

The long tentacles of the Helms-Burton Act in Europe (III)

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There has recently been a new and disappointing development in the saga of the Sánchez-Hill, a Spanish-Cuban-US family who filed a lawsuit before Spanish courts against a Spanish Hotel company (Meliá Hotels) for unjust enrichment. Meliá is exploiting several hotels located on land owned by Gaviota S.A., a Cuban company owned by the Republic of Cuba. That land was expropriated by Cuba without compensation, following the revolution of 1959.

In 2019, the First Instance Court of Mallorca (Spain) held that the lawsuit was a means to circumvent the sovereign immunity of Cuba, given the fact that, in order to decide on the right to compensation of the claimants for the unjust enrichment of the defendant, the court would allegedly have to decide on the lawfulness of a sovereign act - i.e. expropriation -, because only if the expropriation had been unlawful could the defendant be exploiting land which did not belong to Gaviota but to the claimants. The court held that the claimants were also arguing that they had a right *in rem* - such as property or possession - over assets of a sovereign state and that such assets were also protected by the rules of sovereign immunity. This alone would have been enough to dismiss the lawsuit but, unnecessarily, the court added that it did not have jurisdiction to decide about property rights concerning real estate assets located outside Spain.

The Court of Appeal of Mallorca disagreed with the lower court. It held that sovereign immunity was not an issue because Cuba had not been named a defendant in the claim. Besides, Spanish courts had jurisdiction because Spain was the place of the domicile of the defendant and the claim was one of unjust enrichment - i.e. a claim in tort -, not one whose subject matter was the existence or scope of a right *in rem* over a real estate asset. In brief, the claimants were not asking Cuba to give back their land and were not asking monetary compensation neither from Cuba nor from Gaviota.

Meliá then filed a motion arguing that the claim was an attempt to eschew the EU

Blocking Statute meant to prevent the effectiveness of US court rulings against EU companies, under the Helms-Burton Act of 1996. The defendants further requested that the matter be taken to the European Court of Justice for a preliminary ruling on the scope and correct interpretation of the Blocking Statute. The CJEU may have taken years to issue such a ruling but the Spanish First Instance Court denied the motion.

Later on, Meliá filed another motion requesting that Gaviota and the Republic of Cuba be joined to the lawsuit (*exceptio plurium litisconsortium*) and the First Instance Court granted the motion on the basis, once again, that any ruling on unjust enrichment would previously and necessarily require a decision about the property rights of Gaviota and Cuba, which should therefore be heard in the Spanish proceedings. Probably making a very serious strategic mistake, the claimants did not appeal this decision of the First Instance Court and agreed to join Gaviota and Cuba to their claim with the result that, last January 2023, the First Instance Court once again dismissed the lawsuit on grounds of sovereign immunity, given the fact that, now, a sovereign entity is in fact a defendant in the proceedings.

In the meantime, the Cuban Government had been correctly notified and had claimed that it enjoyed sovereign immunity before foreign courts. Beyond that, Cuba never made an appearance in the proceedings but Gaviota did, requesting that the proceedings be stayed on the basis that it also enjoyed sovereign immunity. Besides, the Spanish Government had also issued a report requested by Spanish law, indicating that the Cuban acts of expropriation must indeed be considered acts *iure imperii*.

The potential implications of a claimants' improbable victory for the Spanish tourism industry in Cuba are worrisome but, above all, this muddled and already long-lasting lawsuit has given rise to much interest among Spanish scholars, especially conflict of laws specialists. The 2019 decision of the First Instance Court was criticised for applying the doctrine of sovereign immunity in the absence of a sovereign defendant - e.g. something much more similar to the Act of State doctrine, which has no place in Spanish law - and for confusing an action in rem with an action *in personam*. That initial ruling of the First Instance Court may have also inappropriately mentioned and relied on immunity from execution against property of a sovereign state, which is mostly relevant in enforcement proceedings.

Now, however, the Spanish First Instance Court apparently feels vindicated because its recent and relatively short ruling reiterates verbatim practically everything it said in its 2019 decision. The judge also warns the claimants that they had the chance to appeal the ruling granting the motion to join Gaviota and Cuba but did not do so, which means that such decision is now *res judicata*. The logic of the argument is somewhat baffling. The judge initially dismissed the claim on grounds of sovereign immunity, despite the fact that no sovereign was a party. Then, the judge requested that the sovereign be joined as a party and, when the claimant yielded and did so, the judge once again dismissed the claim on grounds of sovereign immunity.

The key to this stage of the proceedings may have been the joinder of Gaviota and Cuba to the claim. Arguably, it was not necessary to do so. In Spanish law, the *exceptio plurium litisconsortium* can be raised in certain cases provided by statute as well as in certain cases provided by case law. Whenever there is a plurality of parties to the same legal relationship, which is the subject-matter of the proceedings, a joinder is obligatory as a condition for a decision on the merits, based on the inseparable nature of that legal relationship. Its justification lies in the right to be heard of all those who might be affected by the ruling on the merits. A joinder is not necessary when the ruling only affects certain individuals or entities in an indirect manner. In the case at hand, the parties to the unjust enrichment are Meliá, i.e. the party who has allegedly enriched itself at the expense of the other party, i.e. the claimants. Cuba is therefore not a party to the alleged unjust enrichment. Moreover, any findings of Spanish courts concerning the unlawfulness of the expropriation would have no bearing on the property rights of Cuba over that land.

In fact, Spanish courts are no strangers to litigation related to the Cuban nationalisation program and, on several occasions, the Supreme Court has taken into consideration the unlawfulness of that nationalisation process with respect to, for instance, ownership rights over trademarks registered in Spain, emphasising that it is not for Spanish courts to decide on such lawfulness but that they can accept or reject some of the extraterritorial effects of the sovereign acts of the foreign state in the territory of the forum. In those cases, the Supreme Court said that the Cuban nationalization was against the public policy of Spain because of the absence of due process and compensation. However, the Supreme Court added that the applicable law to property rights over trademarks registered

in Spain was Spanish law, not Cuban law.

The Sánchez-Hill family has just a few more days left to appeal this new decision of the First Instance Court, in proceedings which may potentially have opened a new venue for victims of the Cuban revolution, given the EU Blocking Statute and given the fact that, since the end of the suspension of Title III of the Helms-Burton Act, claims before US Federal Courts based on that piece of legislation have not been very being successful.