



RESEARCH PAPER 98/114
14 DECEMBER 1998

Cuba and the Helms-Burton Act

The "Helms-Burton Act 1996", sponsored by (Republicans) Senator Jesse Helms and Representative Dan Burton, punishes foreign companies for exploiting property appropriated by Fidel Castro's regime after the 1959 revolution. This Research Paper looks at the economic and political situation in Cuba in the context of the Act. It also outlines the potential effects of the Act and the international response.

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Summary of main points

The United States government has maintained an economic embargo against Cuba for some 38 years. The Cuban economy suffered its most difficult period in the years immediately following the end of the Cold War in the early 1990s, when it lost most of its Eastern European markets and considerable economic support from Moscow. Cuba did not follow other Communist states in Europe and Latin America in moving to a more open, democratic and pluralist political system but has remained a one-party Communist state. Elections to the National Assembly of candidates from the Cuban Communist Party in January 1998 returned Fidel Castro to power for another five years.

Economic reforms have been introduced, however, that have gone some way towards opening up the Cuban economy to private enterprise and foreign investment, and which have given Cubans more economic freedom. However, this has not prevented hundreds of Cubans from seeking political and civic freedom elsewhere, and in the last ten years there have been many attempts by individuals to enter the US along the Florida coast.

In 1996 the shooting down of two US planes by the Cuban military accelerated the adoption by Washington of the *Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996*, also known as the “Helms-Burton Act”. This extended the territorial application of the existing embargo to apply to foreign companies trading with Cuba, and penalised foreign companies allegedly “trafficking” in property formerly owned by US citizens but expropriated by Cuba after the 1959 revolution.

The Helms-Burton Act has provoked much criticism in international fora such as the United Nations and the European Union (EU), although this has been countered to some extent by criticism of the Cuban regime and its human rights record in particular. The EU initially threatened to take the US to a complaints panel of the World Trade Organisation (WTO) over the extra-territorial effects of the Act, but has now negotiated an “Understanding” with the US Government which has alleviated the effects of Helms-Burton on European companies. The main provisions of the Understanding are a renewable six-monthly waiver of Title III (the extra-territorial effect); US government pursuance with Congress of the authority to grant an indefinite waiver to the EU of Title IV (exclusion from the US of “traffickers” in US property); and no action against EU companies or individuals under the *Iran Libya Sanctions Act (ILSA)*, with similar waiver provisions.

The Pope’s visit to Cuba in January 1998 has been seen as heralding a new era in human rights in Cuba. President Castro has subsequently enacted some of the reforms requested by the Pope, with particular regard to the release of political prisoners.

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I Cuba: Historical Overview

Cuba is situated in the Caribbean Sea some ninety miles south of the US State of Florida. It has a population of around eleven million. Spain governed Cuba from the 16th century until 1898, when it was ceded to the US after the defeat of Spain in the Spanish-American War. Cuba became an independent republic in 1902, but under the controversial “Platt Amendment to the Cuban Constitution” the US reserved the right to intervene in Cuba’s domestic affairs. Under an Agreement on the lease to the US of land in Cuba “for coaling and naval stations” of February 1903, a US naval base was established at Guantánamo Bay, which remains to this day and can only be removed by mutual agreement between the US and Cuba. Under a 1934 Agreement the US was granted complete jurisdiction and control over the military base, in return for which it would recognise Cuban sovereignty over the area.

In 1933 Fulgencio Batista Zaldivar (later General Batista) came to power after a military coup. He ruled Cuba until 1944 and seized power again in 1952. Fidel Castro, then the leader of a radical opposition group, tried to take the military barracks in Santiago de Cuba in an attack in 1953. He was captured, released and went into exile, where he formed the revolutionary movement that included Ernesto “Che” Guevara, and which in early 1959 defeated the increasingly repressive Batista regime.

In December 1961 Fidel Castro announced that Cuba was a communist state. All the pro-government groups were formed into one party called the Integrated Revolutionary Organisations (ORI), which later became the United Party of the Cuban Socialist Revolution (PURSC) and then the Cuban Communist Party (PCC). Prime Minister Castro ruled by decree. His authoritarian style provoked opposition from some of the population, including former revolutionary supporters. In 1962 the US imposed an economic and political embargo against Cuba. It was also excluded from the Organisation of American States (OAS). Cuba developed closer relations with the Soviet Union and the Communist Eastern bloc, from where it received considerable economic support as a member of the Council for Mutual Economic Assistance (CMEA) until the end of the Cold War. The Cuban Missile Crisis in October 1962 brought Cuban-US relations to the brink of war and led to further ostracisation of Cuba by the international community. The OAS imposed diplomatic and commercial sanctions against Cuba in 1964.

II Economic Developments

A. 1989-1993: post-Cold War developments

Following the collapse of the Soviet Union and its system of economically dependent satellite states, Moscow's subvention to Cuba ended and Cuba has been forced to sell and buy products on the world market. Until 1989 Cuba had a captive market for its products, with high prices for sugar, trade guarantees, preferential financing and aid from the Communist bloc COMECON countries. Initially the collapse of Communism in Europe meant the disappearance of around 85 per cent of Cuba's overseas markets and half of its hard currency revenues.¹ As a consequence, the Cuban economy suffered severe dislocation. GDP fell by a third between 1989 and 1993.² By 1992 its trade with former socialist countries was only 7 per cent of its previous levels.³

By 1993 reports appeared describing rationing as being more severe than in Britain during the Second World War. Without initiating political change, the Castro regime has since introduced some economic reforms that have sought to reverse this decline and have helped the Cuban economy to recover. The economic changes include greater freedoms for private enterprise and attempts to attract foreign (except US) investment into Cuba. In the second half of 1993, the Cuban government began to seek private foreign investment, permitting private and co-operative farms and allowing Cubans to own and use foreign currency. The decriminalisation of the holding of foreign currency by Cubans⁴ allowed extra hard currency revenue for the first time. As a result there was tacit acceptance by the government of foreign currency transactions and dual pricing in dollars and Cuban pesos. The official dollar-peso exchange rate had been set at 1:1 since the revolution. The new and informal (but legal) foreign currency market produced a different exchange rate. Whenever possible Cubans preferred to hold dollars. This "dollarisation" of the Cuban economy has benefited individuals. However, many Cubans were not convinced that the economic concessions would bring a significant improvement to the economy. In 1993 alone over three thousand Cuban "boat people" fled Cuba for the US.

