THE HELMS-BURTON ACT AND ITS IMPACT ON THE EU

La Ley Helms-Burton y su impacto en la UE

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Abstract

The Helms-Burton Act, officially known as the Cuban Liberty and Democratic Solidarity Act (LIBERTAD), allows the USA to prosecute foreign companies that do business with Cuba. Thus, the national law, i.e. a law that should apply within the specific territory of the legislator who issued it, extra territorialized. On its base, the US actually imposes sanctions even on third parties that have nothing to do with US conflict with Cuba. This article briefly analyses and evaluates this law in the context of the European Union (EU) response on it. It describes and analysis the mechanism of so-called blocking statue, which is intended to prevent EU companies from being harmed by this law, giving specific examples of its use. It comes to the conclusion that the EU de facto agrees on and accepts violations of international legal practice and tried just protect itself and its trade policy. Based on the premise that if we want to build a free world based on free will, peace and tolerance, where the highest value is freedom and everyone in this world system has the right to freely choose which direction to go, then any foreign interference in the internal development of society is immoral and unacceptable. The Helms-Burton Act is not an exception, being an immoral act that has no place in modern international relations and international law.

Keywords: Helms-Burton Act; United States of America; European Union; common trade policy; blocking statute.

Resumen

La Ley Helms-Burton, oficialmente conocida como Ley de Libertad y Solidaridad Democrática de Cuba (LIBERTAD), permite a Estados Unidos procesar a empresas

extranjeras que hagan negocios con Cuba. Así, la ley nacional, es decir, una ley que debe aplicarse dentro del territorio específico del legislador que la dictó, extraterritorializada. Sobre su base, Estados Unidos impone sanciones incluso a terceros que no tienen nada que ver con el conflicto de Estados Unidos con Cuba. Este artículo analiza y evalúa brevemente esta ley en el contexto de la respuesta de la UE. Describe y analiza el mecanismo del llamado estatuto de bloqueo, cuyo objetivo es evitar que las empresas de la UE se vean perjudicadas por esta ley, dando ejemplos específicos de su uso. Se llega a la conclusión de que la UE, *de facto* está de acuerdo y acepta violaciones de la práctica jurídica internacional y sólo intentó protegerse a sí misma y a su política comercial. Partiendo de la premisa de que si queremos construir un mundo libre basado en el libre albedrío, la paz y la tolerancia, donde el valor más elevado sea la libertad y donde todos en este sistema mundial tengan derecho a elegir libremente qué dirección tomar, entonces cualquier interferencia extranjera en el desarrollo interno de la sociedad es inmoral e inaceptable. La Ley Helms-Burton no es una excepción, ya que es un acto inmoral que no tiene cabida en las relaciones internacionales y el derecho internacional modernos.

Palabras clave: Ley Helms-Burton; Estados Unidos de América; Unión Europea; Política comercial común; estatuto de bloqueo.

Summary

1. HELMS-BURTON ACT AND ITS IMPACT

In the international system, there are states with varying degrees of power and resources. For the good and fair development of society, every state needs a peaceful, secure, friendly environment and neighborhood. But international relations do not create a friendly space; they are rather a sphere of anarchy, injustice and power politics, where the stronger tries to control the weaker and where international law is only a weak instrument of justice. Thus even a national law can become international in such circumstances, especially if such a law is issued by a hegemon whose aim is to subjugate a rebel in its vicinity, in its sphere of influence. Cuba is in such a position. Cuba has a hegemon as a neighbor, who, from the position of his power and sense of exceptionalism, imposes its will and way of life even where there is no interest in it. Cuban-American relations are complicated long time now, just to mention Platt's law

valid up to 1934, which gave the United States the right to control the island's internal affairs.[1] In 50´s, the USA announced official end of support for the Batista regime,[2] Batista was subsequently overthrown by the Cuban revolution and power was passed into the hands of Fidel Castro.[3] Since then, relations between Cuba and the USA only began to deteriorate. The USA began a more aggressive policy in the form of supplying the Cuban opposition with weapons through the CIA, training a paramilitary unit outside of Cuba and planning a secret intervention against the island. The US Congress allowed the president to suspend American economic aid and also adjust sugar quotas. This initiative became a harbinger of the introduction of economic sanctions. In October 1960, US president Eisenhower banned American refineries in Cuba from processing oil imported from the Soviet Union, significantly reduced sugar quotas, and imposed an economic embargo on all trade except food and medicine. Cuba responded by confiscating U.S. oil refineries, nationalizing U.S. and other foreign-owned assets, ordering the reduction of U.S. embassy personnel, and seeking new markets to avoid economic disaster. So it turned to the USSR and Khrushchev agreed to temporarily buy Cuban sugar in exchange for Cuba buying Soviet oil.[4] In 1961 the USA unilaterally severed diplomatic relations with Cuba and planned invasion took place in the Bay of Pigs on April 17, 1961, which failed.[5] After this fiasco, the US had to reform its policy towards Cuba, but the goal, to overthrow the Castro regime, remained unchanged.[6] In 1962, Proclamation No. 3447 was issued, which extended the sanctions to the importation of all goods of Cuban origin, as well as goods imported into the US from or through the territory of Cuba. Furthermore, the proclamation prohibited all export of goods from the USA to the island.[7] In the same year, there was a further aggravation of mutual relations due to the Cuban Missile Crisis, and a year later US President Kennedy imposed sanctions in

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1 After its expiration, mainly trade relations were established in which the Cuban sugar played the main role. Due to Cuba's dependence on sugar exports to the US and the control of most of the Cuban sugar industry by US corporations, the US has gained considerable influence over the island.

2 Haney, P. J.; V. Vanderbush, *The Cuban embargo: the domestic politics of an American foreign policy*, pp. 11 y 12.

3 Hufbauer, G. C.; B. Kotschwar, *Economic normalization with Cuba: a roadmap for US policymakers,* p. 42.

4 Haney, P. J.; V. Vanderbush, *The Cuban embargo…, cit.,* pp. 12-18.

5 American-trained exile troops encountered the Cuban army and were defeated.

6 Haney, P. J.; V. Vanderbush, *The Cuban embargo…, cit.,* pp. 12-18.

7 Hufbauer, G. C.; B. Kotschwar, *Economic normalization..., cit.,* p. 44.

the form of a ban on travel, financial transactions and the freezing of all Cuban assets in the territory of the United States.[8] Thus, the issuance of Proclamation number 3447 in 1962 can be considered the official beginning of US sanctions against Cuba.

The next step in strengthening the US sanctions mechanism against Cuba is the so called "Cuban Democracy Act of 1992" which states that *"Fidel Castro's government has demonstrated a persistent disregard for internationally accepted standards of human rights and democratic values",* while *"there is no indication that the Castro regime would be prepared to make some significant concession to democracy"*[9] and that is why this Act´s aim is to promote a "peaceful" transition from Castro regime to democracy by imposing sanctions on the Cuban government and supporting the Cuban people through the import of medicine and food supplies to non-governmental organizations, the authorization of telecomunication services between states and direct mail service. This law includes also a ban on trade with Cuba for branches of US companies based abroad and a ban on travel and sending remittance to the Cuba for US citizens. It states that sanctions will remain in place until the Island is "democratized" and human rights are respected[10] and, in addition, it gives the US president the authority to stop US aid to countries that provide any assistence to the Cuban regime.[11]

For now, the Helms-Burton Act from 1996 represents the last attempt to subjugate the Cuban regime and make life difficult, especially for third parties.[12]

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8 Haney, P. J.; V. Vanderbush, *The Cuban embargo…, cit.,* p. 18.

9 Cuban Democracy Act, In 22 U.S.C §§6001-6010, 1992, disponible en https://web.archive.org/web/20041108140907/http://www.treasury.gov/offices/enforcement/ofac/legal/statutes/cda.pdf

10 *Ibidem*.

