from the Covid-19 pandemic.

Not only tourism has been gravely affected. During the pandemic, Cuba has sent medical professionals to other countries such as Italy, Andorra and Venezuela and has been unable to secure payments as financial institutions avoid transactions with Cuba due to the sanctions.²³⁰ In addition, the unemployment caused by the pandemic has impeded Cubans residing in Florida from sending remittances to Cuba, which also impacts Cuba's revenues.²³¹

Amidst the lawsuits, another problem for Cuba is its relationship with Venezuela. This relationship is based on economic, political and social cooperation. However, the punitive measures against Venezuela adopted by the Trump administration affect this relationship and increase the economic pressure on Cuba. This contributed to an energy crisis in Cuba because

²²⁵ El Diario de Cuba. *EEU extiende su prohibición de entrada al país a toda la cúpula de Meliá* [The US extends its entry ban to the entire Meliá leadership], available on: https://diariodecuba.com/cuba/1580998579_9833.html. Last modified February 6, 2020. Accessed May 29, 2020.

²²⁶ El Dia, *supra* note 224.

²²⁷ U.S.-Cuba Trade and Economic Council Inc., *supra* note 220.

²²⁸ *Ibid.*

²²⁹ See Cuban Assets Control Regulations, 31 C.F.R. § 515 (1963); Commercial Regulations, 15 C.F.R. § 730-774.

²³⁰ DW. "Misiones médicas" cubanas" cuántas, dónde y por qué? [Cuban "medical missions": how many, where and why?], available on: <https://www.dw.com/es/misiones-médicas-cubanas-cuántas-dónde-y-por-qué/a-53054180>. Last modified April 7, 2020. Accessed May 29, 2020.

²³¹ On Cuba News. Coronavirus: large crowds in Hialeah for unemployment compensation, available on: <https://oncubanews.com/en/world/usa/coronavirus-large-crowds-in-hialeah-for-unemployment-compensation/>. Last modified April 9, 2020. Accessed May 29, 2020; Local 10. Hialeah faces highest growth in unemployment nationwide, Miami follows: WalletHub, available on: <https://www.local10.com/news/local/2020/05/01/hialeah-faces-highest-growth-in-unemployment-nationwide-miami-follows-wallethub/>. Last modified April 30, 2020. Accessed May 29, 2020.

Venezuelan companies, the main suppliers of oil to Cuba, have been sanctioned by the United States.²³²

All this has led to Cuba defaulting on its three billion USD debt to the Paris Club of Creditors Nations. Cuba has been gravely impacted by Covid-19 lockdown measures and its two most valuable sources of revenue, tourism and remittances, have been reduced. Therefore, Cuba has notified its creditors that it will not be able to pay and has requested a delay until 2022.²³³ However, its ability to pay will depend on the consequences of the pandemic and on whether foreign companies in Cuba continue to operate regardless of Title III.

In parallel, Cuba's situation could worsen if the United States decides to return Cuba to the list of countries sponsoring terrorism. As the U.S. State Department has announced, Cuba would return to the list after failing to cooperate with U.S. counterterrorism efforts under 22 U.S.C. § 2781 of the Arms Export Control Act.²³⁴ This could have devastating effects for Cuba, the United States and third countries as it would affect their economic and political relations. As a result, companies operating in Cuba would not only be subject to pressure from the Helms Burton Act, but also to increased scrutiny of their transactions.²³⁵

However, all of these measures, including the activation of Title III, could support President Trump's re-election in the November 2020 elections. Florida, a state where many Cuban Americans live, is considered a pivotal swing state for winning the presidential elections. Except for 1992, Florida has voted with the winner in every presidential election since 1964. Yet, elections in Florida have traditionally been narrow. For example, Obama and Trump won the state's votes by only one percent in 2012 and 2016 respectively.²³⁶

That narrow margin has been obtained by winning the vote of senior voters who represent a majority of the percentage of Florida's voting population. In 2016, President Trump won by nine percent among voters over 65. Nevertheless, this could be difficult to repeat due to the Covid-19 pandemic. Florida residents perceive that the Trump administration's mishandling of the crisis has led to a collapse of public health and the economy, resulting in polls indicating Trump's disadvantage to Democratic candidate Joe Biden.²³⁷

²³² See e.g., Blocking Property of the Government of Venezuela, No. 152, 82 F.R. (2019); Taking Additional steps to Address the National Emergency With respect to Venezuela, No. 20, 84 F.R. (2019); Imposing Additional Sanctions With Respect to the Situation in Venezuela, No. 166, 82 F.R. (2017).

²³³ The Caribbean Council. Cuba defaults on Paris Club debt: says it will meet its commitments, available on: <https://www.caribbean-council.org/cuba-defaults-on-paris-club-debt-says-it-will-meet-its-commitments/>. Accessed May 29, 2020.

²³⁴ U.S. Department of State. Countries Certified as Not Cooperating Fully With U.S. Counterterrorism Efforts, available on: <https://www.state.gov/countries-certified-as-not-cooperating-fully-with-u-s-counterterrorism-efforts/>. Last modified May 13, 2020. Accessed May 29, 2020; Arms Export Control Act, 22 U.S.C. § 2781.

²³⁵ U.S.-Cuba Trade and Economic Council Inc. Trump Administration Inching Nearer To Returning Cuba To Terrorism List; Adding Venezuela, available on: <https://www.cubatrade.org/blog/2020/5/13/trump-administration-inching-nearer-to-returning-cuba-to-terrorism-list-adding-venezuela>. Last modified May 13, 2020. Accessed May 29, 2020.

²³⁶ 270toWin. Florida, available on: <https://www.270towin.com/states/Florida>. Accessed May 29, 2020. See also Florida Department of State. Florida Division of Elections - Data & Statistics, available on: <https://dos.myflorida.com/elections/data-statistics/>. Accessed May 29, 2020.