At the end of 1993 President Castro announced further economic reforms, including cuts in state subsidies and the introduction of income and property taxes. In December 1993, the Cuban legislature adjourned without agreeing the package of monetary measures announced earlier and cynical US observers declared that this was the end of the "cosmetic reforms" of the Castro government.

¹ *The Times*, 16 March 1993.

² *The Financial Times*, 18 June 1996.

³ *Opinion of the Economic and Social Committee on 'Relations between the European Union and Cuba'*, OJC 56, 24 February 1997, p.91.

⁴ Law 140/93.

B. 1994-98

By March 1994 the government had called an end to the consultation period for the proposed reforms and draft proposals were put to the National Assembly on 1 May 1994. The government also began for the first time to release data on foreign companies operating in Cuba. The fiscal package presented to the legislature on 1 May 1994 was approved as a collection of "guidelines", leaving the executive free to adopt a strict adjustment package. The government increased the price of a number of goods and required payment for all services except for health and education, which remained free. The free market in agricultural produce, abolished in 1989, was reintroduced. Many of the reform moves were delayed, leading to speculation that the plans had run into internal opposition within the Communist Party. Although by mid-1994 foreign investment by banks was beginning to grow, an obstacle to reform appeared in 1995 in a move by anti-Communists in the US Congress to tighten the long-standing US embargo against Cuba.

At the end of 1995 Cuba produced its first detailed statistical report on the economy for five years, using IMF guidelines to compile the balance of payments figures instead of the old accounting system used by the Cuban government when it was part of the Soviet-led COMECON trading bloc. The report was intended to bolster confidence in Cuba's prospects for economic recovery. From January 1996 the government required Cuban citizens to pay income tax on hard currency earnings and announced a tax on boats, certain road tolls and other taxes that would be imposed on the new private sector workers. The money was needed largely to support Cuba's free and internationally acclaimed public health and education services. In early 1997 the EU's Economic and Social Committee wrote of these services:

Health care is free of charge, and even cosmetic surgery was free until a year ago. There is a doctor for every 240 people, health facilities cover rural areas, infant mortality stands at 9.4 deaths per 1000 births, life expectancy is 76 years and 95 per cent of children are vaccinated. These figures are exceptional among developing countries. The economic crisis has, however, resulted in a considerable reduction in the availability of medicines, which has hampered hospital facilities.

As far as education is concerned, 94 per cent of Cubans can read and write, 50 per cent have completed secondary school education, 20 per cent have vocational qualifications and 10 per cent have a university degree. Cuban society is thus one of the best educated in the developing world.⁵

The sugar industry was opened up to foreign investment in 1997 and in August that year a joint venture with Spain was announced to produce sugar cane-based spirits in the province of Cienfuegos. The new company, *Alfisca*, was the first in the sugar industry to be established under the foreign investment law promulgated in 1995. The sugar harvest in

⁵ OJC 56, 24 February 1997, p.92.

1997 fell by around 4-5 per cent from 1996 and the external debt was high, at around US\$11 billion. The Vice-President of the Congress, Carlos Lage, predicted that the sugar harvest in 1998 would be between 3.1 million and 3.2 million tonnes, the lowest for fifty years.⁶

At the 1997 Party Congress Mr Lage, warned that greater efficiency in the state sector would mean cuts in public spending and more rationalisation of the labour market. More private initiatives would also be encouraged. The sugar industry would be modernised, with the closure of some mills, the opening up of others to foreign investment in related industries such as animal feed and rum, and the sugar workers retrained for other jobs. In 1996 tourism had replaced sugar as Cuba's biggest foreign exchange earner and tourism was promoted as a priority area for growth. Nickel, seafood and cigars were also cited as promising industries. With foreign interest in developing offshore oil fields, Mr Lage singled out the energy sector for modernisation, and the taxation, foreign trade and banking systems were earmarked for further reforms.

III Political Developments

A. 1997 Party Congress

At the Fifth PCC Party Congress in October 1997 Fidel Castro was re-elected as First Secretary of the Communist Party and his younger brother Raúl, the Defence Minister, as Second Secretary. A smaller politburo was elected, comprising 24 instead of 26 members, and some of the "old guard" communists retired, leaving fewer members of Castro's generation in the politburo and more than half of its membership under 50. A slimmed down Central Committee (reduced from 225 to 150), which supervises the Communist Party's work, was elected at the Congress.

Towards the end of 1997, as reports were emerging of the failing health of President Castro, his younger brother Raúl began to assume a higher political profile. Although Fidel Castro has not announced his retirement, Raúl has been formally designated by the President as his successor as Communist Party leader. Various military appointments were made to the governing bureaucracy, including that of a general as minister for the sugar industry.⁷ This appointment brought to ten the number of active service and retired military officers in senior government and state posts.⁸ The *LAWR* noted:

The military have been notably successful in introducing new management techniques into the businesses they control, while their discipline and efficiency

⁶ *LAWR-CCAR*, 16 June 1998.

⁷ General Ulises Rosales del Toro.

⁸ The others are: defence, interior, transport, communications, fisheries, merchant marines, higher education, civil aviation, public prosecutor's department.

have made a good impression during the past eight years of recession and hardship.⁹

B. National and Provincial Elections

On 11 January 1998 Cubans voted to elect 601 deputies to the National Assembly of People's Power and 1,192 delegates to provincial assemblies for a five-year term. The turnout reported to be around 98 per cent,¹⁰

The National Assembly of People's Power is the supreme organ of state and the sole legislative authority in Cuba. It elects the Council of State, the highest representative of the State, and its president is the Head of State and of Government. This has been President Castro since the present legislative structures were set up under the 1976 Constitution (although Fidel Castro has been Cuba's Head of State since 1959).¹¹ The Assembly has only been elected by direct vote since February 1993, following constitutional amendments in 1992, although only candidates nominated by the PCC are allowed to contest the elections. The PCC is still the only authorised political party, although there are various dissident groups which operate in Cuba but which cannot participate in elections to the Assembly. These include the *Concertación Democrática de Cuba* (CDF), an alliance formed in 1991 which campaigns for political pluralism and economic reform, and the *Partido pro-Derechos Humanos*, founded in 1988 to protect human rights in Cuba. The abstention rate in the 1993 elections was reported to be only 1.2 per cent with 87.3 per cent of the electorate casting a "unified" ballot, that is to say, a vote for the whole list of candidates. When the final results of the 1998 elections were announced on 13 January, Cuba's *Radio Rebelde* commented:

Another singular aspect of these elections is that 94.39 per cent of the voters who correctly cast their votes, cast a united vote, which underlines popular support for the principles of Cuba's democratic system. In issuing this final report, the National Electoral Commission reported that the 601 deputies were elected with a very high number of votes, which validated their election. Fidel and Raul Castro were elected with more than 99 per cent of the votes.¹²

⁹ LAWR-CCAR, 2 December 1997.