11 Hufbauer, G. C.; B. Kotschwar, *Economic normalization..., cit.,* p. 46.

12 This Act is a so called private bill of senators Jesse Helms of North Carolina and Dan Burton of Indiana. It is often said that the passage of this Act was a response to the shooting down of two American private Cessna "Brothers to the Rescue" planes with four exiled Cubans on board, which repeatedly violated Cuban airspace and dropped anti-Castro leaflets, near the shores of Cuba on February 24, 1996. But the fact is that tightening of sanctions against Cuba began to be pushed by both senators in February 1995. The House of Representatives passed this Act on the 21st of September, 1995. It was approved by the Senate on March 5, 1996, and signed into law by President Bill Clinton on March 12, 1996. It follows that the downing of the planes was only used as a pretext to justify the introduction of a total embargo against Cuba and to deter and intimidate third countries from doing business with Cuba.

This Act strengthens the embargo against Cuba and its aim is to promote "a peaceful transition to representative democracy and market economy". Its main provisions can by sumarized in five points:

1. the prohibition of US citizens to provide loans, credits and other financial means for transactions involving confiscated US property. Confiscation of property by the Cuban government (or better yet, nationalization of property) is considered theft by the USA under this Act;

2. the ordering the US to veto Cuba´s entry into international organizations such as the World Trade Organizatoin and the World Bank;

3. the US citizens have the power to sue anyone involved in dealing in nationalized US property;

4. the prohibition of entry into the USA for anyone involved in nationalized US property in Cuba;[13]

5. the putting control over embargo lifting into the hands of Congress. That means that US president does not have the power to lift sanctions against Cuba without the approval of US Congress.[14]

The most controversial provisions are contained in Title III. In this Title, there are precisely the measures which concerns the right to sue third parties, foreign persones and entities involved in trading with nationalized property. These persons and entities may also be denied entry to the US market. Its aim is to scare investor away from Cuba by alloving US nationals to sue any person or entities who *"traffic"* in property confiscated by Cuba government.[15] *"Traffics"* is defined here expansively, to include not only engaging *"in a commercial activity using or otherwise benefiting from confiscated property"* but also profiting from or even benefiting from any trafficking done by anyone else.[16] These provisions made from this national law an act with extrateritorial dimension

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[13] Cuban Liberty and Democratic Solidarity (Libertad) Act, In 22 U.S.C. §§ 6021-6091, 1996, disponible en https://www.treasury.gov/resource-center/sanctions/Documents/libertad.pdf; Joaquain, R., "Cuba, the United States, and the Helms-Burton Doctrine: International Reactions", pp. 34 y 35.

[14] *Ibidem*.

[15] Cuban Liberty and Democratic Solidarity (Libertad), *cit*., § 6082(a)(1)(A).

[16] Cuban Liberty and Democratic Solidarity (Libertad) Act, *cit*., § 6023(11).

and provoked a response in the international community, mainly the EU, which led to the introducion of the right of the US president to suspend the provision for 6 months. And US president used this authority regularly[17] until Donald Trump took the Office.[18]

However, Titles I and II do not lag behind Title III in terms of controversy. They defines the conditons, the fulfilment of which should lead to the removal of the embargo. These conditions can be considered as aims to be achieved through the sanctions. First of all, the Act requires the establishment of a transitional government that must meet the following conditions:

1. to legalize of all political activities;

2. to release of all political prisoners and to allow international human rights organizations to inspect Cuban prisons;

3. to abolish current Department of State security falling under the Ministry of Interior;

4. to expressi of public commintment to organize free elections with participation of several political parties and under the supervision of an internationally recognized organization;

5. to terminate of interference with Marti radio and television broadcasting+

6. Raúl Castro and Fidel Castro can´t be members of the government;

7. to consent to the distribution of an aid to the Cuban population;

8. the transition from communist dictatorship to representative democracy;

9. the guarantee of freedom of the expresion and freedom of the media;

10. the guarantee of the right to private property

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[17] Cuban Liberty and Democratic Solidarity (Libertad) Act, §§ 6021-6091, *cit*.; Joaquain, R., "Cuba, the United States…", *cit*., pp. 34 y 35.

[18] Between 1996 and 2017, Presidents Clinton, Bush, and Obama suspended Title III operation because of assumption that it would cause friction with allies and have potentionally unintended consequences. However, the Trump administration fully activated Title III on May 2, 2019.

11. to grant citizenship to persons born in Cuba who have returned to the Cuba;

12. to extradite of persons criminally prosecuted in the USA;

13. to return or provide compensation for confiscated US property from 1959;

14. to consent to monitoring of human rights.[19]

To sum up, the Helms-Burton Act in fact extends sanctions to all non-US companies that do any business with Cuba by giving US citizens and companies, whose properties had been confiscated after the Revolution, the right to file a claim against third country companies, who benefits from the use of this property. Simply, it allows US citizens to sue foreign companies for dealing in confiscated US property in Cuba. So its main goal is to discourage US and foreign business partners and investors from doing business with Cuba, thereby isolating the Cuban economy. In addition, it also affects persons who do not have a business relationship with Cuba, as it calls for the denial of entry visas to the US not only to managers, owners or majority shareholders, but also to family members of foreign companies that are the subject of claims under Title III. These measures and sanctions gained the status of law and only US Congress can lift these sanctions what leads to a reduction of possibility for any US president to change the US policy towards Cuba. In fact, this Act strips US president of decisions concerning embargo on Cuba and pass it to the US Congress.

This Act lists also a long catalogue of US sanctions and threats against Cuba. As such it freezes and immunizes embargo policy against Cuba against any change. It defines only possible way of change for Cuban political system out of will of Cuban people. It expects complete change of power in Cuba orchestraded by the USA but such change does not mean the end to the embargo but only gradual lifting of it. In fact, it dictates the cornerstones of Cuban politics. For any new political order in Cuba, this Act represents an inborn error – congenital defect, as it does not allow for a reform and transformation process in dignity and reconciliation. Such political tutelage can be considered and certainly is anti-democratic and unacceptable to the international community.

Concerning the international law, this Act is in open contradicition with its basic principles because it introduces retroactivity by extending the jurisdiction of

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[19] Cuban Liberty and Democratic Solidarity (Libertad) Act, §§ 6021-6091, *cit*.

US courts to the claims of persons who were expropriated in Cuba as Cuban citizens by a Cuban government and in accordance with Cuban laws; and introduces extraterritoriallity what is simply unlawful under international law. This Act simply applies national law on international relations because it threatens and deters firms or individuals located in other countries that trade with Cuba. It is also immoral because it imposes so called secondary sanctions or secondary boycotts and infringing on the sovereignty of third countries.

And on a side note, if we should talk about the concept of nationalization or estatization, by the definition it means a transfer of a private ownership of a company, means of production or other economically important parts of private ownership (or ownership of lower levels of public administration to state or joint ownership. It can be expropriation (for compensation) or confiscation (without compensation). Nationalization si a legitimate tool of the state used to redistribute wealth in the state. Confiscation of private property and nationalization as a legal act after the Second World War in 1945 took place in many European countries, wherever the country was occupied by the Third Reich and after liberation it was necessary to dispose of property after forced German administration and collaborators. Nationalization was a standard policy and legitimate tool in legal systems not only in socialist countries, but also in the United Kingdom after 1945, but also during the Labor government in the 1960s, or in France. Today, it is widely applied to the property of wealthy Russians throughout the euroatlantic world, and none of the Western democracies and politicians shout that this is a violation of the sacred right to property.