²³⁷ Al Jazeera. In key US state of Florida, Trump stumbles among senior voters, available on: <https://www.aljazeera.com/news/2020/05/key-state-florida-trump-stumbles-senior-voters-200515143604360.html>. Last modified May 15, 2020. Accessed May 29, 2020. See also Pew Research Center. Behind Trump's victory: Divisions by race, gender, education, available on: <https://www.pewresearch.org/fact-tank/2016/11/09/behind-trumps-victory-divisions-by-race-gender-education/>. Last modified: November 9, 2016. Accessed May 29, 2020.

Moreover, Florida has one of the highest rates of unemployment due to the pandemic.²³⁸ Among them are many Cuban Americans, and this could also hinder President Trump's re-election. Hence, the activation of Title III along with the other measures adopted against Cuba could be useful to secure the vote of Cuban Americans and compensate for the loss of voters from other segments of the population. This means that more punitive measures against Cuba can be expected until the 2020 U.S. presidential election, especially if the dispute of the nationalized properties is not settled.

The conflict between the United States and Cuba also poses a challenge for the EU. Council Regulation 2271/96 requires European-based companies to obtain authorization from the European Commission (EC) before they can file a response to any claim under the Helms Burton Act.²³⁹ In April 2020, the Spanish company Iberostar Hotels applied for authorization from the EC to respond to a Title III lawsuit and requested the U.S. District Court for the Southern District of Florida for a brief stay of proceedings based on the principle of international comity.²⁴⁰

If it had not done so, Iberostar would be subject to a penalty from the Spanish government pursuant to Spanish Law 27/1998 on Sanctions Applicable to Infringements of the Rules established in Council Regulation 2271/96.²⁴¹ There is however no specific deadline under the European legislation for the EC to respond. Thus, the EC is confronted with a potential international relations issue where if it decides against Iberostar and the U.S. court rules against the company, it would result in liability and the company's assets in the U.S. would be in jeopardy.²⁴²

Unfortunately, a rapprochement between the Trump administration and the Cuban government is virtually impossible. President Trump's policy toward Cuba has been repressive, and so it is unlikely that he will change his rhetoric. This policy of pressure will continue if Trump is re-elected, which means that property claims will not have a prompt resolution. By contrast, if Democratic candidate Joe Biden is elected president and decides to follow the Obama administration's approach to Cuba, it would facilitate the settlement of property claims.

The U.S. government retains broad discretion in negotiating FCSC-certified claims, and it is likely that certified claimants will favor an expeditious resolution. There are currently 8,821 claims of which 5,913 have been certified by the FCSC and are valued at approximately nine billion USD. However, 30 certified claimants account for 56 percent of the total value of certified claims which would create an efficient pathway towards a settlement. In addition, two

²³⁸ On Cuba News, *supra* note 231.

²³⁹ Council Regulation (EC) 2271/96, *supra* note 195, Article 5 (2).

²⁴⁰ *Maria Dolores Canto Marti v. Iberostar*, 1:20-cv-20078-RNS, 3 (S.D. Fla. 2020).

²⁴¹ *Ley 27/ 1998, de 13 de julio, 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*, BOE 1998 [Law 27/1998, of July 13, on sanctions applicable to infractions of the norms established in Regulation (EC) number 2271/96, of the Council, of November 22, relative to protection against the extraterritorial application of the third country legislation, BOE 1998].

²⁴² U.S.-Cuba Trade and Economic Council Inc. EC Now Has To Decide What It Perhaps Doesn't Want to Decide – Iberostar of Spain Libertad Act Lawsuit Is First To Report U.S. Court Recognizing EC'S Interest In Title III Lawsuits, available on: <https://www.cubatrade.org/blog/2020/4/26/ec-now-has-to-decide-what-it-perhaps-doesnt-want-to-decide-iberostar-of-spain-libertad-act-lawsuit-is-first-to-report-us-court-recognizing-ecs-interest-in-title-iii-lawsuits-nbsp>. Last modified April 26, 2020. Accessed May 29, 2020.

claims from Office Depot and Marriott account for 24 percent of the total value of certified claims, further facilitating an intergovernmental settlement.²⁴³

The objective of the negotiation should be finding a resolution and concluding the dispute. Therefore, considering Cuba's economic problems other opportunities to reach a settlement can also be included. For example, along with compensation formats the Cuban government could provide transferable securities to certified claimants such as property tax credits or the sale of development rights to third parties, United States-based or non-United States-based.²⁴⁴

The normalization of economic and political relations between Cuba and the United States would be beneficial to both, as well as to Cuban citizens, claim holders and third parties investing in Cuba. For this to occur there must be a resolution of the certified claims. However, the current policy of the Trump administration against Cuba indicates that this is not feasible. Meanwhile, sued companies should consider other factors and potential defenses under Title III.

Among those defenses, defendants may argue that plaintiffs have failed to assert a claim. Title III provides that the plaintiff must prove that the defendant *knowingly and intentionally trafficked* in property that was nationalized by the Cuban government. Thus, defendants can contest whether they knowingly and intentionally trafficked in such property or whether their actions constitute trafficking.²⁴⁵

Defendants can also challenge the title to the expropriated property. For claims not certified by the FCSC, plaintiffs need to prove that they had title to the property being trafficked. This would be challenging to prove since the nationalizations occurred over 60 years ago. However, contesting the title to the property will be difficult for certified claims as certain expropriations have recently occurred.²⁴⁶

Title III also mentions certain activities that are exempt from claims. These include transactions and uses of property for lawful travel to Cuba to the extent that such transactions and uses are necessary for such travel.²⁴⁷ This exception is particularly important for companies in the tourism industry as they may argue that their activities are necessary for tourists who are lawfully traveling to Cuba. Therefore, they may rely on this exception as a potential defense against claims under the Helms Burton Act.²⁴⁸

Furthermore, the defendants could hold that the claims infringe principles of justiciability and constitutionality. This is because the proceedings would violate the Act of State doctrine and rights of equal protection and due process of the U.S. constitution.