¹⁰ *BBC Summary of World Broadcasts*, Part 5, excerpt from Cuban television, 12 January 1998, and *Radio Rebelde*, 13 January 1998.

¹¹ Dr Castro has several positions of supreme authority: President of the Council of State, President of the Council of Ministers, First Secretary of the Cuban Communist Party and Head of the Revolutionary Armed Forces.

¹² *BBC Summary of World Broadcasts*, Part 5, 15 January 1998.

C. The Pope's Visit

Pope John Paul II visited Cuba for the first time from 21-25 January 1998, adding a powerful moral dimension to the political and economic arguments concerning both the Cuban government and the US trade embargo.

In 1962 President Castro had designated Cuba as a communist and atheist state, and professing Catholics were punished, or at the very least, discriminated against. After 1959 hundreds of Catholic priests were expelled and many churches closed, with the number of Catholic priests reduced from some 870 to 200. In recent years, however, the church has been given more freedom and open worship has been allowed. In 1991 discrimination based on religion was abolished and believers were allowed to join the Cuban Communist Party. Reports vary as to the state of Christianity in Cuba today. Around four million Cubans have been baptised and an estimated half a million are practising Christians. As well as Catholicism, a number of Protestant denominations have emerged, and many Cubans believe in Afro-Cuban creeds such as Santeria and Abakua (similar to the voodoo practised in Haiti), some of which have blended with traditional Catholicism to produce a hybrid personal creed.

Many commentators, in particular the US-based anti-Castro Cuban exile groups, were cynical about the government's motives in welcoming the Pope to Cuba. The Pope was welcomed to Cuba with a massive show of support from the population. In his welcoming address to the Pope, President Castro compared the holocaust in Europe with the "holocaust" suffered by Cubans under colonial rule. He described what he called "another genocide", referring implicitly to the US embargo and comparing the suffering of Cubans with that of the non-apostates of ancient Rome:

... another genocide is being attempted, by trying to use hunger, disease and total economic asphyxiation, on a people who refuse to yield to the dictates and the orders of the most powerful economic, political and military power in history, a country much more powerful than the ancient Rome that for centuries took to the beasts to be devoured those who refused to disavow their faith.¹³

The Pope called for family values to be upheld and for human rights to be protected, and asked the Cuban government to release all political prisoners. He also condemned economic embargoes "because they hurt the most needy" and warned Cuban youth against "idealizing foreign values, letting themselves be lured by unbridled materialism, losing their own roots and wishing to escape..."¹⁴

Elizardo Sanchez Santacruz, a leading activist in the illegal opposition *Commission for Human Rights and National Reconciliation*, welcomed the Pope's request for the release of political prisoners, and there were rumours of a special list of political prisoners for whom

¹³ *BBC Summary of World Broadcasts*, Part 5, 23 January 1998.

¹⁴ *BBC SWB*, Part 5, 26 January 1998, extract from *Prensa Latina news agency*, Havana, 23 January 1998.

the Pope had interceded personally. In his farewell address the Pope said that “no nation can live in isolation”. He continued:

Therefore, the Cuban people cannot be deprived of their ties with other people, ties which are necessary for economic, social and cultural development, particularly when imposed isolation indiscriminately affects the people, worsening difficulties for the weakest in basic aspects, such as food, health and education. Everyone can and should take specific steps to bring about a change in this regard.¹⁵

The Cuban government responded to the Pope’s appeal for greater individual and political freedom by granting some concessions. In advance of the Pope’s visit, President Castro had declared Christmas a public holiday and allowed the country’s Roman Catholic Cardinal, Jaime Ortega, to address the people on television. In mid-February 1998, Fidel Castro announced the release of some 200 prisoners in an “act of clemency and good will to commemorate the visit”, although those released were not the 500 or so political prisoners believed to be held in Cuban gaols.

Cuba might have hoped for a humanitarian gesture from the US but this was not forthcoming. However, the Pope’s plea to end the isolation of Cuba immediately gave rise to hints and even pledges from a number of countries opposed to the Cuban regime, such as Argentina, Guatemala and Spain, that they would resume diplomatic relations with Cuba. This was interpreted by the Cuban government as an indication that the isolationist policy of the US government was “deeply in crisis”.¹⁶ Only four members of the OAS still do not have full diplomatic relations with Cuba: the US, Costa Rica, Honduras and El Salvador. The Canadian government, a longstanding critic of the US embargo, quickly stepped up its links with Cuba and received Carlos Lage shortly after the Pope’s visit for talks on economic agreements between the two countries.

Many non-Cuban press reports on the Pope’s visit commented on the incongruous combination of Marxism and Catholicism demonstrated by the images of Che Guevara and Christ which dominated Revolution Square in Havana. However, the same reports also acknowledged that there was no incongruity about the statesmanship of Fidel Castro on this occasion. The *Irish Times* commented that his demeanour during the Pope’s visit would:

... do a great deal to enhance his standing internationally. He has allowed some of the most trenchantly anti-Communist statements imaginable to be broadcast on state-controlled television. He has encouraged the Cuban people to attend the religious ceremonies associated with the visit. Many of those who did attend felt able to cry out for freedom in Dr Castro's presence.¹⁷

¹⁵ *BBC SWB*, Part 5, 27 January 1998, excerpt from *Cuba Vision*, 25 January 1998.

¹⁶ *BBC SWB*, 27 January 1998.

¹⁷ *Irish Times*, 26 January 1998.

IV Human Rights

The Pope's visit has generally been assessed in the context of Cuba's human rights record. The Cuban government has been criticised by the EU, western governments and international human rights organisations such as Amnesty International and Americas Watch for its repression of political dissidents and lack of democracy. Amnesty International drew attention in its 1998 annual report (covering 1997) to the hundreds of political prisoners and prisoners of conscience, to dissidents (including independent journalists and groups working in the areas of civil and political rights) who had suffered short-term detention, harassment and ill-treatment, "in some cases amounting to torture", and to prison conditions that "sometimes constituted cruel, inhuman or degrading treatment". The death penalty is still the maximum punishment for a wide range of crimes, although there have been no reported executions recently. The Cuban government has continued to restrict the monitoring of human rights and to refuse access to the United Nations Special Reporter on Cuba. In November 1997 the UN Committee against Torture expressed concern that torture was not established as a specific crime in Cuba, as required under the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, in spite of a revision of the penal code in August 1997.