2. POSITION OF THE EU AND BLOCKING STATUTE

Today, the EU in its official documents[20] claims that the Union is Cuba´s 1st trade partner for both - imports and exports as well as Cuba´s 1st foreign investor mainly in sectors of tourism, construction, light- and agro-industries. Since 2008, the EU has commited over 200 million euros to support the development of the country in these three priority sectors. EU also states that tourists from the EU member states make up ¼ of all tourists that visited Cuba in the first half of 2019 and that EU and Cuba shere a political commitment to the 2030

[20] See f.e.: Common position on Cuba, 1996 EU-Cuba Political Dialogue and Cooperation Agreement (PDCA) implemented since 1st November 2017 or Multiannual Indicative Programme 2021-2027 for Cuba, disponible en https://ec.europa.eu/international-partnerships/where-we-work/cuba_en; and https://international-partnerships.ec.europa.eu/countries/cuba_en

Sustainable Development Goals and work hand in hand on achieving many of them. Cuba's main export goods are agricultural products, beverages, tobacco and mineral fuels, for which there is no preferential trade regime.The main export goods from the EU to Cuba are food, chemicals products, plastics, basic metals and their manufactures, machinery, household appliances and transport equipment. Diplomatic relations between EU and Cuba were established in 1988. Since then, the European Union has funded with around EUR 300 million more than 200 cooperation projects in the country. Some 80 projects worth EUR 155 million are currently ongoing, reflecting an increase of three times the average level of the last decade. In the first twenty years, the main focus of this cooperation was on emergency projects. The first bilateral cooperation strategy was programmed in 2008, prioritising the sectors of sustainable agriculture and food security, renewable energy and climate change, and the modernisation of the economy, currently in force.

In an effort to update bilateral relations, limited between 1996 and 2016 by the restrictive 1996 Common Position,[21] the European Union re-launched a dialogue on 12 December 2016 by repealing of the Common Position and the signing of the Political Dialogue and Cooperation Agreement (PDCA) between the two parties gave new impetus to bilateral relations. The PDCA started to apply provisionally on 1 November 2017.[22] The following document Multi-annual Indicative Programme 2021-2027 states that the embargo is the key obstacle for EU foreign direct investment in Cuba, what is the main reason that currently the only EU development bank active in Cuba is the *Agence Française de Developpement* but Cuba´s participation in the post-Cotonou ACP-EU Partnership Agreement[23] and its possible accession to the EU-Cariforum Economic Partnership Agreement (EPA) would provide a stable and robust framework for trade and investment relations and stable economic cooperation

[21] The EU member states agreed on this common position in 1996 in 72 hours, while the negotiations took place only at the level of finance ministers of the EU member states in Madrid during the government of the then Spanish Prime Minister José María Aznar. Belgium has never relied on this position in its relations with Cuba.

[22] Council of The EU (2016), *Political dialogue and cooperation agreement between the European Union and its Member States, of the one part, and the Republic of Cuba, of the other part,* disponible en https://data.consilium.europa.eu/doc/document/ST-12504-2016-INIT/en/pdf

[23] Cuba have not signed the Cotonou Convention and it is not member of CARICOM –an intergovernmental organisation that is a political and economic union of 15 member states (14 nation-states and one dependency) throughout the Americas and Atlantic Ocean.

with the EU in the future.[24] This programme focuses on supporting sustainable municipalities and boosting the national economy, with an emphasis on MIPYMEs and the sectors of agriculture, energy, communication technologies, creative cultures and biotechnology, including cooperation on development and access to vaccines against COVID-19.[25] In addition to bilateral, regional and thematic programmes, Cuba benefits from its participation in higher education (Erasmus +) and research (Horizon-Europe) programmes. All 27 EU Member States have bilateral diplomatic relations with Cuba. Spain and Italy cooperate with Cuba most, France through AFD loans and Belgium through academic cooperation. Germany cooperates in Cuba through triangular actions and regional projects and the Netherlands and Sweden through line ministries or NGOs. Slovakia has very good relations with Cuba long time. Both states develop cooperation in the field of energy, computer science, culture, education or biotechnology and joint and mixed ventures.[26]

Regarding the EU's position towards the Helms-Burton Act, the EU position is based on acceptance the US policy towards Cuba concerninig the embargo and regime change on the one side and on the other side it is based on the protections of EU businesses and firms trading with Cuba. It can be said that conformity is the word which defines EU attitude defines towards this Act. The EU policy tends in the same direction as Helms-Burton Act. In general, EU accepted the content of the Titles I and II the Union never ever protested against them. In fact, they are in compliance with the official above mentioned documents such as Council common position of 1996, EU-Cuba Political Dialogue and Cooperation Agreement (PDCA), implemented since 1st November 2017 or Multi-annual Indicative Programme 2021-2027 for Cuba that contain similar wordings. They also linked the extension of economic aid and cooperations to the progress in the human rights records and guarantee of political liberties, the amnesty for political prisoners, and revision of Cuba's

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[24] European Commission, *Republic of Cuba. Multi-annual Indicative Programme 2021-2027 for Cuba,* 2020, 31 pp., disponible en https://international-partnerships.ec.europa.eu/system/files/2022-01/mip-2021-c2021-9130-cuba-annex_en.pdf

[25] *Ibidem*, pp. 3 y 4.

[26] Proxenta is the only company from Slovakia and only the tenth company in the world that does business in Cuba in the food industry sector. Over the next 25 years, the Proxcor plant in Cuba will produce approximately 17,000 tons of candy per year and employ more than 300 employees. With its 51 percent stake, Proxenta is the majority owner of Proxcor. The remaining 49 percent of the shares are owned by the Cuban state represented by Coralsa. Disponible en https://www.proxenta.sk/produkty/investicia-do-projektu-na-kube/

penal code, admission of non-governmental organizations into the country, conditioning future European relations with Cuba on specific and concrete progress towards "democracy".[27] This political position was held by the EU in 1996 and is held even more strongly today.

As regards Title III, EU protested against it, because it directly threatened its commercial interests at that time. In this case, the EU chose the path of protection, although here too it left this protection more at the bilateral level in the hands of individual member states, as if it were protecting its single market as a whole. And in 2019, when this Title was fully activated, EU only managed to declare that in order to protect the common trade policy of the EU and European-based partners and investors in Cuba the EU considers the full activation of the Title III and allow measures under Title IV to apply by the US as a violation of long-term agreements between the EU and US of 1997 and 1998 which both sides have followed without interruption since the and it will couse *unnecessary tensions and weaken trust and predictability* in the transatlantic partnership. And EU considers that the extra-territorial application of unilateral restrictive measures is contrary to international law and will take all appropriate measures to address the consequences of the Helms-Burton Act, including in relation to its WTO rights and through the use of its blocking regulation.[28] Today (2023), however, the EU is completely at the mercy of US policy.

Let's briefly look at a history of the EU-USA dispute. At the time of the adoption of the Helms-Burton Act in 1996, the European Commission (EC) expressed its strong disapproval of this Act contradicting international law and announced that it would consider sanctions against the USA. The EC also planned to approach the World Trade Organization (WTO). In July 7, 1996, Clinton administration decided on a six-month moratorium on the third article of the law, complying with the official request of European Commission President Jacques Santer. In October 16, 1996, the US blocked the EU´s request to create a ruling panel to rule on the Act´s compatibility with the WTO rules and on October 28th EU

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[27] See: Common position on Cuba, 1996 EU-Cuba Political Dialogue and Cooperation Agreement (PDCA) implemented since 1st November 2017 or Multiannual Indicative Programme 2021-2027 for Cuba.