²⁴³ U.S.-Cuba Trade and Economic Council Inc. Troika To Negotiate Settlement Of Certified Claims Against Cuba?, available on: <https://static1.squarespace.com/static/563a4585e4b00d0211e8dd7e/t/5c115e8b0ebbe830845cf398/1544642187247/KushnerGreenblattFeinbergShouldLeadCubaCertifiedClaimsNegotiationsForTrumpAdministration.pdf>. Accessed May 29, 2020.

²⁴⁴ *Ibid.*

²⁴⁵ Freshfields Bruckhaus Deringer. Title III Suits Under the Helms-Burton Act, available on: http://knowledge.freshfields.com/en/Global/r/3961/title_iii_suits_under_the_helms-burton_act. Last modified June 21, 2019. Accessed May 29, 2020.

²⁴⁶ *Ibid.*

²⁴⁷ Libertad Act, *supra* note 39.

²⁴⁸ Freshfields Bruckhaus Deringer, *supra* note 245.

Notwithstanding this possibility, it would be challenging because Title III prohibits the application of the Act of State doctrine.²⁴⁹

There is also the possibility that Title III could be suspended again, especially if the Democrats win the November 2020 elections. Nevertheless, the Helms Burton Act provides that actions filed before such a renewed suspension will not be affected or suspended. Moreover, if the U.S. government announces the reinstatement of the suspension, there could be a surge of claims before claimants lose their right of recourse.²⁵⁰

Still, several companies continue to operate in Cuba. The result is that they are exposed to claims under Title III because of their activities or affiliations with entities trading with Cuba. Consequently, companies should analyze their business transactions and adopt measures to limit their exposure under Title III. Among these measures, companies should first gather information. This will enable companies to assess whether their actions or those of their affiliates constitute trafficking.²⁵¹

For future transactions involving Cuba, companies should conduct due diligence procedures which could assist in the creation of the *knowingly and intentionally* defense against trafficking claims. This would include developing policy and procedure manuals for their operations in Cuba and documents indicating their compliance with government regulations. Additionally, contracts involving Title III risks should include indemnification and warranty clauses and, if possible, companies could consider limiting or terminating their activities that create Title III exposure.²⁵²

Exposed companies should also monitor legal developments and set countermeasures. This will enable them to establish contingency plans including how to cease their business activities in Cuba and what remedies may be available under the blocking statutes or investment treaties. Nonetheless, the act of trafficking involves many activities which means that, in the absence of established legal practice, there is substantial uncertainty as to how the provisions of Title III will be interpreted.²⁵³

Despite all these possibilities, companies will confront a complicated litigation. Property claims are merely a part of the political dispute between Cuba and the United States which affect third parties. Cuba particularly faces a potential crisis that could worsen if more companies are sued under Title III. Certainly, the most appropriate resolution is an intergovernmental negotiation. However, this will depend on their political will to resolve property claims which is necessary for Cuba's stability.

²⁴⁹ *Ibid.* See also Libertad Act, *supra* note 48.

²⁵⁰ *Ibid.*

²⁵¹ *Ibid.*

²⁵² *Ibid.*

²⁵³ *Ibid.*

CONCLUSION

The Helms Burton Act is a controversial law. The United States seeks to support its citizens in resolving their property claims by providing a right of action against individuals who benefit from their property. Yet it codifies the dispute with the purpose of strengthening the embargo against Cuba. Moreover, the Helms Burton Act extends the conflict between Cuba and the United States to companies legitimately investing in Cuba which are being sued for trafficking under Title III.

The provisions of Title III cause legal effects that are contrary to international law. By allowing private civil claims the United States disregards that nationalization is a sovereign act thus transforming an intergovernmental claim into a domestic legal claim. International law recognizes the right of states to nationalize or expropriate so national courts are not allowed to entertain such claims under principles of jurisdiction and state immunity.

In U.S. law this is referred to as the Act of State doctrine, similar to state immunity under customary international law. Similarly, Spanish law and other national legal systems also grant immunity to the state and its property. However, Title III states that U.S. courts may not rely on such a principle to preclude a determination on the merits. This will result in a discussion on its justiciability and constitutionality since to determine whether individuals have trafficked it is necessary to examine the legality of the nationalization by the Cuban government, over which domestic courts have no jurisdiction.

A claims tribunal could be established for addressing the claims. Such tribunal would also be competent to evaluate the conditions of the expropriations: public purpose, non-discrimination and compensation. Unfortunately, this depends on the political will of both Cuba and the United States and is therefore virtually impossible. Besides, the Act includes a broad definition of trafficking and, in the absence of an established legal practice, creates uncertainty about how the courts will interpret such actions.

Despite such uncertainty, companies are in principle operating lawfully in Cuba. In international law there is an absence of prior practice in this regard in which trafficking in expropriated property is unregulated. This means that individuals using such property do not violate any norm of international law, and the use is consistent with Cuban law. Therefore, further research on judicial interpretation would be useful to establish what activities would create liability for companies.

Several companies have been sued under Title III, with U.S. and European companies being the most affected. They also face treble damages, which triples the amount awarded to the plaintiffs without allowing the defendants to contest the manner in which the damages were calculated. However, claims against them should not proceed as the Helms Burton Act does not consider applicable norms of international law and is therefore contrary to it.

As for the terms, the Act misuses *confiscation* to refer to acts of nationalization since the Cuban state seized the properties in its sovereign capacity and not as a punitive measure. Additionally, the Act confers the right to claim on persons who were not U.S. citizens at the time of the nationalizations despite the fact that international law establishes that nationality must be continuous from the time of the injury until the settlement of the claim. Still, the United States could espouse the claims of those who were its citizens at the time of the nationalizations, or certified claimants, and seek to negotiate with Cuba.

The Helms Burton Act is also contrary to international law because it is an extraterritorial legislation. Classically, state jurisdiction, or the ability of a state to exercise its powers, has been rooted in territory which means that acts committed on the territory of a state fall directly within its jurisdiction. Some exceptions to exercising jurisdiction extraterritorially have been established in modern international law, notably in international human rights law and international criminal law, which are not applicable herein.

