

POLITICS IN THE COURTROOM: AN EXAMINATION OF ASPECTS OF THE HELMS-BURTON ACT IN U.S. COURTS AND THE EUROPEAN LEGISLATIVE REACTION.

Foundational Public Policy for the Act

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Right wing political elements in the United States led by late Senator Jesse Helms of North Carolina, a stalwart of the conservative political movement, and a highly partisan politician who opposed civil rights legislations, led the fight to create the Helms-Burton Act (named after him). Helms, along with others, championed the legislation, now known as Helms-Burton Act, in the belief that they can extend their anti-communist stand by this extra-territorial legislation, designed to extend their conservative campaigns, and shame the progressive elements in American politics.

Congress enacted the Helms-Burton Act, 22 U.S.C. §§ 6021 *et seq.*, in 1996. The goal was to deter trafficking of confiscated properties by providing "United States nationals who were the victims of th[o]se confiscations . . . with judicial remedy in the courts of the United States." § 6081(11). Valle v. Trivago GmbH. Title III of the Helms-Burton Act establishes a private right of action for "any United States national who owns the claim to [confiscated property]" against "any person that . . . traffics in [such] property." § 6082(a)(1)(A). Until 2019, Title III was suspended by successive Presidential decrees. *See* § 6085 (allowing the President to suspend the effective date of Title III if suspension is "necessary to the national interests of the United States").

Under Title III, a person "traffics" in confiscated property if that person 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 (ii)) through another person,

without the authorization of any United States national who holds a claim to the property. § 6023(13).

In *Valle* the trial court dismissed the plaintiffs' Title III claims without leave to amend, ruling that it lacked personal jurisdiction over the defendants under the relevant provisions of Florida's long-arm statute. *See Fla. Stat. 48.193(1)(a)(1), 48.193(1)(a)(2), 48.193(2).*

The case involved websites of the Booking Entities and Expedia Entities that "are fully interactive websites that have robust internet e-business capabilities. They have worldwide reach and are fully accessible in Florida."

The Booking Entities and Expedia Entities promote their websites and the ability to book lodgings at the Resorts on their websites through banner ads directed at Florida residents, follow-up emails sent to Florida residents who have searched for the Resorts or other geographically proximate hotels, and search engine optimization. The appeals court ruled that jurisdiction was established and sent the case back to the trial court.

Calculating alleged damages

In *Havana Docks Corp v. Carnival Corp.*, the court noted as follows about the Act "In pertinent part, it provides that Plaintiff may recover "money damages in an amount equal to the sum of (i) the amount which is the greater of- (I) the amount, if any, certified to the claimant by the Foreign Claims Settlement Commission under the International Claims Settlement Act of 1949 [22 U.S.C. 1621 et seq.], plus interest; ...; or (III) the fair market value of that property, calculated as being either the current value of the property, or the value of the property when confiscated plus interest, whichever is greater 22 U.S.C § 6082(a)(1)(A)(i) (emphasis added). *Havana Docks Corp. v. Carnival Corp.*, 19-cv-21724, (S.D. Fla. Jun. 22, 2022) Interestingly, the court did not specify how the evaluations of the properties were to be done, and whose value, Cuban or American, would be used for the calculation and the factors to determine value of property in Cuba. From all indications the Act is simply establishing a springboard for a conservative political approach to policy interpretation by the courts.

The politics in the legislation is not without limit. The court in *Gonzalez v. Amazon.com, Inc.*, No. 20-12113 (11th Cir. Feb. 11, 2021) held that a Plaintiff cannot recover under the Helms-Burton Act if he failed to allege that he acquired ownership of a claim to confiscated property by March 12, 1996.

In *Fernandez v. Trafigura Trading, LLC*, Civil Action 21-1606-GBW (D. Del. Nov. 14, 2022) the Court held that the claims brought under the Helms-Burton Act are not extinguished upon the

death of a party' because the Act is remedial in nature. The Helms-Burton Act, itself, is silent regarding whether a claim is extinguished after the death of a party'."

In *Glen v. Club Méditerranée S.A.*, 365 F. Supp. 2d 1263 (S.D. Fla. 2005) , the court held that Plaintiffs' contention that "Congress has been explicit that Americans' rights in their Cuban property survived expropriation," grossly overstates the position of the United States. Plaintiffs erroneously suggest that U.S. law considers the Cuban expropriation decree somehow to be ineffective and leaves ownership interest in Plaintiffs' hands. There is no case law to support such an inference. To the contrary, the Supreme Court in *Sabbatino* recognized the power of the Cuban government to expropriate property within its borders and to vest the property right in Cuba. See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 414-415 (1964) (Cuba's confiscation vested in Cuba the "property right in" and "dominion over" sugar expropriated by Cuba, even though Cuba failed to compensate the former owners).

The court noted that to rule otherwise "would . . . render uncertain titles in foreign commerce, with the possible consequence of altering the flow of international trade." *Id.* at 433; see also *Ricaud v. Am. Metal Co.*, 246 U.S. 304, 309-10 (1918) (seizure of bullion by Mexican government divested titled and ownership of the bullion by a U.S. citizen). The Helms-Burton Plaintiffs can only make claims against those trafficking in the alleged properties and that status does not and cannot graduate into ownership status because only the government of Cuba can write legislation on property ownership in Cuba and not the United States Congress.