[28] Declaration of the EU High Representative on the full activation of the Helms-Burton (Libertad) Act by the United States, Council of the EU, press release, 2 May 2019, disponible en https://www.consilium.europa.eu/sk/press/press-releases/2019/05/02/declaration-by-the-high-representative-on-behalf-of-the-eu-on-the-full-activation-of-the-helms-burton-libertad-act-by-the-united-states/

foreign ministers approved the rulings[29] that allow entities from the member states to defend themselves against penalties based on the activation of the Act. In November 20th the WTO decided to set up an arbitration panel to settle the dispute and a three member arbitration panel consisting of Arthur Dunkel, Ted Woodfield and Tommy Koh was appointed on February 20, 1997. In March 1997 Clinton extended the freeze on Title III for another six months and in April the EU withdrew its complaints to the WTO. On May 18, 1998, the EU and USA agreed on EU – U. S. Memorandum of Understantding in which the US agreed not apply the disputed provisions until the end of Clinton´s term in office and Clinton kept the promise by postponing the implementation of the most controversial articles for another six months and the EU accepted that it will not give any assistance to business operations involving property which was named as "illegally expropriated" by the US, moreover it will put pressure on the promotion of democracy in Cuba for the promotion of democracy in Cuba and removal of Castro from office through the economic ties.[30] This path was repeated by the next administrations of Bush and Obama till the Trump administration when US State Secretary of State Michael. R. Pompeo announced the full implementation of the Helms-Burton Act on April 17, 2019. It was the first time that US administration did not suspend this Title´s III private right of action, while behind it was a hidden a political objective to increase the global pressure on the promotion of democracy in Cuba and to stifle support, including support of Cuba itself, for Maduro government in Venezuela behind. In this context, it is necessary to draw attention to the fact that Pompeo´s announcement did not refer at all to the above mentioned Memorandum and did not indicate that natural and legal persons from the EU and other allies were punished for their homeland´s failure to uphold its commitment to promote democracy in Cuba.[31] Biden administration did not re-suspended Title III of Helms-Bruton Act.

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[29] Council Regulation 2771/96, OJ L 309, 29.11.1996 and Joint Action of November 1996, O. J. L 309/7 (1996) will be discussed later in details.

[30] U.S. Department of State, *U.S. - EU Understanding on Expropriated Property*, 1998, disponible en https://1997-2001.state.gov/statements/1998/980518a.html

[31] The EU Commission´s Guidance Note 2018/C 277 I/03 to the EU Regulaton states that *"In 1998, the Union and the U.S. signed a Memorandum of Understanding by which the U.S. administration suspended the application of certain provisions of the Cuba extra-territorial sanctions 'as long as the EU and other allies continue their stepped up efforts to promote democracy in Cuba".* See: EuropeanCommission,*GuidanceNote-QuestionsandAnswers:adoptionofupdateoftheBlocking Statute,* 2018, (2018/C 277 I/03), C/2018/5344, OJ C 277I, disponible en https://eur-lex.europa.eu/legal-content/EN/TXT/?toc=OJ%3AC%3A2018%3A277I%3ATOC&uri=uriserv%3AOJ.CI.2018.277.01.0004.01.ENG

In terms of legal protection against the implementation of this Act, the Council of the EU (Council) during its July 15, 1996 session identified a range of measures that the EU could deploy in response to the damage EU companies incurred from the introduction of the Helms-Burton Act. The Council focused mainly on the goal to neutralize the extra-territorial effects of that US domestic law. According to EC law and EU law today, the initiative for legislation in trade and economic issues lies with the European Commission, therefore on July 31, 1996 the EC submitted to the Council a proposal for a Council regulaton which would be leading to protection against the effects of the application of any legislation adopted by any third country and proceedings and actions based on or resulting from them. The Committee of Permanent Representatives of the Member States (COREPER)[32] as well as the Council both held long and intensive discussions which were tough and difficult due to political and legal reason.[33] At the end, the Council came up with the political agreement on Council Regulation 2771/96 (Regulation) which was aimed *"to protect… against the effects of the extra-terriotorial application of legislations adopted by third country and actions and actions based thereon or resulting thereform".*[34] This Regulation is derived from the primary law, which is the the Treaty Establishing the European Community (EC Treaty) of 1992, so called Maastricht Treaty, specifically the Articles 73c paragraph 2, 113 paragraph 2 and 235. Article 73c paragraph 2 states: *"Whilst endeavouring to achieve the objective of free movement of capital between Member States and third countries to the greatest extent possible and without prejudice to the other Chapters of this Treaty, the Council may, acting by a qualified majority on a proposal from the Commission, adopt measures on the movement of capital to or from third countries involving direct investment –including investment in real estate–, establishment, the provision of financial*

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[32] The Committee of Permanent Representatives of the Member States (COREPER) - from French *Comité des représentants permanentsis* - is Council committee composed of the permanent representatives of the member states on the level of ambasador to the EU. COREPER's defined role is to prepare the agenda for the ministerial Council of the European Union meetings; it may also take some procedural decisions. It oversees and coordinates the work of some 250 committees and working parties made up of civil servants from the member states who work on issues at the technical level to be discussed later by COREPER and the Council. The COREPER is chaired by the Presidency of the Council of the European Union. Article 240 of the Treaty on the functioning of the European Union lays down the legal basis of COREPER. There are in fact two committees within the COREPER: COREPER I consists of deputy heads of mission and deals largely with social and economic issues; COREPER II consists of heads of mission (Ambassador Extraordinary and Plenipotentiary) and deals largely with political, financial and foreign policy issues.

[33] Huber, J., "The Helms-Burton Blocking Statute of the European Union", *Fordham International Law Journal*, Vol. 20, Issue 3, 1996, pp. 699-700.

[34] Council Regulation 2771/96, OJ L 309, 29.11.1996.

services or the admission of securities to capital markets". Article 113 paragraph 2 says: *"The Commission shall submit proposals to the Council for implementing the common commercial policy"* and Article 235 provides that *"If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal form the Commission and after consulting the European Parliament, take the appropriate measures".*[35] But the Council was worried that this would not cover all areas of activities that would need protection that is why it adopted a Joint Action based on Articles J. 3 and K. 3 paragraph 2 of the Treaty on European Union (TEU) which define the procedure how the Council is able to adopt Joint Action[36]. Both mentioned legal acts mainly concentrated on the removal of the adverse affects of Title III and Title IV of the Helms-Burton Act. In its preamble the Regulation states the objectives which led EU to adopt it such as: contribution to the harmonious development of world trade, progressive abolishon of restrictions on international trade and achievement to the greatest extenet possible the free movement of capital.[37] The reasons formulated in this way clearly refer to the Articles 73c, 113 and 235 of the EC Treaty, which then form the legal basis of the Regulation. The preamble continues that *"a third country has enacted cerain laws which purport to regulate activities of persons under the jursdiction of the Member State"* and *„by their extra-territorial aplications such laws…violate international law and impede the attainment of the aforementioned objectives"* and furher states that these laws *"affect or likely to affect the established legal order and have adverse effect on the interest of natural nad lebal persons exercising rights under the [EC Treaty].*[38] It goes on to

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[35] Treaty establishing the European Community, codified version of The Treaty Establishing The European Community, Document 11992E/TXT. OJ C 224, 31.8.1992.

[36] Article J. 3 defines procedure for adopting joint action in matters covered by the foreign and security policy and K. 3 paragraph 2 states: *"The Council may: on the initiative of any Member State or of the Commission, in the areas referred to in Article K.1(1) to (6); on the initiative of any Member State, in the areas referred to in Article K1(7) to (9): (a) adopt joint positions and promote, using the appropriate form and procedures, any cooperation contributing to the pursuit of the objectives of the Union; (b) adopt joint action in so far as the objectives of the Union can be attained better by joint action than by the Member States acting individually on account of the scale or effects of the action envisaged; it may decide that measures implementing joint action are to be adopted by a qualified majority;(c) without prejudice to Article 220 of the Treaty establishing the European Community, draw up conventions which it shall recommend to the Member States for adoption in accordance with their respective constitutional requirements".* Treaty on European Union, OJ C 191, 29.7.1992.

[37] Council Regulation 2771/96, OJ L 309, 29.11.1996.

[38] *Ibidem*.

say that therefore *"it is necessary to take action at the Community level to protect the established legal order, the interests of the Community and the interests of the said natural and legal persons in particular by removing, neutralizing, blocking or otherwise countering the effects of the foreign legislation concerned".*[39] It makes also reference to the Joint Action indicating that the purpose of the Joint Action is to ensure tha Member States itself take measures to protect those persons whose interests would be affected by the foreign legislations insofar as Regulation does not protest those interests. It can be interpreted as that the EU is not able to protect everyone affected by Helms-Burton Act on Community level, and in the Joint Action it gave such an option to the Member States on a bilateral level.