Washington has made human rights improvements a condition for any lifting or partial lifting of the economic embargo. The Helms-Burton Act, which is described in detail later, requires a transition government to be in power that does not include Fidel or Raúl Castro, regardless of any democratic support they may have, before it will be rescinded. President Castro has made some efforts to improve the country's human rights record and recent reports have been more optimistic of change. The Pope's visit in January 1998 has been seen as a major influence in recent moves to improve human rights, such as the release of a number of prisoners from Cuban gaols. Elizardo Santacruz noted that in the last three years the number of arrests related to freedom of expression has fallen, but that there are still some 300 prisoners arrested "for expressing and defending their ideas to attain democratic change" in Cuba.¹⁸

The United Nations Commission on Human Rights has condemned Cuba's human rights record in Resolutions over a number of years, but on 21 April 1998, for the first time in seven years, the latest US-sponsored motion condemning Cuba for human rights violations and the persecution of political dissidents was rejected by 19 votes to 16. Most Latin American countries abstained, with Argentina joining the US, Japan, Canada and European countries in the censure motion. Cuba was supported by many developing countries in Africa and Asia, as well as China, Russia, India and South Africa. This defeat was seen by the Cuban government as a diplomatic triumph for Havana, but western governments will no doubt continue to press Cuba to implement more democratic reforms.

¹⁸ BBC *Summary of World Broadcasts*, 24 November 1998.

In February 1998 a UK Presidency declaration from the EU was delivered to the Cuban government supporting the calls by Pope John Paul II for the release of political prisoners.

The EU expresses its appreciation for the welcome extended by Cuba to Pope John Paul and views this as a positive step in the development of religious freedom there. The Union also welcomes the Cuban government's decision to release immediately a certain number of prisoners in response to an appeal by the Pontiff. It urges the authorities to liberate and fully reintegrate into society all those who have been imprisoned because of the peaceful expression of their political views, including the four leading members of the Internal Dissidence Working Group. The Union considers both the visit and the release of prisoners as positive steps towards greater religious and civic freedom in Cuba, and looks for this process to continue. ¹⁹

¹⁹ *Agence Europe* No. 7168, 26 February 1998.

V Cuba's Foreign Relations

A. US-Cuban Trade Relations

1. Historical Perspective

Following the overthrow of the Batista regime, the United States recognised the government of Fidel Castro on 7 January 1959. In 1960, the US State Department advised US oil firms operating in Cuba to stop refining oil purchased from the USSR. The oil refineries in Cuba were then nationalised. President Eisenhower canceled most of the Cuban sugar quota to the US, which prior to 1960 amounted to 3 million tonnes of sugar imported into the US annually, or half the (then) Cuban sugar crop. All US property in Cuba, valued at around \$1 billion, was expropriated without compensation. First a partial, and then a total, US embargo on exports to Cuba (except for medicine and food) was imposed by the US in 1960. This was extended to foreign subsidiaries of US firms and the Cuban sugar import quota was cut to zero by the US. Vessels carrying cargo to and from Cuba were blacklisted from the carriage of US government-financed cargo.

The 1959 revolution had resulted in the emigration of a substantial section of the property owning Cuban middle class to the US. Together with other Cuban emigration since the revolution, this exodus contributed to a substantial Cuban-American population that has, in the main, sought the overthrow of the Castro regime. The 1.1 million Cuban-Americans are politically vocal and concentrated in two US states, New Jersey and Florida. The death in November 1997 of Jorge Mas Canosa, the Miami-based, anti-Castro leader of the *Cuban American National Foundation*, left the Cuban exile movement without its most charismatic and influential lobbyist. Younger generations of exiles seem to be on the whole more tolerant of the Castro regime and more aware of the humanitarian cost of the economic embargo for ordinary Cubans.

Alan Shipman²⁰ commented on US-Cuban relations compared with US relations with the former Communist bloc countries in Eastern Europe:

Heightened US hostilities towards Cuba contrast with the welcome extended to former Soviet satellites in Eastern Europe, where trade and technology curbs quickly gave way to multilateral loans and rising inward investment. The presence of ex-communists in government and expropriated assets were not serious obstacles.²¹

He attributed the different relations to Cuba's "undiminished loyalty to communism", but also noted that:

²⁰ Transition economies analyst at the Economist Intelligence Unit.

²¹ "Polishing the Long Spoon", *The World Today*, August/September 1998.

Cuba's brand of one-party democracy is no more blatant than that of China, where the US swapped isolation for 'constructive engagement' as early as 1973.

2. US use of sanctions: some earlier examples

According to a report in the *Financial Times*, "no less than two-thirds of the [world] population is covered by some form of US sanctions. These range from aid cutbacks and trade bans to crippling embargoes".²²

The use of economic sanctions against countries that expropriate US assets has been a US response on other occasions. Sanctions were used against the Chilean government of President Allende from 1970-73, against President Goulart of Brazil in 1962-4 and against Prime Minister Mossadegh of Iran in 1951-3, for example. The US has been "successful" in eight of the nine cases in which it has used sanctions against expropriation²³, Cuba being the only exception. Despite 38 years of US trade sanctions, the US has failed to resolve its dispute with Cuba.

The US used national security arguments when it tried to defend its trade sanctions against Nicaragua in 1984. Nicaragua, however, took the US to a GATT Panel under article XXIII of the Agreement, following the US government's decision to cut its sugar import quota in 1983. The challenge was successful and the GATT Panel produced a report that was critical of the US sanction. However, the worst that could have happened to the US was authorisation by the GATT Contracting Parties allowing Nicaragua to suspend its trade concessions.²⁴ The US has frequently justified its use of sanctions on national security grounds. Some critics of the US action even question whether Cuba is a security threat to the US.

3. The legal basis of US Sanctions

The authorisation for the US comprehensive economic boycott of Cuba is based primarily on the *Trading With the Enemy Act* (TWEA), which was passed in 1917.²⁵ The *International Emergency Economic Powers Act* (IEEP) was passed in 1977 to replace the TWEA, which had become essentially an unlimited power of authority for the President to exercise, at his discretion, broad powers in both the domestic and international arena, without congressional review. The TWEA is still applicable in time of war. A so-called "grandfather provision" was included in the 1977 statute that has kept it as the statutory basis for peacetime controls against certain (target) countries such as Cuba.²⁶ This provision allows the President to continue to exercise:

²² 21 July 1998.