According to these exceptions a state may justify the application of its laws extraterritorially for regulating acts that may have occurred only in part in its territory. This is referred to as objective and subjective territoriality. Notwithstanding these exceptions, the basic premise is that there must be a substantial connection between the matter in dispute and the sovereign authority of the state. Therefore, since there is no connection between the nationalizations nor the activities of third parties with the U.S. sovereign authority, the United States does not have the right to exercise its jurisdiction extraterritorially.

The Helms Burton Act not only raises legal issues for companies but its incompatibility with international law also causes problems for claimants. For example, in the *Meliá* case, the first since the activation of Title III, the Court of First Instance of Mallorca declined jurisdiction because it found that it was necessary to evaluate the legality of the nationalization to determine whether Meliá had trafficked in expropriated property. Along with this, the court also referred to EU law and considered that it had no international competence as the immovable property is located in Cuba.

The decision was appealed, and the Provincial Audience of Mallorca upheld it establishing that its literal interpretation should be heeded, which is a claim of trafficking. It would therefore be interesting to monitor the case for reviewing the court's analysis as it could serve as guidance for future lawsuits. Other problems for claimants are blocking statutes such as the adopted by the EU. This will further hinder the enforcement of U.S. courts' judgments on European territory.

Paradoxically, the companies that are mainly sued are United States companies. Thus, U.S.-based Expedia and the U.S. subsidiaries of Netherlands-based Booking have been sued in U.S. courts for trafficking under Title III. To date these proceedings are still in progress. However, it would be interesting to follow the findings in order to compare the courts' interpretations. Furthermore, these claims entail the political dispute between Cuba and the United States.

Cuban tourism industry, the main source of revenue for the government, is the most affected. U.S. economic and political pressure on Cuba has extended to companies that must decide whether to continue operating in Cuba. In addition, international sanctions and the Covid-19 crisis have aggravated Cuba's economy by not being able to receive remittances from Cubans abroad and by not receiving tourists.

A peaceful settlement between Cuba and the United States would be the ideal solution. This would be in the interest of all parties concerned. Yet, political unwillingness by both governments hampers such a negotiation. Perhaps a rapprochement will be possible if the Democratic Party wins the 2020 elections. Meanwhile, companies at risk of being sued should adopt protective measures and prepare potential legal defenses. Even so, property claims must be resolved for Cuba's stability and the normalization of governmental relations.

BIBLIOGRAPHY

Primary sources

U.S. law

1. Arms Export Control Act, 22 U.S.C. § 2781.
2. Blocking Property of the Government of Venezuela, No. 152, 82 F.R. (2019).
3. Commercial Regulations, 15 C.F.R. § 730-774.
4. Cuban Assets Control Regulations, 31 C.F.R. § 515 (1963).
5. Cuban Liberty and Democratic Solidarity (Libertad) Act, 22 U.S.C § 6021-6091 (1996).
6. Determination of Cuban Sugar Quota to Supplement the Quota Established by Proclamation, No. 3383, 75 Stat. 1041-1043 (1961).
7. Florida Statutes Title VI. Civil Practice and Procedure § 48.193. Acts subjecting person to jurisdiction of courts of state.
8. Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. § 1605.
9. Imposing Additional Sanctions With Respect to the Situation in Venezuela, No. 166, 82 F.R. (2017).
10. International Claims Settlement Act, 22 U.S.C. Subchapter V - Claims Against Cuba and China § 1643-1643m.
11. Judiciary and Judicial Procedure, 28 U.S.C. Title 28.
12. Restatement (Second) of Foreign Relations Law of the United States.
13. Restatement (Third) of U.S. Foreign Relations Law.
14. Taking Additional steps to Address the National Emergency With respect to Venezuela, No. 20, 84 F.R. (2019).
15. U.S. Const. amend. V and XIV § 1.
16. U.S. Department of State. Bureau of Western Hemisphere Affairs, available on: <https://www.state.gov/cuba-title-iii-faqs-libertad/>. Accessed May 29, 2020.
17. U.S. Department of State. Countries Certified as Not Cooperating Fully With U.S. Counterterrorism Efforts, available on: <https://www.state.gov/countries-certified-as-not-cooperating-fully-with-u-s-counterterrorism-efforts/>. Last modified May 13, 2020. Accessed May 29, 2020.

U.S. jurisprudence

U.S. Supreme Court cases

18. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).
19. *Dames & Moore v. Regan*, 453 U.S. 654 (1981).
20. *Kwong Hai Chew v. Colding ET AL.*, 344 U.S. 590, 2 (1953).
21. *Mathews v. Diaz*, 426 U.S. 67, 77 (1976).
22. *Underhill v. Hernandez*, 168 U.S. 250 (1897).

23. *Wong Yang Sung v. McGrath*, 339 U.S. 33, 49-50 (1950).
24. *Yamataya v. Fisher*, 189 U.S. 86, 101 (1903).
25. *Zadvydas v. Davis*, 533 U.S. 678, 679 (2001).