Articles 1 and 11 of the Regulation determine its scope which is to protect against the extra-territorial application of the laws which are specified in the Annex.[40] Under Article 1 such protection covers the interests of persons reffered to in Article 11, who engage in international trade or the movement of the capital and related commercial activities between the European Community (EC) (today European Union) and third countires affected by those laws.[41] Article 11 covers all nationals of Member States who are residents in the EC/EU whether they are inside or outside the EC/EU as well as any natural person who is a citizen of a third country and a resident in the EC wherever that person is found, unless that person is in the country of which he/she is a national. It also covers 1) any other natural person present in the EC/EU who is not a resident of the EC/EU, if that person acts in a professional capacity –if he/she is on a business trip in the EC/EU but not if he/she stays in the EC/EU as a turist; 2) any legal person incorporated within the EC/EU[42] and 3) any natural or legal person reffered to in Article 1, paragraph 2 of the Regulation (EEC) No 4055/86.[43] This Article establish clear link between the persons Regulation covers and the EC/EU either through nationality, residency, physical presence, incorporation

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39 *Idem*.

40 It means the Helms-Burton Act covers Cuba and the D´Amato Act covers sanctions against Iran and Libya. See: Council Regulation 2771/96, OJ L 309, 29.11.1996.

41 Article 1, Council Regulation 2771/96, O. J. L. 309/1 (1996).

42 See: Article 11 paragraphs 1-5, Council Regulation 2771/96, O. J. L. 309/1 (1996).

43 Council Regulation No. 4055/86, OJ L 378, 31.12.1986 states that it applies the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries. Article 1 of this Regulation states that the its provisions apply also *„to nationals of Member States established outside the EC/EU and to shipping companies established outside the EC/EU and controlled by nationals of a Membre State, if their vessels are registred in that Memer state in accordance with its legislation".*

or control. But the Regulation protects them only if they are engaging in one of the activities reffered to in Article 1.

Article 2 obliges these persons whose economic or financial interests the foreign legislation affects to inform the Commission accordingly within 30 days and if legal person is affected, this obligation applies to directors and persons with management responsibilities.[44] This information is essential for the Commission in order to enable it to assess the impact of the Helms-Burton Act on EC/EU based companies. Article 3 states that this information may be used only for the purposes for which it was provided. This Article creates a clear obligation for the Commission to respet the principle of confidentiality and its aim is to counterbalance the obligation to inform the Commission under Article 2. Article 4 categorically prohibits the recognition and enforcement of any judgment of a court, as well as any decision of an administrative authority located outside the EC/EU implementing the Helms-Burton Act or the D'Amato Act or actions based on or arising from them. The purpose of Article 4 is clearly to prevent the enforcement of judgments by US courts or administrative authorities under Title III of the Helms-Burton Act in the EC and to provide relief against EU companies or individuals.[45] Article 5 sets forth the duty not to comply with any requirement or prohibition, including request of foreign courts based on the Helms-Burton Act and the D´Amato Act: *"No person referred to in Article 11 shall comply, whether directly of through a subsidiary or other intermediary person, actively or by deliberate omission, with any requirement or prohibition, including requests of forfeign courts, based on or resulting, directly or indirectly from the laws specirfied in the Annex or from actions based thereon or resulting therefrom".* Its paragraph 2 provides for the possibility to obtain compliance authorization to the extent that non-compliance would seriously damage the interests of the person concerned or the interests of the EC/EU. In such case, the Commission is granting such authorization according to the procedure which is set out in Article 8 that provides for a comitology decision[46]

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[44] Article 2, Council Regulation 2771/96, O. J. L. 309/1 (1996).

[45] Article 3 and Article 4, Council Regulation 2771/96, O. J. L. 309/1 (1996).

[46] Comitology is a relatively complicated procedure, so we will briefly describe the procedure mentioned: 1. the Commission first submits to the Committee created by the Council a draft of the measure it will likely take –in this case a draft to grant the authorization of compliance; 2. the Committee delivers its opinion by qualified majority; 3. if the measure envisaged corresponds to the opinion of the Committee, the Commission adopts the measure but, if the Commissions draft measure is not in accordance to the opinion of the Committee or if the Committee delivers no opinion, the Commission must submit to the Council proposal relating to that measure; 4. if the Council has not acted by qualified majority within 2 weeks,

under Procedure III variant (a) of the Concil Decision of July 13, 1987 laying down the procedures for the exercise of implementing powers conferred on the Commision.[47]

Article 6 is the cornerstone of the entire Regulation. It contains a so-called "claw-back" clause that allows persons listed in Article 11, who engage in activities listed in Article 1, to recover any damages, including legal costs, incurred by that person as a result of the application of the Helms-Burton Act. The claimant can recover from the natural or legal person, a person acting on its behalf or as an intermediary, or any other other entity causing the damages. However, this provision does not allow recovery from a company incorporated within the EU in accordance with the law of a Member State, if the damage was caused by a company based in the USA of which the EU Company is a subsidiary. Under Community law, such a subsidiary is effectively an EU-based company and must be legally distinguished from a US-based company. Paragraph 3 of the Article 6 creates a new special jusdiction not mentiond in the Brussels Convetion on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters,[48] as it allows for judicial proceedings to be commenced in the courts of any Member State in which the defendant has assets. Paragraph 4 states that the recovery may take the form of seizure and sale of defendant´s assets within the EC/EU, including shares owned by a legal entity incorporated within the EC/EU.[49] That means f. e. that any damage General Motors causes to an EU-based company cannot be recovered from Opel in Germany, as that company is a separate legal entity registered in the EU, but any General Motors shares in Opel could be confiscated if held within the EC/EU. In Article 9, Member States are required to introduce sanctions in case of violation of any relevant provisions, so that the Regulation sounds serious and effective. The Regulation states that these sanctions must be effective, proportional and dissuasive.[50]

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the Commission adopts the porposed measure. Council Decision of July 13, 1987, O.J. L. 197/33, 34 (1987).

47 Council Decision of July 13, 1987, O.J. L. 197/33, 34 (1987).

48 1968 Brussels Convetion of Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters. J. O. L 299/32 (1972), amended by O. J. L 304/77 (1978), amended by O. J. L 388/1 (1982), amended by O. J. L 285/1 (1989).

49 Article 6, Council Regulation 2771/96, O. J. L. 309/1 (1996).

50 Article 9, Council Regulation 2771/96, O. J. L. 309/1 (1996).

The Regulation was supplemented by above mentioned Joint Action,[51] as the Regulation itself did not cover all the persons and areas of activities which the Commission had proposed and which Council and Member States wanted to protect. Thus, Council adopted a Joint Action that stipulated that each Member state take the measures it considers necessary to portect the interests of any persons listed in Article 11 of the Regulation that my by affected by the which US legislation, unless the Regulation protect those interests. In the preamble of mentioned Joint Action is stated that together with Regulation it constitutes an integrated system involving the Community/Union and the Member States each in accordance with its own powers.[52] The Joint Action does not specify what measures Member States may or must take to protect endangered persons. They can take measures that are similar to those provided by the Regulation, however, Member States are not limited. They can take the measures they consider appropriate what leaves a great deal of discretion to each member state.

As Huber points out, the functioning of the common market is at issue in the areas covered by the Regulation, so if some nationals of Member States involved in investment or trade related to Cuba will be subject to US sanctions, while others investing in other countries were not, the rights granted by the EC Treaty to the first category of persons would be seriously violated. Member States would be required to individually adopt national measures in the areas covered by the Regulation, thereby disrupting the operation of the common market. Assessing whether action is necessary is partly legal and partly political matter.[53] Regarding the legal aspects of the assessment, the measure must be necessary for the common market to continue to function properly and must comply with the principles of EC law, in particular subsidiarity and proportionality. In the absence of measures taken on a uniform basis by the EC/EU, if Member States take unilateral measures in the areas covered by the Regulation, the common market would be disrupted. Huber further notes that if the EC/EU would take actions of a more limited scope and intensity than that provided by the Regulation, these would not ensure the implementation of the EC Treaty, particularly ensuring that the common market and common commercial policy continue to operate. According to him the envisaged action, including Articles 4, 5 and 6, appears to be the minimum necessary to achieve these objectives and to react effectively to the challenge

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51 Joint Action of November 1996, O. J. L 309/7 (1996).