²³ Other cases are Ethiopia, Iran, Peru, Ceylon and Egypt. See Barry Carter, *International Economic sanctions: improving the haphazard US legal regime*, 1988.

²⁴ Barry Carter, *International Economic sanctions: Improving the haphazard US legal regime*, p 137

²⁵ Barry Carter, *ibid*, p. 111 n53.

²⁶ Barry Carter, *ibid*.

the authorities conferred upon [him] by section 5(b) which were being exercised with respect to a country on July 1 1977, as a result of a national emergency declared by the President before such date.²⁷

Although in 1993 President Castro expressed his belief that the Clinton administration was “less hostile” than previous administrations,²⁸ the US Democrat President supported a continuation of the existing economic embargo against Cuba and Title XVII of the *Cuban Democracy Act 1992*, or “Torricelli Act”, which aimed to strengthen the ban. However, in October 1995, as President, Clinton authorised a relaxation of a number of restrictions on Cuba, including greater media and humanitarian contacts with the island. In the same year the House of Representatives approved the Helms-Burton Bill, which aimed to tighten the embargo further. The Senate was also quick to respond and Senator Bob Dole announced that he would set an early date for a vote on the Bill.

The Helms-Burton Act, which President Clinton signed into law in March 1996, was passed in the aftermath of the shooting down of two small aircraft in international airspace by Cuban forces in February 1996. The aircraft were flown by four US-based anti-Castro Cuban exiles who were seeking to drop supplies to Cubans defecting by sea across the straits between Cuba and Florida. US officials maintained that the shooting might have been planned and ordered by President Castro. The UN Security Council denounced the Cuban action and President Clinton announced new measures, including the suspension of charter flights to Cuba and an increase in anti-Castro radio broadcasts by exiles.

On 23 July 1996, the US House of Representatives gave final approval to the *Iran and Libya Sanctions Act 1996* (also known as ILSA), which imposes sanctions on companies which make new investments in the oil and gas fields of Libya and Iran. According to a *Financial Times* report,

The House accepted a Senate version of the legislation which was more stringent than the original House bill. It would compel the President to impose at least two sanctions from a list of options on companies investing in Iran and Libya, including export and import bans on companies, denial of US bank loans and official credit, and exclusion from US government contracts.²⁹

This legislation, like Helms-Burton, also raises questions of extraterritoriality since the restrictions also apply to companies based in countries other than the US. Its economic implications are more serious for the EU countries than the Helms-Burton Act because it is

²⁷ Further details on the history of US sanctions against Cuba are given in G.C.Hufbauer, J.J.Schott, K.A.Elliott, *Economic Sanctions Reconsidered, Supplemental Case Histories*, 1990.

²⁸ *Latin American Weekly Report*, 22 July 1993.

²⁹ *Financial Times*, 24 July 1996, “ House approves sanction law”.

aimed at countries which supply about a fifth of Europe's energy needs and especially in the case of Libya where the European oil industry has large investments.³⁰

B. Cuba's rehabilitation

Cuba's rehabilitation into the international community is still some way off. In spite of having relations with over 160 countries world wide, Havana has not been re-admitted to the OAS.³¹ At the OAS assembly in Caracas at the beginning of June 1998, only Mexico spoke in favour of allowing Cuba to join the organisation. The rest of the assembly decided that readmission should come only after more political and economic reforms had been put in place. It was also suggested that the Cuban government showed no particular desire to return to the OAS.

Cuba's efforts to join the *Latin American Integration Association* (Aladi), were more successful, however. Having been an observer of the group since 1985, the first round of meetings held in Montevideo on 26 June 1998 to discuss the Cuban request was favourable towards its eventual entry.

Cuba has been trying to become an "observer" to European Union (EU) negotiations with the African, Caribbean and Pacific (ACP) states on a new (fifth) *Lomé* Convention. In December 1996, the EU linked EU-Cuban cooperation with issues such as human rights, economic and political freedom and legislative reform. In June 1998, the EU Council of Ministers noted that Cuba had made "certain progress" towards political and economic openness, thus holding out the prospect of closer relations in the future. Cuba is to host the Ibero-American Summit in 1999.

³⁰ See *Financial Times*, 25 July 1996, "EU hits at US oil sanctions law and Politics sets tone for trade barriers". Oil groups with oil interest in Libya include Agip of Italy, Repsol of Spain, Austria's OMV, Belgium's Petrofina and Total of France. Lasmo are exploring for reserves. Only Total of France has signed a deal with Iran.

³¹ Cuba was a member until 1962, when it was expelled, largely as a result of US diplomatic pressure.

VI The Helms-Burton Act (Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996)

Under normal circumstances, bilateral trade relations are primarily the preserve of the countries concerned. The crucial issue arising from the Helms-Burton Act is that third parties are involved, as the US extends its legal reach to include the nationals of other countries in its policy against Cuba. The extra-territoriality basis of the Helms-Burton legislation is the feature that has attracted most criticism. The Act creates a situation similar to that of the Siberian pipeline controversy and the earlier *Fruehauf* case.³² In these examples the US sought to impose US law on transactions involving third parties.

A. Aims and Main Provisions of the Act³³

Section 1 of the Helms-Burton Act lists its main aims, as follows:

- (1) to assist the Cuban people in regaining their freedom and prosperity, as well as joining the community of democratic countries that are flourishing in the Western hemisphere;
- (2) to strengthen international sanctions against the Castro government;
- (3) to provide for the continued national security of the United States in the face of continuing threats from the Castro government of terrorism, theft of property from United States nationals by the Castro government, and the political manipulation by the Castro government of the desire of Cubans to escape that results in mass migration to the United States;
- (4) to encourage the holding of free and fair democratic elections in Cuba, conducted under the supervision of internationally recognised observers;
- (5) to provide a policy framework for United States support to the Cuban people in response to the formation of a transition government or a democratically elected government in Cuba; and
- (6) to protect United States nationals against confiscatory takings and the wrongful trafficking in property confiscated by the Castro regime.

³² Fruehauf-France was a French corporation with its factory and employees in France. It was 70% owned by Fruehauf, a US corporation, however. Under the Trading With the Enemy Act controls against China were extended in early 1960s. The US Treasury Department instructed the US corporation to instruct the French subsidiary to cancel a contract to sell truck trailers to China. However, a French court took the unusual step of appointing a temporary administrator to Fruehauf-France to ensure that the contract went ahead. The US Treasury declined to take the matter further.