The European Union Approach to Helms-Burton Act:

The European Union was opposed to the Act from its inception and described it as an extra-territorial legislation that attempted to legislate matters within Cuban sovereignty. The EU also took the position that the Helms-Burton Act was against the letters and spirit of International Law.

In response to the Helms Burton Act, the EU adopted Regulation 2271/96. For the purpose of combating or at least limiting the effects of the Helm-Burton Act, the Union adopted a range of rules to ward off the effects of the Act ("antidotal rules"), which constitute the so-called "Community blocking statute". The essential tool of this legislation is Council Regulation (EC) No 2271/96 of November 22, 1996, protecting against the effects of the extra-territorial application of legislation adopted by a third country, (in this case, the United States) and actions based thereon or resulting therefrom. Regulation 2271/96 is also supplemented by provisions of the member states, focused, in particular, on specifying the system of sanctions established by the Regulation itself. In the case of Spain, those provisions are provided in Law 2 7/1998, of July 13, on sanctions applicable to infringements of the rules established in Council Regulation (EC) No 2271/96 of November 22, 1996, protecting against the effects of the extra-territorial application of legislation adopted by a third country.

The centerpiece of Regulation 2271/96 are as follows:

Prohibition of compliance by EU private individuals and companies with the requirements or prohibitions, including requests of foreign courts, based on:

Legislative instruments of third countries listed in its Annex unless the European Commission authorizes compliance.

Obligation to notify the Commission when any of the above-mentioned persons are directly or indirectly affected by the application of the U.S. legislation.

Recognition of a right to compensation for the damage suffered as a consequence of the application of the U.S. legislation.

The possibility of suing in the courts of member states to exercise the above-mentioned right. Refusal to recognize judgments issued by foreign courts that apply the U.S. legislation.

Article 2 of Regulation 2271/96 obliges the persons listed in Article 11 to notify to the Commission if their economic or financial interests are directly or indirectly affected as a consequence of the Helms-Burton Act or by the possible actions which are based on it. The notification must be made within a period of 30 days from the date the person becomes aware of such circumstance. If the interests of corporations are affected, this obligation will be imposed on the directors, executives, and other people with management responsibility.

The Commission and, in the case of Spain, the Secretariat of State for Trade (Article 2.2 Law 27/1998) may require the person affected to provide all information which he considers relevant within a period of 30 days from the date of the request. The information may be supplied, either directly to the European Commission, or in the case of Spain, through the Secretariat of State for Trade (Article 2.3 of Law 27/1998). If one chooses to supply the information directly to the Commission, the latter must immediately inform the competent authorities of the member state in which the person that has supplied the information resides or has been incorporated.

In the event of a breach of the obligations or prohibitions imposed by the Regulation, the latter provides for the imposition of sanctions, although it leaves it in the hands of each member state to specify them.

As regards Spain, the system of sanctions is governed in Law 27/1998.

The sanctions provided in Law 27 /1998 (Article 5) are ranked as: minor, serious, or very serious. The amount of the sanction must be determined in view of the extent of the economic or financial interests affected and ranges from €1,502.53 to €60,101.21. However, the amount may be greater if the economic or financial interests affected exceed

€6,010,121.04. In these cases, the serious infringement may be penalized by a greater fine, in proportion to the economic or financial interests involved, up to a maximum of €601,012.10.

The impact and issues of the EU legislation came up in a Florida case in 2020. Plaintiff, Maria Dolores Canto Marti, filed suit against *Iberostar Hoteles Y Apartamentos SL*, a Spanish company, raising claims under Title III of the Helms-Burton Act, 22 U.S.C. § 6082. Iberostar filed a motion to stay on the grounds that European Commission Regulation 2271/96 prohibits Iberostar from responding to the complaint without express authorization from the Commission. (ECF No. 16, at 1-2.) Failure to comply with Regulation 2271/96 exposes Iberostar to substantial fines up to EUR 600,000, imposed by the Spanish government pursuant to Spanish Law 27/1998, for each violation. (ECF No. 16, at 2-3.) "In the interim, the Court directed Iberostar to submit a status report every 30 days updating the Court on its request to the European Commission. *Marti v. Iberostar Hoteles y Apartamentos S.L.*, C(S.D. Fla. Sep. 16, 2020)

The Marti court, citing another Florida case, noted that : "The European Union Blocking Statute: The international community did not react positively to the United States' passage of the Helms-Burton Act, and, in November 1996, the European Union enacted a Blocking Statute to counteract its extraterritorial effects. Council Regulation (EC) No 2271/96 of 22 November 1996 ("protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom") (the "EU Blocking Statute")." *De Fernandez v. CMA CGM S.A.*, 21-CV-22778, (S.D. Fla. Jul. 12, 2022).

It is clear from the legislation coming from the EU that Helms-Burton Act is considered an aggressive grab of extra-territorial legislative powers by the United States Congress. The Plaintiffs in the United States have not had much success. Attempting to legislate the attainment of right-wing political ideology and the concomitant vehicles for attaining it into a scheme of legal rules for the courts to interpret is an unworkable formula. Federal courts in the United States have carefully navigated the corridors of the legislation and it has been challenging giving a legal interpretation to a political scheme written into legislative code. And this explains why the law has not been able to produce the anticipated benefits worldwide the framers of the Act counted upon.

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