52 Joint Action of November 1996, O. J. L 309/7 (1996).

53 Huber, J., "The Helms-Burton Blocking Statute…", *cit*., pp. 711-712.

facing the EC/EU common market and its functioning. Furthermore, such remedies, the use of which is limited to the objective of the Regulation as set out in Articles 73c and 113 of the EC Treaty and in Article 1 of the Regulation inself, are remedies legally available to the EU and the Council has already used such measures in a number of cases concerning Iraq, Libya, Haiti and the former Yugoslavia.[54] Huber concludes that Regulation focuses mainly on neutralizing and removing the adverse effects of the Hemls-Burton Act, particularly it's Title III but because because there were concerns that the measures taken would not be sufficient, the Council and the Commission undertook to take the necessary measures in the event that the regulation and joint action did not provide sufficient remedies against the effects of the extraterritorial application of the law. In addition, let's not forget that the Member States themselves must take legislative or other measures to implement joint action and to determine the sanctions to be imposed in case of violation of the provisions of the regulation.[55]

If we would like to summarize the activities adopted by the EU (or EC at that time), then it is necessary to emphasize that, the EU Blocking statute is an integrated system involving the EU and the Member states each in accordance with its own powers and which consists of:

1. Council Regulation 2771/96, O. J. L. 309/1 (1996): aimed to protect any person who resides in the EU territory, whether that person is found inside or outside the EU, it is aimed against the effects of the extra-territorial application of legislation adopted by a third country and actions based thereon or resulting therefrom. Article 11 of this Regulation covers all persons who have link to the EC/EU through nationality, residency, physical presence, incorporation or control.

2. Joint Action of November 1996, O. J. L 309/7 (1996): each Member state shall take the measures it deems necessary to protect the interest of any person referred to in Article 11of the Regulation that may be affected, insofar as the Regulation does not protect these interests.[56]

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54 Huber, J., "The Helms-Burton Blocking Statute…", *cit*., p. 712.

55 *Ibidem*, p. 716.

56 See Council Regulation 2771/96, OJ L 309, 29.11.1996 and Joint Action of November 1996, O. J. L 309/7 (1996).

This Blocking statute is mainly concerned with removing the adverse effects of Title III and IV of the Helms-Burton Act. As such it:

1. prohibits EU persons form directly or indirectly complying with US sanctions on Cuba unless the EU person can demonstrate that compliance with the statute would seriously damage their interests or those of the EU;

2. identifies the Helms-Burton Act as one of the US laws that triggers the blocking statutes provisions;

3. nullifies the effect of any third country judgment of decision of a court, tribunal or administrative authority;

4. Individual member states are responsible for the implementation of the statute, including setting the applicable penalties for noncompliance and enforcement of the statute.

Last but not least, as an EU regulation, the EU Blocking Statute is directly applicable in all EU Member States. It provides an express legal basis for compensating "any damage, including legal costs" suffered by EU persons due to the application of Helms-Burton Title III. The scope of the relevant provisions of the EU Blocking Statute is very broad - any EU person engaging in international trade is entitled to recover any damages, including legal costs, caused to that person by the application of the laws specified in the EU Blocking Statute Annex or by actions based thereon or resulting therefrom and the compensation may be obtained from any person or entity causing such damages or from any person acting on their behalf. The EU Commission confirmed in a Guidance Note (2018/C 277 I/03)[57] published in August 2018 that the EU Blocking Statute, in line with its protective aim, applies a very broad standard with regard to the damages and legal costs that can be claimed, as well as individuals and entities that can be held liable. The EU Blocking Statute also stipulates that EU persons may recover against Helms-Burton claims before EU Member State courts in application of EU law provisions determining jurisdiction, including before courts of any Member State where the defendant holds assets. Recovery may generally also be obtained in the form of the seizure and sale of assets held by the defendant within the EU, including shares held by a legal person incorporated within the EU.[58] In simple

[57] European Commission, *Guidance Note*…, *cit*.

[58] See Article 6 of Council Regulation 2771/96, OJ L 309, 29.11.1996

terms, the Blocking statute is therefore a tool of reciprocity: if an American party sues a European business or person in an American court for trade with Cuba, then the aggrieved business or person has the right to sue the American party in a European court for the damages caused.

Regarding EU-US relations, as it was already mentioned above, in April 1997 the US and the EU reached an agreement to postpone their conflict in the World Trade Organization. Part of this agreement is the EU's pledge to discourage EU companies from investing in "illegally" confiscated properties not only in Cuba but anywhere in the world and the US administration, namely Clinton administration formulated non-binding declaration of intention to suspend Title III for the rest of its mandate. The EU basically backed down or "has blinked", as Hoffmann stressed,[59] although there was no doubt that the WTO would have to rule in favor of the EU. But on the other hand, the US government has declared in advance that it will simply ignore any such decision, declaring the Helms-Burton Act and all its parts a matter of national security, thereby challenging the competence of the WTO. In addition, the US government warned that any WTO decision against the US would provide new ammunition for a strong anti-WTO current in Congress and in the USA.[60] Based on these facts, it can be concluded that the unintedent secondary effect of the Helms-Burton Act was to demonstrate a dominant world power's ability to define the rules of the game after the end of Cold war and to demonstrate its power to rise above international norms and institutions, when necessary. This so-called rules-based unilateral international system, created by the US and supported by Europe, today faces challenges from the Global South (India, African countries, Latin America South East Asia), Middle East, Russia and China.

It was already mentioned above, that on May 18, 1998, the US and the EU reached another agreement that went beyond the 1997 agreement that ended the entire dispute. This "Understanding on Expropriated Property" placed the Cuban case in a general context.[61] Within this agreement the US committed itself not to use of Title IV against European businesses and to try to persuade Congress to accept the non-application of the full potential of the sanction to the EU and the EU accepted that it will not give any institutional assistance to business

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[59] HOFFMAN, Bert, The Helms-Burton Law and its consequences for Cuba, the United States and Europe. p.15.

[60] Ibídem, p. 16

[61] U. S. DEPARTMENT OF STATE. U. S.-EU Understanding on Expropriated Property. Disponible en: https://1997-2001.state.gov/statements/1998/980518a.html

operations involving property designated as "illegally expropriated" in the US.[62] The EU did not even protest and did not ever pronounce itself in relevant form on the Titles I and II of the Act. The EU de facto accepted postulates of Titles III and IV because this agreement does not revoke or modify the extra-territorial character of the Act itself but just excludes one region of the world – the EU – from its full application. By this agreement, the EU gave an approval to the US thesis that confiscation in Cuba violated international law, what is in contradiction with its own way of dealing with the issue when EU member states resolved these issue years ago through compensation deals with Cuban government. And at last, the EU de facto accepted the violations of international legal practice, mainly the retroactive extension of US citizenship to all those Cuban-American who at the time of loss were Cuban citizens. Its position even includes the establishment of registry of claims that is to be the base on which the EU is to withhold any assistance or official cooperation for business operations in Cuba; it is open to all Cubans who later became US citizens and does not even establish any serious process of verification of the claims.[63] As in 1996 after Helms-Burton was passed, the European Commission immediately again criticized only the reactivation of Title III by the Trump administration in 2019. In a Joint statement by High Representative and Vice President Federica Mogherini and Commissioner for Trade Cecilia Malmström on April 17, 2019, the EU reiterated its *"strong opposition to the extra-territorial application of unilateral Cuba-related measures that are contrary to international law"*.[64] According to this statement, the decision not to renew the waiver is also a breach of commitments made by the United States in the EU-U.S. agreements entered into in 1997 and 1998.[65] The same was repeated in already mentioned Declaration of the EU High representative from May 2019.[66]

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62 Hoffman, Bert, The Helms-Burton Law and its consequences for Cuba, the United States and Europe. p. 16

63 Ibídem, p. 16-17

64 See JOINT STATEMENT by EU High Representative/Vice President Federica Mogherini, Minister of Foreign Affairs of Canada Chrystia Freeland and EU Commissioner for Trade Cecilia Malmström on the decision of the United States to further activate Title III of the Helms Burton (Libertad) Act.