³³ The full text of the Act can be found on the Internet website: <http://www.usia.gov/topical/econ/libertad.htm>

The main provisions of the Act are as follows:

Title I: Strengthening international sanctions against the Castro government.

- Sec 1.01 Statement of policy.
- Sec.1.02 Enforcement of the economic embargo of Cuba.
- Sec 1.03. Prohibition against indirect financing of Cuba.
- Sec 1.04. United States opposition to Cuban membership in international financial institutions.
- Sec 1.05. United States opposition to termination of the suspension of the Cuban Government from participation in the Organisation of American States.
- Sec 1.06. Assistance by the independent states of the former Soviet Union for the Cuban Government.
- Sec 1.07. Television broadcasting to Cuba.
- Sec 1.08. Reports on commerce with, and assistance to, Cuba from other foreign countries.
- Sec 1.09. Authorization of support for democratic and human rights groups and international observers.
- Sec 1.10. Importation safeguard against certain Cuban products.
- Sec 1.11. Withholding of foreign assistance from countries supporting Juragua nuclear plant in Cuba.
- Sec 1.12. Reinstitution of family remittances and travel to Cuba.
- Sec 1.13. Expulsion of criminals from Cuba.
- Sec 1.14. News bureaus in Cuba.
- Sec 1.15. Effect of Act on lawful United States Government activities.
- Sec. 1.16 Condemnation of Cuban attack on American aircraft.

Title II: Assistance to a free and independent Cuba

- Sec 2.01 Policy toward a transition government and a democratically elected government in Cuba.
- Sec 2.02. Assistance for the Cuban people.
- Sec 2.03. Coordination of assistance program; implementation and reports to Congress; reprogramming.
- Sec. 2.04. Termination of the economic embargo of Cuba.
- Sec. 2.05 Requirements and factors for determining a transition government.
- Sec. 206. Requirements for determining a democratically elected government.
- Sec 2.07 Settlement of outstanding United States claims to confiscated property in Cuba.

Title III: Protection of property rights of United States nationals

- Sec 3.01 Findings
- Sec 3.02 Liability for trafficking in confiscated property claimed by United States nationals
- Sec 3.03 Proof of ownership of claims to confiscated property.

- Sec 3.04. Exclusivity of Foreign Claims Settlement Commission certification procedure.
Sec 3.05 Limitation of actions.
Sec 3.06 Effective date.

Title IV: Exclusion of certain aliens

- Sec 4.01 Exclusion from the United States of aliens who have confiscated property of United States nationals or who traffic in such property.

B. US Justification for Helms-Burton

The following report of a speech by US Under Secretary of Commerce, Stuart Eizenstat, President Clinton's special representative for the promotion of democracy in Cuba, outlines the case for the Helms Burton Act. The speech was given to a conference on Helms Burton held in February 1997.

Freedom in Cuba is better promoted by pressuring the regime that is suppressing it than by ignoring and strengthening that regime, says Under Secretary of Commerce Stuart Eizenstat, President Clinton's special representative for the promotion of democracy in Cuba.

Political, economic, and moral pressure from the United States and its friends can hasten the end of the Castro government, but freedom can never flourish while Castro remains, Eizenstat said at a conference on the Helms-Burton law held at the Brookings Institution February 10.

Accordingly, he asserted, any move to free Cuba from international isolation while Castro remains in power can serve only to strengthen the Cuban people's chains. Anything that assists the move toward democracy is welcome, but anything that purports to do so by helping the regime as well is to be rejected, he said.

...

Eizenstat defended the special attention to the Cuban tyranny paid by every U.S. president since Castro seized power.

"Whatever one thinks about U.S. policy, one ought to at least admit that this is a regime which has been thoroughly Stalinist. It's one of the few left in the world. It is a thorough-going police state.

"There's a complete deprivation of the right to assembly, the right to free speech, the right of association, the right to organize and bargain collectively in unions, the right to be directly employed. Every one of the rights of the international conventions which have been so much a part of the post-World War II era are brutally violated every single day," declared Eizenstat.

"And this is the basic problem that we face. If Castro weren't taking that position, then the United States wouldn't have taken the position it took," he said.

Eizenstat pointed out that the Helms-Burton law did not create the embargo against Cuba. "That was created by President John Fitzgerald Kennedy, and it's been followed by other presidents since," he said.

"And so what the president tried to do and asked me to begin to commence, was a new approach. I can't tell you it will bear fruit tomorrow. But it is a new approach, it isn't a first effort at a multilateral approach. And we think that it ought to be given some time to begin to work."

Helms-Burton "clearly got the attention of a number of countries that might not have put Cuba on as high a plane on their agenda. There's no question but that Europe has long supported the concept of democracy and human rights in Cuba, but I think that Helms-Burton did get the attention of a number of companies and a number of countries and helped elevate the debate," said Eizenstat.

For this reason the controversial Title III of Helms-Burton has been an effective provision, said Eizenstat. Clinton has twice suspended for six-month periods any implementation of Title III, which allows U.S. nationals to sue foreign concerns that trade in U.S.-owned assets the Castro regime seized when it came to power.

"The president said that the waiver and suspension would continue so long as our allies continue their stepped-up efforts to democracy in Cuba. I think that's the right calibration on this issue. I think it will help continue the momentum for democratization," said Eizenstat.

"That is the best policy, and it's one that we should continue so long as we get stepped-up efforts on human rights and democracy" in Cuba from U.S. allies, he said.³⁴

C. US View on the Consistency of the Act with International Undertakings

In June 1996 the Under-Secretary of State, Joan Spero, was reported as saying that the US's use of unilateral trade sanctions against Cuba, Iran and Libya was "fully consistent with our multilateral obligations". She is also reported as saying:³⁵

I believe we have just about the best record around on supporting open trade and investment. ... But we have also made it very clear we think there are a handful

³⁴ Eizenstat says pressure on Castro hastens liberty for Cuba (Speech at Brookings conference on Helms-Burton), Bruce Carey, USIA Staff Writer, 11 February 1997.

³⁵ "US' Spero says Cuba/Iran trade sanctions 'fully compatible' with obligations": AFX News, 26 June 1996.

of very clear exceptions to our approach to open trade and investment, and those are states that do not follow international rules.