U.S. District and Circuit courts cases:

26. *Alberti v. Empresa Nicaraguense de la Carne*, 705 F.2d 250, 254 (7th Cir. 1983).
27. *Banco Nacional de Cuba v. Sabbatino*, 193 F. Supp. 375 (S.D. N.Y. 1961).
28. *Garb v. Republic of Poland*, 440 F.3d 579, 7 (2d Cir. 2006).
29. *Glen v. Visa and Mastercard*, 1:19-cv-01870-LPS (D. Del. 2020).
30. *Gonzalez v. Amazon and Susshi*, 1:19-cv-23988-RNS (S.D. Fla. 2020).
31. *Haven v. Republic of Poland*, 68 F. Supp.2d 947, 954 (N.D. Ill. 1999).
32. *Herederos de Roberto Gomez Cabrera v. Teck Resources Limited*, 1:20-cv-21630-XXXX (S.D. Fla. 2020).
33. *Hunt v. Mobil Oil Corp.*, 550 F.2d 68 (2d Cir. 1977).
34. *Lake Airways Ltd. v. Sabena, Belgian World Airlines and KLM*, 731 F.2d 909, 90 (D.C. Cir. 1984).
35. *Maria Dolores Canto Marti v. Iberostar*, 1:20-cv-20078-RNS, 3 (S.D. Fla. 2020).
36. *Mata, Hernandez and others v. Meliá Hotels International, Expedia, Trivago, Booking and others*, 19-cv-22529-FAM (S.D. Fla. 2019).
37. Opinion of Mr. Justice Harlan. *Banco Nacional de Cuba v. Sabbatino*, available on: <https://www.iilj.org/wp-content/uploads/2016/08/Banco-Nacional-de-Cuba-v.-Sabbatino.pdf>. Accessed May 29, 2020.
38. *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945).

Cuban law

39. *La Constitución de la República de Cuba* [The Constitution of the Republic of Cuba] (1 July 1940). Available on: <https://archivos.juridicas.unam.mx/www/bjv/libros/6/2525/36.pdf>. Accessed May 29, 2020.
40. *La Constitución de la República de Cuba, Artículo 5* [The Constitution of the Republic of Cuba, Article 5] (10 April 2019). Available on <http://www.granma.cu/file/pdf/gaceta/Nueva%20Constitución%20240%20KB-1.pdf>. Accessed May 29, 2020.
41. *Ley de Reforma Agraria de 1963* [Agrarian Reform Law of 1963].
42. *Ley Fundamental de Cuba de 1959, Sección Primera, Artículos 96 y 196* [Cuban Fundamental Law of 1959, First Section, Articles 96 and 196].

Spanish law and jurisprudence

Laws

43. *Constitución Española de 1978* [Spanish Constitution of 1978], available on: <https://www.boe.es/legislacion/documentos/ConstitucionCASTELLANO.pdf>. Accessed May 29, 2020.
44. *Ley Orgánica (LO) 16/2015, de 27 de Octubre, 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, BOE 2015* [Organic Law (LO) 16/2015, of October 27, on privileges and immunities of foreign States, International Organizations with headquarters or office in Spain and International Conferences and Meetings held in Spain, BOE 2015].
45. *Ley Orgánica (LO) 6/1985, de 1 de Julio, del Poder Judicial, BOE 1985* [Organic Law (LO) 6/1985, of July 1, of the Judiciary, BOE 1985].

Cases

46. *Central Santa Lucía v. Meliá*, Juzgado Primera Instancia núm 24 de Palma de Mallorca, de 29 de Mayo 2019 [Court of First Instance No. 24 of Palma de Mallorca, of 29 of May 2019].
47. *Juzgado Primera Instancia núm 24 de Palma de Mallorca, de 2 de Septiembre 2019 (procedimiento ordinario 542/2019)* [Court of First Instance No. 24 of Palma de Mallorca, of 2 of September 2019 (ordinary procedure 542/2019)].
48. *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, BOE 1998* [Law 27/1998, of July 13, on sanctions applicable to infractions of the norms established in Regulation (EC) number 2271/96, of the Council, of November 22, relative to protection against the extraterritorial application of the third country legislation, BOE 1998].
49. *Sentencia Audiencia Provincial (SAN) de Palma de Mallorca, de 18 de Marzo de 2020 (Auto Núm 66/20)* [Judgement Provincial Court (SAN) of Palma de Mallorca, dated March 18, 2020 (Order No. 66/20)].

Canadian, Argentinian and Mexican laws

50. *Decreto de la fecha 23 de Octubre de 1996 de la ley de proteccion al comercio y la inversión de normas extranjeras que contravengan el derecho internacional* [Decree dated October 23, 1996 of the law for the protection of trade and investment of foreign norms that contravene international law].
51. *Foreign Extraterritorial Measures Act*, R.S.C., 1985, c. F-29.
52. *Ley No 24.871, E.D.L.A., B.O.: 10/09/97* [Law No 24.871, E.D.L.A., B.O.: 10/09/97].

EU law

53. Council Regulation (EC) No 2271/96 of 22 November 1996 on protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom, OJ L 309, 11 November 1996, p. 1-6.

54. Directive 2008/101/EC of the European Parliament and the Council of 19 November 2008 amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community text with EEA relevance, OJ L 8, 13.1.2009, p. 3-21. Available on: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32008L0101>. Accessed May 29, 2020.
55. 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 judgements in civil and commercial matters, OJ L 351, 20.12.2010, p.1.

ECJ and ECtHR jurisprudence

ECJ cases

56. Climate Change Litigation Databases. *Air Transport Association of America and Others v. Secretary of State for Energy and Climate Change*, available on: <http://climatecasechart.com>. Accessed May 29, 2020.
57. Judgement of 21 December 2011, *Air Transport Association of America and Others v. Secretary of State for Energy and Climate Change*, C-366/10, EU:C:2011:864.