65 See JOINT STATEMENT by EU High Representative/Vice President Federica Mogherini, Minister of Foreign Affairs of Canada Chrystia Freeland and EU Commissioner for Trade Cecilia Malmström on the decision of the United States to further activate Title III of the Helms Burton (Libertad) Act.

66 Declaration of the EU High Representative on the full activation of the Helms-Burton (LIBERTAD) Act by the United States, Council of the EU, press release, 2 May 2019

3. BLOCKING STATUTE IN ACTION

The provisions of Title III of the United States Helms-Burton Act 1996, the enforcement of which was suspended for a long period, were reactivated by US President Donald Trump on 2 May 2019. That means that it is possible now –and it already happens– to bring an action before US courts against any person that is doing business with property confiscated during the Cuban Revolution. The US citizens of Cuban orgin –so called Cuban exiles who are also US nationals– thus gained the private right to bring legal action before US federal courts against persons trading with property confiscated by the Cuban government since 1959 what triggers an increase in the risk of lawsuits in the US against international companies that conduct business activities in Cuba.

The Act targets natural and legal persons who *knowingly* and intentionally engage in commercial activity using confiscated property. Persons who have been declared liable under Title III may face significant financial consequences. The legislative regime allows claimants to choose between various methods of calculation of the damages incurred, including calculating the current value of products confiscated or the value at the time of the confiscation, plus interest. Claimants may also recover triple damages for claims certified by the US Foreign Claims Settlement Commission or if the defendants continue to exploit the confiscated property beyond 30 days from formal notice to cease its use. The Helms-Burton Act having an extraterritorial reach, lawsuits may be filed against both US and international companies. But the claims specified in Title III are nevertheless subject to the following restrictions: (1) a statute of limitations of two years after the end of the trade concerned; and (2) a materiality threshold set at US$50,000. A number of American, Cuban and European companies have already been sued before US courts as a result of this reactivation.

What measures should potentially affected companies take, according to legal advisors? All concerned international companies are advised to do an inventory of their various direct and indirect business activities involving Cuba and to conduct background checks of any property that could be potentially concerned in order to determine whether it has been previously confiscated by the Cuban government. Companies should also examine the origin of their products in order to determine whether they come from confiscated property or trafficking of these goods. Such self-assessment may help mitigate reputational risks. Companies that are being sued in accordance with Title III may risk losing their relationship with financial institutions, customers and

other business partners who do not want to benefit indirectly from the proceeds of the confiscated property in question.[67] Business partners of the US are very reluctant about the reactivation of these provisions.

One of the possible options for business partners of the USA would be to challenge the extraterritorial reach of Title III through a complaint before the World Trade Organization (WTO) again, since the WTO has a Dispute Settlement Body that could resolve the issue through international arbitration. Another one is protection form the side their homeland through the all possible legal measures. Given that most jurisdictions around the world –including, most notably, Canada and the EU– do not maintain sanctions against Cuba, many global companies have engaged in business with Cuba that may now be subject to US litigation under Helms-Burton. The interesting legal twist –apparently never before litigated, since the relevant portion of Helms-Burton has been consistently waived– involves the impact of so-called blocking statutes enacted by Canada and the EU to counter US sanctions against Cuba. These statutes allow companies sued under Helms-Burton to file counterclaims, plus reasonable attorneys' fees and court costs. This contest between Helms-Burton and the blocking statutes likely means that any lawsuits filed against companies located in blocking statute jurisdictions will, if not settled quickly, stretch well into the future, perhaps to a time when a future President will once again decide whether to waive Title III.[68]

What is the practical effect of EU blocking statute? First, Title III venue will almost always have to be in the United States. Second, Title III suit will only be effective if the defendant´s property is located in the United States. Third, the Title III plaintiff cannot have assets in the defendant's country. Fourth, if witnesses or documents are required to be obtained from the defendant outside the United States, any subpoena or other request will not be honored. According the Regulation´s provisions, a specifically Article 2 defendant is obliged to inform the Commission accordingly within 30 days and if legal person is affected, this

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[67] See: SKADDEN, Under Helms-Burton Act, Entities With Business Ties to Cuba Now at Risk of Lawsuits; BELLINER, John B. III., SHANNON, Thomas A. Jr., BARKER, John P., WEISS, Barucg, MIRSKI, Sean A. Two years of Title III: Helms-Burton Lawsuits Continue to Face Legal Obstacles; MORRISON & FOERSTER LLP. Back to the Future: Helms-Burton Versus the Blocking Statutes. Who Will Prevail?

[68] See: SKADDEN, Under Helms-Burton Act, Entities With Business Ties to Cuba Now at Risk of Lawsuits; BELLINER, John B. III., SHANNON, Thomas A. Jr., BARKER, John P., WEISS, Barucg, MIRSKI, Sean A. Two years of Title III: Helms-Burton Lawsuits Continue to Face Legal Obstacles; MORRISON & FOERSTER LLP. Back to the Future: Helms-Burton Versus the Blocking Statutes. Who Will Prevail?

obligation applies to directors and persons with management responsibilities. Commission is then obliged to assess the impacto of the Helms-Burton Act on EU based companies.

Since Title III was not active untill May 2019, there is no case law yet regarding the recovery of losses related to the application of Helms-Burton Act. The exact scope and application of the EU Blocking Statute in this context thereforer remains open. It is subject to interpretation by the relevant courts, which in the first instance will be local courts of the EU Member States. One of the first decision EU plaintiffs must make is which EU Member State court will have jurisdiction to hear the Helms-Burton counterclaim. As the EU Commission states in its Guidance Note, the answer depends on the specifics of the case, on the applicable rules on jurisdiction, the national civil procedure, and other factors.[69] These are mainly EU rules determining jurisdiction according to Regulation (EU) No. 1215/2012.[70] Under these rules, if the defendant (i.e., the Helms-Burton claimant) is not domiciled in an EU Member State, the question of jurisdiction is to be determined by the relevant domestic law of the EU Member State where the court is located. For example, according to German civil procedure, a local court could be competent in such a scenario if the defendant has assets that are located within the court's jurisdiction.

Since the Trump administration deviated from the precedent established by its predecessors and permitted Title III into effect on May 2, 2019, there have been filled roughly 40 suits against mix of American, European and Cuban companies operating in industries such as mining, sugar, tobacco, advertising, banking, construction and ranching. Of all the suits filled so far, 17 have already been dismissed in whole, 5 voluntarily and 12 by court order. Courts most frequently dismiss cases because plaintiff failed to acquire their claim in time or because there was no personal jurisdiction. Fewer than 10 cases overall have entered the discovery stage of litigation, indicating that plaintiffs are having trouble getting past even the motion to dismiss stage. So it seems like US courts have more common sense than US politicians. From all cases just Spanish Iberostar Hoteles y Apartamentos S. L. seeks permission from the European Commission

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69 European Commission, *Guidance Note*…, *cit*.

70 Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast)

to defend the suit. There were cases against businesses and firms from France, Denmark, and Norway.[71]

In the case of the recent lawsuit brought by the heirs of US citizen of Rafael Lucas Sánchez Hill against the Meliá hotel chain, the European Union threatened to use the EU blocking statute, namely Council Regulation No. 2271/96, as well as as the exercise of its rights within the WTO for sanctions against the United States. As the EU blocking statute applies to any natural person or entity that is an EU national or that is incorporated and registered in the EU, accordingly, in the 27 countries comprising the EU, any pursuit of compensation will be blocked from enforceability, and if the plaintiff has a presence or assets in the EU, it and they will be at risk.