Speaking in defence of the Act, Senator Helms is reported as saying that criticism of Title III was hypocritical, especially coming from some of Washington's closest allies. He accused critics of "subsidising" the Castro regime and of condemning a US law which aimed, as it stated in its title, to restore freedom to the Cuban people. He cited Mexico and Canada in particular, accusing them of pretending not to know about Fidel Castro's poor human rights record and alleged disregard for the Cuban people. He concluded by stating:

This is no time to mince words. Those who oppose the Helms-Burton Act are more concerned about selfishly engaging in irresponsible business transactions and couldn't care less about helping establish freedom for the Cuban people.³⁶

Inconsistencies in US policy in this respect have been pointed out. For example, a European Parliament Report in 1993 on the US embargo stated that:

... the United States, for its part, challenges the principle of extra-territorial application of foreign laws and trade embargoes. Indeed, the 1969 Export Administration Act contains a specific clause – the Foreign Anti-boycott Provision – which prohibits American companies from complying with foreign boycotts. In other words, the USA rejects the embargoes of other countries but insists that its own embargoes should be enforced.³⁷

D. Potential Effects of Helms-Burton

Some of the potential effects of the legislation are outlined below.

1. Extraterritoriality

The Act extends the reach of US law and foreign policy into the jurisdictions of other countries. According to reports from US officials at the time the legislation was being approved, the Canadian mining and energy firm, Sherritt International Corporation of Toronto, was facing sanctions.³⁸ Senator Jesse Helms (Republican-North Carolina.) was reported as saying that the law had made it impossible for Mexican investors to raise the \$300 million they needed to go forward with a Cuban project, and the project had been scrapped.³⁹ He was also reported as claiming that the law had caused Mexico's giant cement company, CEMEX, to halt its operations in Cuba because its top executive was about to

³⁶ Conference on the law, sponsored by Regent University of Virginia Beach, Virginia, 9 July 1996.

³⁷ EP Report of the Committee on External Economic Relations on the embargo against Cuba and the Torricelli Act, A3-243/93/PART B, 29 July 1993.

³⁸ EUR310, 10 July 1996, US sanctions foreign firm for Cuban investments, State Department announces measures) European Wireless File 11/7/96

³⁹ "President urged to fully enforce Helms-Burton Act on Cuba" (Sen. Helms says Act discouraging foreign investment), Eric Green, USIA Staff Writer, *LAR* 9 July 1996

receive a State Department warning that he might be violating provisions of the law. The law had allegedly caused the American Express Co. to withdraw the credit of two Dutch firms that traded with Cuba and another company, Redpath Sugars, had stopped importing raw Cuban sugar because more of its customers were demanding non-Cuban sugar.

Sir Patrick Sheehy and Rupert Pennant-Rea, the former deputy-governor of the Bank of England, have been among the first British businessmen to fall foul of the Act. They are barred from the US because as directors of the Canadian company, Sherritt International Corporation, they face allegations of trafficking expropriated Cuban property. The FCO issued the following statement in response to the accusations.

Their business dealings with Cuba are entirely legitimate in the eyes of the British, Canadian and Cuban Governments. The idea that excluding them from the US will put pressure on the Cuban regime makes no sense whatsoever. It is simply a wrong-headed restriction on their freedom to travel and do business. We are taking this up vigorously with the US Administration and pressing them to rescind their decision.⁴⁰

Although current directors of Sherritt International Corporation were informed that they were barred from entering the US under the provisions of Title IV,⁴¹ it is less clear whether former directors would face the same ban, particularly since the US-EU “Understanding” of May 1998 (see below).

International businesses face a particular dilemma if the US law induces them to break their contractual undertakings with Cuban or other businesses, or even perhaps the laws of another country. The UK settled its claims over expropriated property in Cuba some years ago. A former DTI Minister, Ian Taylor, commented:

It is strange that the US should seek to compensate its own citizens by permitting them to pursue claims against the rights and assets of companies from other friendly states.⁴²

2. US inward investment

To the extent that the Act puts at risk foreign investments in the US, it may perversely reduce the attractiveness of the US as a destination of inward investment. This may be in response to the general principle that assets in the US can in some way be held to ransom.

⁴⁰ FCO statement, 11 July 1996, via the internet.

⁴¹ On 10 July 1998 the State Department sent letters to top executives and directors barring entry to the US for them and their families within 45 days from the date of the letters (source:<http://www.exportprac.com/augcorn.htm>).

⁴² Speech to Caritag Conference on Helms-Burton legislation, 2 May 1996.

3. The risk of retaliatory trade sanctions

The Act has attracted widespread criticism, not least from the EU and Canada. Some US allies, notably the EU members, have been so concerned about Titles III and IV that they have considered retaliatory trade sanctions in what they see as a defence of EU rights and interests.⁴³ This is discussed in more detail in the Section on the European Union.

E. Suspension of the date on which Title III enters into force

In July 1996 President Clinton issued the first of a series of six-month suspensions of Title III of the Act. Although formally allowing the provision (Title III) to go into effect, this temporarily suspended for six months the August 1 deadline for enforcement of Title III.⁴⁴ This was seen by some as a response to pressure from the European Union and to Cuban pledges on democratic reforms. The use of the suspension provision was bad news for US nationals wanting to take cases to the US courts, but a reprieve for Cuba, particularly its declining sugar industry, which is especially vulnerable to Helms-Burton.

President Clinton said in a statement in July 1996:

Title III allows US nationals to sue foreign companies that profit from American-owned property confiscated by the Cuban regime. The law also provides me with the authority to suspend the date on which Title III enters into force, or the date on which US nationals can bring suit, if I determine that suspension is necessary to the national interests and will expedite a transition to democracy in Cuba. I have decided to use the authority provided by Congress to maximize Title III's effectiveness in encouraging our allies to work with us to promote democracy in Cuba.

I will allow Title III to come into force. As a result, all companies doing business in Cuba are hereby on notice that by trafficking in expropriated American property, they face the prospect of lawsuits and significant liability in the United States. This will serve as a deterrent to such trafficking one of the central goals of the LIBERTAD Act.

At the same time, I am suspending the right to file suit for six months. During that period, my Administration will work to build support from the international community on a series of steps to promote democracy in Cuba. These steps include: increasing pressure on the regime to open up politically and economically; supporting forces for change on the island; withholding foreign assistance to Cuba; and promoting business practices that will help bring democracy to the Cuban workplace.

⁴³ European Council Statement, April 22, 1996 No. 23/96, EU regrets US trade legislation on Cuba, Iran and Libya.

⁴⁴ To exercise this provision, the President must notify Congress in writing 15 days before that date if he intends to suspend Title III.