ECtHR cases

58. *Al-Skeini and others v. The United Kingdom* [GC], no. 55721/07, 7 July 2001, ECHR 2001.
59. *Athanasidou v. Greece*, no. 2531/02, § 24, 9 February 2006, ECHR 2006.
60. *Azas v. Greece*, no. 50824/99, § 52-53, 19 September 2002, ECHR 2002.
61. *Bancović and others v. Belgium and others* (dec.) [GC], no. 52207/99, § 60, 12 December 2001, ECHR 2001.
62. Guide on Article 1 of Protocol No. 1 to the ECHR. Available on: https://www.echr.coe.int/Documents/Guide_Art_1_Protocol_1_ENG.pdf. Accessed May 29, 2020.
63. *Guiso-Gallisay v. Italy*, [GC] (just satisfaction) no. 58858/00, § 103, 22 December 2009, ECHR 2009.
64. *Ilascu and others v. Moldova and Russia* [GC], no. 48787/99, 8 July 2004, ECHR 2004.
65. *James and others v. The United Kingdom*, no. 8793/79, Commission Report of 11 May 1984, DR 56.
66. *Loizidou v. Turkey*, [GC], no. 40/1993/435/514, 28 July 1998, ECHR 1998
67. *Moreno Diaz Peña and others v. Portugal*, no. 44262/10, § 76, 4 June 2015, ECHR 2015.
68. *Osmanyan and Amiraghyan v. Armenia*, no. 71306/11, 11 October 2018, ECHR 2018.
69. *Picanová and Pinc v. The Czech Republic*, no. 36548/97, § 53, 05 February 2003, ECHR 2007.
70. Protocol 1 Article 1 ECHR. EUROPEAN CONVENTION OF HR
71. *Vistiņš and Perepjolkins v. Latvia*, [GC] no. 71243/01, § 11, 25 October 2012, ECHR 2011.
72. *Werra Naturstein GmbH & Co. KG v. Germany*, no. 32377/12, § 46, 19 January 2017, ECHR 2017.

UN and WTO

73. G.A. Res. 1803, U.N. GAOR, 17th Sess., U.N. Doc. A/RES/1803 (XVII 1962).
74. G.A. Res. 3281, U.N. GAOR, 29th Sess., U.N. Doc. A/3281 (XXIX 1974).
75. Report of the International Law Commission, GAOR, 61th Session Supplement No. 10, at 16, U.N. Doc. A/61/10 (2006).
76. U.N. CHARTER, art.2, para.4.
77. United Nations Conference on Trade and Development, *Expropriation - UNCTAD Series on Issues in International Investment Agreements II*. New York and Geneva: United Nations, 2012.
78. United Nations Convention on Jurisdictional Immunities of States and Their Property (New York, 2 Dec. 2004), not yet in force.
79. *United States – The Cuban Liberty and Democratic Solidarity Act – Request for Consultations by the European Communities*, WT/DS81/1, G/L/71, S/L/21 (13 May 1996).
80. Yearbook of the International Law Commission (1959), Vol. II.
81. Yearbook of the International Law Commission (2001), Vol. III, Parts 1, 2, 3 and 4, pp. 32-143.

PCIJ and ICJ jurisprudence

PCIJ cases

82. *Case concerning certain German interests in Polish Upper Silesia (Germany v. Poland)*, Judgement (1926), P.C.I.J. Serie A, No. 7, p. 22.
83. *Factory at Chorzów (Germany v. Poland)*, Judgement (1928), P.C.I.J. Series A, No. 17.
84. *Factory at Chorzów (Germany v. Poland)*, Judgement (1928), P.C.I.J. Series A, No. 13.
85. *SS. Lotus (France v. Turkey)*, Judgement (1927), P.C.I.J. Series A, No. 10.

ICJ cases

86. *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Merits, Judgement, I.C.J. Reports. 2005 (December 19).
87. *Interhandel (Switzerland v. United States of America)*, Preliminary Objections, Judgement, I.C.J. Reports 1959 (March 21).
88. *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgement, I.C.J. Reports 2012 (Feb 3.).
89. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgement, I.C.J. Reports. 1986 (June 27).

Arbitration cases

90. *Administrative Decision No. V. (United States of America v. Germany)*, Arbitral Award, U.N., 1924, (II), (October 31).

91. *Amoco International Finance Corporation v. The Government of the Islamic Republic of Iran, National Iranian Oil Company, National Petrochemical Company and Kharg Chemical Company Limited (Amoco v. Iran)*, Partial Arbitral Award, 1987, (July 14).
92. *BP Exploration Company (Libya) Limited v. Government of the Libyan Arab Republic (BP v. Libya)*, Arbitral Award, 1973, (October 10).
93. *Libyan American Oil Company (Liamco) v. the Government of the Libyan Arab Republic* (12 April 1977, unreported). Available on: https://www.trans-lex.org/261400/_liamco-v-the-government-of-the-libyan-arab-republic-yca-1981-at-89-et-seq/. Accessed May 29, 2020.
94. *Libyan American Oil Company v. The Libyan Arab Republic* (12 April 1977, unreported). p. 2. Available on: https://www.biicl.org/files/3939_1977_liamco_v_libya.pdf. Accessed May 29, 2020.
95. Reports of International Arbitral Awards. *Walter Fletcher Smith Claim (Cuba v. USA)*, Volume II pp. 913-918 (1929).
96. *Texaco Overseas Petroleum Company v. The Government of the Libyan Arab Republic* (19 January 1977, unreported). Available on: https://www.trans-lex.org/261700/_texaco-overseas-petroleum-company-v-the-government-of-the-libyan-arab-republic-yca-1979-at-177-et-seq-/#head_0. Accessed May 29, 2020.

Additional cases (Italy and Greece)

97. *Ferrini v. Federal Republic of Germany*, Cass. 11 Marzo [March] 2004, n. 5044
98. *Prefecture of Voiotia v. Federal Republic of Germany*, N.B. 11/2000 (288933), 513.
99. *The Prosecutor v. Max Josef Milde*, Cass. 21 Ottobre [October] 2008, n. 1072.

Secondary sources

Scholarly work

100. Anillo-Badia Rolando. “Outstanding Claims to Expropriated Property in Cuba”, *ASCE, Association for the Study of the Cuban Economy* (2011).
101. Antonio Lázaro, “Cuba: Las Leyes Cubanas de la Revolución” [Cuba: The Constitutional Laws of the Revolution], *Instituto de Estudios Políticos [Institute of Political Studies]* (1961).
102. Bell, José, Delia Luisa López and Tania Caram, *Documentos de la Revolución Cubana 1960* [Documents from the Cuban Revolution 1960] (La Habana: Instituto Cubano del Libro, 2007) [Cuban Book Institute].
103. Cedric Ryngaert, “The Concept of Jurisdiction in International law”, in *Research Handbook on Jurisdiction and Immunities in International Law* (Cheltenham: Edward Elgar Publishing Limited, 2015).
104. Clyde Hufbauer Gary, Jeffrey J. Schott, Kimberly Ann Elliott and Milica Cosic, “Case Studies in Economic Sanctions and Terrorism”, *PIIE, Peterson Institute for International Economics, Case 60-3 US v. Cuba (1960- : Castro)* (2011).
105. David Kaye, *The Helms-Burton Act: Title III and International Claims*, 20 *Hastings Int’l & Comp. L. Rev.* 729 (1997).