Let's list some few other lawsuits involving European companies. Back in 2018, before the activation of Title III, French banking giant Société Générale (SocGen) In November 2018, French banking giant Société Générale ("SocGen") has agreed to pay penalties totaling approximately $1.3 billion (€1.2 billion) to the US Authorities, including $53.9 million to the Office of Foreign Assets Control of the U.S. Department of the Treasury (OFAC), $717.2 million to the U.S. Attorney's Office of the Southern District of New York (SDNY), $162.8 million to the New York County District Attorney's Office (DANY), $81.3 million to the the Board of Governors of the Federal Reserve System and the Federal Reserve Bank of New York (together the Federal Reserve), and $325 million to the New York State Department of Financial Services (DFS), resolving their investigations relating to certain U.S. dollar transactions processed by Société Générale involving countries, persons, or entities that are the subject of U.S. economic sanctions and implicating New York State laws. As SocGen stated the vast majority by value of the sanctions violations involved in the settlements related to Cuba, and stem from a single revolving credit facility extended in 2000. The remaining transactions involved other countries that are the target of U.S. economic sanctions, including Iran.[72] But that's not the end; the case continues. After the

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71 See Skadden, *Under Helms-Burton Act, Entities with Business Ties to Cuba Now at Risk of Lawsuits*; Belliner, J. B. III; T. A. Shannon Jr., J. P. Barker, B. Weiss, S. A. Mirski, (2021): *Two years of Title III: Helms-Burton Lawsuits Continue to Face Legal Obstacles*; Morrison & Foerster LLP, *Back to the Future: Helms-Burton Versus the Blocking Statutes. Who Will Prevail?*,disponible en https://www.mofo.com/resources/insights/190820-helms-burton-blocking-statutes

72 Societe Generale, "Societe Generale reaches agreements with U.S. authorities to resolve U.S. Economic sanctions and AML investigations", disponible en https://www.societegenerale.com/en/news/newsroom/societe-generale-reaches-agreements-us-authorities-resolve-us-economic-sanctions-and

Title III of Helms-Burton Act went into effect, Banco Nuñez[73] –a Florida based corporation founded in 1996 to hold the confiscated equity of a Cuban bank of the same name whose assets were confiscated by the Cuban government– has joined the US Attorney´s forfeiture lawsuit seeking a portion of the funds to satisfy a trafficking claim. The basis of its claim is that the SocGen had to process the payments through the Cuban financial system must have been made through the BNC and thus through the assets of and trafficking in Banco Nuñez´s property. Banco Nuñez relies on evidence from the forfeiture action to allege that SocGen developed a system of credit facilities to circumvent U.S. sanctions against Cuba. SocGen's credit facilities allowed it to process BNC transactions with foreign companies and thereby gain a profit of over $1 billion. Banco Nuñez's trafficking argument is that, because it owned 10.5 percent of BNC at the time it was confiscated, any profits realized from commercial activity with BNC constitute trafficking in its property. What is interesting about this, as Morrison & Foerster point out, is Nuñez's argument involving secondary and perhaps tertiary trafficking liability. This is because its argument implies that anyone who does business with a trafficker is themselves a trafficker. This type of downstream liability is exactly what non-U.S. businesses were concerned about when Helms-Burton was passed.[74] Concerning this case, there is some precedent for using settlement proceeds to compensate victims of the Castro governmet from 2015 when French banking giant BNP Paribas entered into similar settlement with US Authorities. The US Department of Justice invited victims to provide any information which can prove that they suffered at the hands of the Cuban government so they could be compensated from the fine assessed against BNP Paribas. Banco Nuñez argues that this precedent has to be followed to satisfy its trafficking claim.[75]

The first fully "uncertified" claim filed under Helms-Burton is case Mata *et al.* v. Grupo Hotelero Gran Caribe *et al.* In 1925, Antonio Mata, a Cuban national, built the Hotel San Carlos in Cienfegos, Cuba. After the Cuban revolution, in 1962 the legal government confiscated this hotel from Antonio´s son. Later on the hotel was abandoned and it felt into disrepair. In 2005 Cimax Cimex began to renovate it and through a joint venture with the Spanish hotel chain Meliá Hotels International, S.A. (Meliá), reopened it in early 2018. According to

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[73] Banco Nuñez was the second largest bank in Cuba before the Cuban Revolution, when the Castro Regime nationalized all the Cuban owned banks and consolidated them into Banco Nacional de Cuba (BNC).

[74] Morrison & Foerster LLP, *Back to the Future*…, *cit.*

[75] *Ibidem*.

Morrison & Foerster this case is interesting in two aspects. The first is that it is the first fully "uncertified" claim what means that there is no presumption in favor of the plaintiffs. In this regard, the case should proceed in a manner similar to a typical lawsuit to determine damages and liability. The second is that this case is the first one decided case that invokes Helms-Burton's notice provision, which requires plaintiffs to file uncertified claims to notify alleged "traffickers" that they are "trafficking" in confiscated property 30 days prior to joining those persons as defendants. Complying with this notice provision entitles these plaintiffs to three times the value of the property plus interest, court costs, and reasonable attorneys' fees.[76] When Mata´s heirs notified Meliá of their intention to add Meliá as a defendant after the prescribed notice period has expirde, this can lead to litigation in which the EU persons will intend to activete and use the EU Blocking Statute to defend themselfs against Helms-Burton liability. Mata´s heirs are also suing German travel service Trivago GmbH for „trafficking" the Hotel San Carlos by booking rooms for international travelers in the case Mata et al v. Trivago GmbH. In this case, the heirs argue that their claim to "trafficking" goes beyond booking hotel rooms to include use of the San Carlos trade name, goodwill, legacy and storied history.[77]

Moreover, the plaintiffs in the Grupo Hotelero and Trivago cases demaned the court to grant a cass certification to their claim. This would allow the lawsuit to become a class action. The class would include all US citizens who own unverfied property confiscated by the Cuban government traded by Trivago and other entities. Since Mata´s lawsuits, at least four other claims have been filed against Grupo Hotelero and Trivago, each seeking to have their claim treated as part of a class action. All these claims involve other conficated properties in Cuba that have since been converted into hotels and resorts. If the court grants these class certification, travel services like Trivago or Booking could be stuck in litigation for years fighting allegations of illegal trading.[78]

In any event, the cases discussed above involving SocGen, Mélia and Trivago show that Helms-Burton claims are a new reality for EU businesses. Reports indicate that additional claims relating to the hotel and rum industries are currently being prepared. Given the broad wording of the EU Blocking Statute's provisions allowing for compensation of losses, reverse litigation

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[76] *Idem*.

[77] *Idem*.

[78] *Idem*.

in the EU is likely to occur shortly after any Helms-Burton claims against EU persons proceed.

4. CONCLUSION

The world community perceives Helms-Burton Act and mainly it's Title III as a violation of international law. It is perceived as a world order created by the US based on American or transatlantic rules that disrupt the traditional status quo in international relations and good neighborhood. Some governments –Canada, European Union and its Member States, Mexico– therefore activated so called blocking statutes to protect their national interests, but in fact defenses based on these statutes almost uniformly fail in U.S. courts. That means the blocking statutes are only *fig leafs* reacting to the audacity that, in an international environment of equal nation-states, one dares to extend one's internal jurisdiction over third, sovereign states with their own sovereignty and jurisdiction, while these are one´s own allies and partners, not enemies. Therefore, such measures, and therefore the Helms-Burton Act itself, should be rejected and ignored. They should be regarded as a manifestation of hostility and condemned as such.

Based on the premise that if we want to build a free world based on free will, peace and tolerance, where the highest value is freedom and everyone in this world system has the right to freely choose which direction to go, then any foreign interference in the internal development of society is immoral and unacceptable. As such, it must be condemned as a brutal interference with the freedom of society. In the spirit of Fukuyama's end of history and an arrogant, fictional sense of exceptionality, the United States seeks to install its way of life and worldview as the only one, but often incompatible with the way of life and the values of the re-educated territory. The Helms-Burton Act is not an exception. It is immoral act that has no place in modern international relations and international law.

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