The long tentacles of the Helms-Burton Act in Europe

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On 2 September, the First Instance Court number 24 of Palma de Mallorca (Spain) issued an *auto* (interlocutory decision) staying proceedings commenced against Meliá Hotels International S.A., one of the biggest Spanish hotel chains, on grounds of immunity from jurisdiction, act of state doctrine and lack of international jurisdiction.

The claimant was Central Santa Lucía L.C., a US company which considers itself the successor of two Cuban corporations: Santa Lucía Company S.A. and Sánchez Hermanos. These two legal entities owned a sugar plantation and other pieces of land in Cuba. Following the revolution of 1959 in this country, those properties were expropriated by Law 890 of 1960. The expropriated land under discussion – known as *Playa Esmeralda* – is now owned by Gaviota S.A. a corporation of the Cuban State. The Cuban Government authorized Meliá to manage and exploit the land for touristic purposes and Meliá now owns two hotels on that landplot. The claimants contended that Meliá was conscious of the illegitimacy of the expropriation but had nevertheless sought to profit from it. This is apparently the first such claim in Europe and the decision staying the proceedings can still be appealed.

The claim was based on the argument that, since what the claimant describes as "confiscation" had been contrary to international law, it was null and void and the US company – as successor of the original Cuban proprietors – should still be considered the rightful owner of the land. Meliá was now in possession of the land and was profiting from it in bad faith, conscious of the illegitimacy of the property title of the Cuban state. The claimant contended that under article 455 of the Spanish Civil Code, possessors in bad faith must hand over not only the profits of their illegitimate exploitation but any other fruits that the legitimate possessor could have obtained.

This claim filed by the US company was against a legal entity domiciled in Spain.

Therefore and under normal circumstances, the Spanish court would have had jurisdiction. However, the Spanish court understood that it did not. First of all, article 21 of the Spanish Judiciary Law (*Ley Orgánica del Poder Judicial*) and article 4 of Organic Law 16/2015 on immunities of foreign states establish that Spanish courts shall not have jurisdiction against individuals, entities and assets which enjoy immunity from jurisdiction, as provided by Spanish law and Public International Law. The Cuban State and the property owned by its company – Gaviota – were therefore and in principle protected by the rules on immunity but the Cuban State had actually not been named as a respondent in the claim and its object was not the expropriated property itself but the profits from its exploitation. The decision does not explain why the property of a commercial corporation owned by the Cuban State – as opposed to the State itself – also enjoys immunity.

The decision goes on to say that Spain subscribes to a limited understanding of immunity from jurisdiction (articles 9 to 16 of Organic Law 16/2015), so that claims arising from the commercial relations between Gaviota and Meliá for the touristic development of the land – *acta iure gestionis* – might not be covered by immunity. Nevertheless, the Spanish court understood that the true basis for the claim were not the relations between Gaviota and Meliá – commercial or otherwise – but the alleged illegitimacy of the expropriation – *acta iure imperii* –, the property title that Cuba now has over the land and any responsibility incurred by Meliá for illegitimately profiting from the situation. Santa Lucía could only have a right to the illegitimate profits if it was considered the rightful owner and this entailed a discussion about a truly sovereign act: the expropriation.

Therefore, it can be said that the court's rationale is actually more akin to the act of state doctrine of English and US law, whereby courts should refuse to hear cases where they are called to question the conduct of foreign governments or acts of any sovereign entity within their own territory. For a finding that Meliá had illegitimately profited from Santa Lucía's disgrace, not only the knowledge of the expropriation by the Spanish company but the illegality of the expropriation itself would have had to be discussed before the Mallorca court.

Additionally, the court explains that Spanish courts do not have jurisdiction to hear claims concerning property rights – ownership or possession, in this case – over immovable assets located outside Spain. The court wrongly considers that EU Regulation 1215/2012 is applicable to this case. However, the immovable

property under discussion is located outside the EU, so the Regulation actually does not apply. Similarly and as indicated above, the court considers that article 455 of the Spanish Civil Code is applicable, notwithstanding the fact that article 10.1 of the same norm establishes that the law applicable to property rights will be the law of the place where they are located.

This decision and this claim by Cubans "exiled" in the US arrives after the US announced the end of the suspension of Title III of the 1996 Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996 (aka Helms–Burton Act), which effectively opens the door to lawsuits in the US by providing a right of action for all US nationals (i.e. including naturalized Cubans and their descendants) whose property was taken by the Cuban Government after the revolution. Such claims can be directed against anybody – regardless of nationality – who "profits" from, "traffics" with or otherwise has an "interest" in such property.

European Union officials have recently voiced their concern for these potential lawsuits against European investors in Cuba and have reminded that some countermeasures were already foreseen when the law was passed in 1996. Several members of the European Commission have also warned the US Government that the EU may launch a case before the WTO and that it already has in place a "blocking statute" which bans the recognition and enforcement of any of the resulting US judgements against European companies and that also allows them to recover in EU courts any losses caused by claims under Title III, against assets that US claimants may have in the EU. The Spanish Government has also set up a special committee to study these risks, given the important commercial interests of Spanish companies in the Caribbean island. In this regard, Miami lawyers confirm that many families of Cuban origin are now requesting legal advice. The swift way in which the Spanish case here discussed has been decided may be an incentive for those families to claim in the US – and not in Europe – under the newly activated Helms-Burton act.