106. Dugan, Christopher F., Don Wallace Jr., Noah D. Rubins, Borzu Sabahi, *Investor State Arbitration*. New York: Oxford University Press, 2008.
107. Edwin Borchard, “*The Minimum Standard of the Treatment of Aliens*”, 38 Mich. L. Rev. 4 (1940).
108. Elena Merino Blanco and Joana Razzaque, *Globalisation and Natural Resources Law: Challenges, Key Issues and Perspectives* (Cheltenham: Edward Elgar Publishing Limited, 2011).
109. Elsea, Jennifer K., “Substantive Due Process and U.S. Jurisdiction over Foreign Nationals”, *Fordham L. Rev.* 82 (2014).
110. Feinberg, Richard E., “Reconciling U.S. Property Claims in Cuba”, *Latin America Initiative at Brookings* (2015).
111. Friedman, Mark W., Dietmar W. Prager and Ina C. Popova, “Expropriation and Nationalisation”, in *The Guide to Energy Arbitrations - Second Edition*, edited by Doak Bishop and Gordon Kaiser. London: Global Arbitration Review, 2017.
112. Gordon A, Christenson, “International Claims Procedure before the Department of State”, *Syracuse Law Review* (1961): pp. 527-543.
113. John B. Houck, “Restatement of the Foreign Relations Law of the United States (Revised): Issues and Resolutions”, *Int’l L.* 20 (1986).
114. Kathleen Hixson, “Extraterritorial Jurisdiction Under the Third Restatement of Foreign Relations Law of the United States”, *Fordham L. Rev.* 12 (1988).
115. M. W. Gordon, *The Settlement of Claims for Expropriated Private Property Between Cuba and Foreign Nations Other Than the United States*, 5, *Miami Inter-Am L. Rev.* 457 (1973).
116. Nikièma, Suzy H., “Compensation for Expropriation”, (2013) IISD.
117. The Foreign Sovereign Immunities Act: A Guide for Judges, Federal Judicial Center - International Litigation Guide, p. 55 (2013).
118. Wang, Guiguo. *International Investment Law: A Chinese Perspective*. London and New York: Routledge, 2015.

Non-scholarly work

119. 270toWin. Florida, available on: <https://www.270towin.com/states/Florida>. Accessed May 29, 2020.
120. Al Jazeera. In key US state of Florida, Trump stumbles among senior voters, available on: <https://www.aljazeera.com/news/2020/05/key-state-florida-trump-stumbles-senior-voters-200515143604360.html>. Last modified May 15, 2020. Accessed May 29, 2020.
121. Antonio Pastor. Herbert Smith Freehills. Spanish Court Decision Following End of Suspension of the US Helms-Burton Act: Jurisdiction Declined in Claim concerning Assets Nationalized by Cuba, available on: <https://hsfnotes.com/publicinternationallaw/2019/11/14/spanish-court-decision-following-end-of-suspension-of-the-us-helms-burton-act-jurisdiction-declined-in-claim-concerning-assets-nationalized-by-cuba/#page=1>. Accessed May 29, 2020.
122. CounterPunch. The Cuban Nationalization of US Property in 1960: the Historical and Global Context, available on: <https://www.counterpunch.org/2019/03/29/the-cuban->

- nationalization-of-us-property-in-1960-the-historical-and-global-context/. Last modified March 29, 2019. Accessed May 29, 2020.
123. CubavsBloqueo. *La indemnización por nacionalizaciones* [The compensation for nationalizations], available on: <http://www.cubavsbloqueo.cu/es/genesis/la-indemnizacion-por-nacionalizaciones>. Accessed May 29, 2020.
 124. Diario de Cuba. *American Airlines y LATAM, demandas en EEUU por utilizar el aeropuerto José Martí* [American Airlines and LATAM sued in the US for using the José Martí Airport], available on: https://diariodecuba.com/cuba/1569446467_493.html. Accessed May 29, 2020.
 125. El Día. *La política de mano dura de Trump da la puntilla al comercio entre Cuba y Canarias* [Trump's heavy-handed policy gives the tip to trade between Cuba and the Canary Islands], available on: <https://www.eldia.es/economia/2020/02/12/politica-mano-dura-trump-da/1050236.html>. Last modified February 2, 2020. Accessed May 29, 2020.
 126. El Diario de Cuba. *EEU extiende su prohibición de entrada al país a toda la cúpula de Meliá* [The US extends its entry ban to the entire Meliá leadership], available on: https://diariodecuba.com/cuba/1580998579_9833.html. Last modified February 6, 2020. Accessed May 29, 2020.
 127. El País. *España rechazará las reclamaciones de EE UU contra empresas con intereses en Cuba* [Spain will reject US claims against companies with interests in Cuba], available on: https://elpais.com/economia/2019/11/06/actualidad/1573073454_157823.html. Last modified November 7, 2019. Accessed May 29, 2020.
 128. Florida Department of State. Florida Division of Elections - Data & Statistics, available on: <https://dos.myflorida.com/elections/data-statistics/>. Accessed May 29, 2020.
 129. Freshfields Bruckhaus Deringer. Title III Suits Under the Helms-Burton Act, available on: http://knowledge.freshfields.com/en/Global/r/3961/title_iii_suits_under_the_helms-burton_act. Last modified June 21, 2019. Accessed May 29, 2020.
 130. Garrigues. *Ley Helms-Burton: que implica y de qué mecanismos de defensa disponen los particulares y empresas de la UE?* [Helms-Burton Law: what does it imply and what defense mechanisms do individuals and companies in the EU have?], available on: https://www.garrigues.com/latam/es_ES/noticia/ley-helms-burton-que-implica-y-de-que-mecanismos-de-defensa-disponen-los-particulares-y. Last modified May 3, 2019. Accessed May 29, 2020.
 131. Gowling WLG. Cuba Update: Helms Burton Act Title III Activated, available on: <https://gowlingwlg.com/en/insights-resources/articles/2019/cuba-update-helms-burton-title-iii-activated/>. Last modified May 8, 2019. Accessed May 29, 2020.
 132. HostelTur. *Demandantes de Miami van a por Expedia y Booking dejando a Meliá y Trivago* [Miami Plaintiffs Go For Expedia And Booking Leaving Meliá and Trivago], available on: https://www.hosteltur.com/133675_demandantes-de-miami-van-a-por-expedia-y-booking-dejando-a-Meliá-y-trivago.html. Last modified January 4, 2020. Accessed May 29, 2020.
 133. Law Help BD. Case Note on The Chorzow Factory (*Germany v. Poland*, 1928), available on: https://lawhelpbd.com/international-law/case-note-on-the-chorzow-factory-germany-v-poland-1928/#_ftnref15. Last Modified May 23, 2020. Accessed May 29, 2020.
 134. Local 10. Hialeah faces highest growth in unemployment nationwide, Miami follows: WalletHub, available on: <https://www.local10.com/news/local/2020/05/01/hialeah-faces->

- highest-growth-in-unemployment-nationwide-miami-follows-wallethub/. Last modified April 30, 2020. Accessed May 29, 2020.
135. On Cuba News. Coronavirus: large crowds in Hialeah for unemployment compensation, available on: <https://oncubanews.com/en/world/usa/coronavirus-large-crowds-in-hialeah-for-unemployment-compensation/>. Last modified April 9, 2020. Accessed May 29, 2020.
 136. Pew Research Center. Behind Trump’s victory: Divisions by race, gender, education, available on: <https://www.pewresearch.org/fact-tank/2016/11/09/behind-trumps-victory-divisions-by-race-gender-education/>. Last modified: November 9, 2016. Accessed May 29, 2020.
 137. Reuters. Exxon Mobil sues Cuba for \$280 million over expropriated property, available on: <https://www.reuters.com/article/us-usa-cuba-lawsuit/exxon-mobil-sues-cuba-for-280-million-over-expropriated-property-idUSKCN1S91YQ>. Last modified May 3, 2019. Accessed May 29, 2020.
 138. The Caribbean Council. Cuba defaults on Paris Club debt: says it will meet its commitments, available on: <https://www.caribbean-council.org/cuba-defaults-on-paris-club-debt-says-it-will-meet-its-commitments/>. Accessed May 29, 2020.
 139. U.S.-Cuba Trade and Economic Council Inc. EC Now Has To Decide What It Perhaps Doesn’t Want to Decide – Iberostar of Spain Libertad Act Lawsuit Is First To Report U.S. Court Recognizing EC’S Interest In Title III Lawsuits, available on: <https://www.cubatrade.org/blog/2020/4/26/ec-now-has-to-decide-what-it-perhaps-doesnt-want-to-decide-iberostar-of-spain-libertad-act-lawsuit-is-first-to-report-us-court-recognizing-ecs-interest-in-title-iii-lawsuits-nbsp>. Last modified April 26, 2020. Accessed May 29, 2020.
 140. U.S.-Cuba Trade and Economic Council Inc. Troika To Negotiate Settlement Of Certified Claims Against Cuba?, available on: <https://static1.squarespace.com/static/563a4585e4b00d0211e8dd7e/t/5c115e8b0ebbe830845cf398/1544642187247/KushnerGreenblattFeinbergShouldLeadCubaCertifiedClaimsNegotiationsForTrumpAdministration.pdf>. Accessed May 29, 2020.
 141. U.S.-Cuba Trade and Economic Council Inc. Trump Administration Inching Nearer To Returning Cuba To Terrorism List; Adding Venezuela, available on: <https://www.cubatrade.org/blog/2020/5/13/trump-administration-inching-nearer-to-returning-cuba-to-terrorism-list-adding-venezuela>. Last modified May 13, 2020. Accessed May 29, 2020.
 142. U.S.-Cuba Trade and Economic Council, Inc. The Trump Administration on 2 May 2019 made operational Title III of the Cuban Liberty and Democratic Solidarity Act of 1996 (known as “Libertad Act”), available on: <https://static1.squarespace.com/static/563a4585e4b00d0211e8dd7e/t/5ea9b8923361221b3862ef91/1588181139307/Libertad+Act+Filing+Statistics.pdf>. Accessed May 29, 2020.
 143. U.S.-Cuba Trade and Economic Council, Inc. *Title III - lawsuits may be filed*. Available on: <https://static1.squarespace.com/static/563a4585e4b00d0211e8dd7e/t/5ccae50eeef1a1c18fe7b14d/1556800782374/TitleIIIOfLibertadActPotentialImpactByTrumpAdministrationInMarch2019.pdf>. Accessed May 29, 2020.
 144. Vozpopuli. *Golpe a Meliá: la justicia Española reactiva el pleito por sus hotels en Cuba en plena crisis* [Blow to Meliá: Spanish Justice reactivates the lawsuit for its hotels in Cuba in the midst of crisis], available on: [54](https://www.vozpopuli.com/economia-y-

</div>
<div data-bbox=)

finanzas/Meliá-pleito-justicia-helms-burton-cuba_0_1349866226.html. Accessed May 29, 2020.

145. Xinhua. *Feature*: Cuba seeks to increase quality of its tourism industry by holding in'1 fair, available on: http://www.xinhuanet.com/english/2019-05/31/c_138106208.htm. Last modified May 31, 2019. Accessed May 29, 2020.