At the end of that period, I will determine whether to end the suspension, in whole or in part, based upon whether others have joined us in promoting democracy in Cuba. Our allies and friends will have a strong incentive to make real progress because, with Title III in effect, liability will be established irreversibly during the suspension period and suits could be brought immediately when the suspension is lifted. And for that very same reason, foreign companies will have a strong incentive to immediately cease trafficking in expropriated property - the only sure way to avoid future lawsuits.⁴⁵

On 16 July 1996 the then British Foreign Secretary, Malcolm Rifkind, issued the following statement:

I welcome the President's suspension of the right to bring actions. This means that there will be no court proceedings this year. I am glad that the US Administration have pulled back from the brink in this way.

At the same time, I regret the President's decision not to waive provisions which threaten companies doing legitimate business in Cuba and which are inconsistent with a healthy world trade system.

We hope to use this opportunity to encourage genuine international dialogue on how to best promote democratic change in Cuba.

We will be discussing the details of today's decision with the Administration.'

On 16 January 1998 the AFX News Service⁴⁶ reported that President Clinton had signed the fourth successive six-month waiver of implementation of the sanctions provisions and the fifth was issued on 16 July 1998.

⁴⁵ Text: Clinton Statement on suspending implementation of Helms-Burton, *96071614.LAR, July 16 1996

⁴⁶ 16 Jan 98 AFX-EUROPE: Clinton extends Helms-Burton waiver for 4th time: *AFX News*

VII International Responses to the Act

A number of states have condemned the Act while at the same time acknowledging Cuba's shortcomings in the areas of human rights and democratic government. The hostile reaction to the Act was evident early on.

Helms-Burton, say its critics around the world, is nothing short of bullying. The European Union, the Organisation for Economic Co-operation and Development and the Organisation of American States, not to mention America's closest trading partners, Canada and Mexico, have or will lodge formal complaints. Even the charity Oxfam has stepped into the fray; its Canadian arm has joined with church groups to urge tourists to boycott Florida.⁴⁷

In addition to criticism from the UN, the EU, and Canada and Mexico in particular, the US has also faced a resolution passed at the Panama General Assembly of the Organisation of American States (OAS) to refer the Helms-Burton measure to a legal panel for a ruling. Of the OAS's 34 member-countries, only Dominica joined the US in opposing the resolution, which US ambassador, Harriet Babbitt, described as “diplomatic cowardice” and “interventionist.”⁴⁸ The following sections consider various responses.

A. United Kingdom

In 1996 the UK Government lodged a strongly worded diplomatic note to the US government protesting at the provisions of the Helms-Burton legislation and urged EU partners to take action both bilaterally and internationally. The UK Government of the time was prepared to consider all options, including the use of the *Protection of Trading Interests Act*. This would allow domestic companies not to comply with US legislation, as well as the possible use of entry permission procedures to bar US businessmen and women from the UK.

The present UK Government has supported EU initiatives opposing Helms-Burton and has also joined calls for democratic reform in Cuba in return for increased investment in the country. The (then) DTI Minister, Lord Clinton-Davis, described the two-stranded approach in a parliamentary exchange in the Lords:

Of course, we have not hesitated to let Cuba know of our interest in this matter [UK trade with Cuba to aid development] but, equally, we have not hesitated to let Cuba know of breaches of human rights in that country which must also be addressed. Some balance must be applied in such matters and we are seeking to

⁴⁷ *The Independent*, 17 Jul 1996, “Cuba Trade Row”.

⁴⁸ 20 Jun 96 CUBA: Law & Diplomacy: Helms-Burton row grows more bitter: OAS legal challenge enrages State department: Caribbean & Central America report, Latin American Newsletters.

do that. ... in seeking to arrive at a sensitive and proper compromise with the United States on this issue we have to apply some degree of delicacy and tact. Equally, we are letting the United States and Cuba know precisely where we stand on these matters.⁴⁹

In reply to a question in early June 1998 about UK-Cuban relations, Foreign Office Minister, Tony Lloyd, said:

We have normal diplomatic relations with Cuba and support normal trade relations in civil goods and services. The EU's Common Position on Cuba, binding on all Member States, enshrines the principle that constructive dialogue and co-operation, not isolation, is the best way to promote change to a pluralist democracy, and encourage respect for human rights, in Cuba. UK firms are encouraged to exploit the growing civil market opportunities which arise as Cuba undergoes a process of economic liberalisation. We have opened a dialogue with the Cuban Government on the issue of outstanding debt to ECGD and UK firms.⁵⁰

In a parliamentary exchange in December 1998, Mr Lloyd said, with particular reference to the meningitis vaccine being developed in Cuba:

... it has been the policy of successive Governments that constructive engagement with Cuba will be more helpful in bringing it to acceptance of basic democratic standards and human rights than the process pursued by the United States. ... we have already made many exchanges, in terms of both trade and science. A team from Imperial College will shortly make a third visit to Cuba to conduct a further assay and to follow up clinical tests in connection with the meningitis vaccine pioneered in Cuba.⁵¹

British-Cuba diplomatic and commercial links have been stepped up in recent months. FCO Under Secretary of State, Baroness Symons, visited Cuba in October 1998 for talks with the Cuban Foreign Trade Minister, Ricardo Cabrisas, and to sign an agreement on air services that will introduce direct British Airways flights between the UK and Cuba. Britain is Cuba's seventh largest trade partner.⁵² In 1997 UK exports to Cuba totalled £15m, with imports at £19.5m. In the first nine months of 1998 UK exports to Cuba amounted to £11.2m and imports £27.9m.⁵³

⁴⁹ HL Deb, 17 July 1997, c.1078.

⁵⁰ HC Deb, 5 May 1998, c.346W.

⁵¹ HC Deb, 1 December 1998, c.659.

⁵² *BBC Summary of World Broadcasts*, 13 October 1998.

⁵³ *Business Monitor*, "Overseas Trade Statistics", December 1997 and successive editions.

B. United Nations

1. Secretary-General's 1997 Report on the Embargo

A report by the UN Secretary General on the embargo in 1997⁵⁴ contained responses from governments to General Assembly Resolution 51/17, adopted in 1996, which had urged an end to the US blockade. In its reply, Cuba maintained that the US had ignored the international community, international law and the UN Charter. Summarising the effects of the Act on the Cuban economy, the Cuban representative said that the US had suspended aid to countries providing economic assistance to Cuba or which were trading with it on non-market terms, and had denied Cuba access to its nearest markets, further damaging its economy. Vessels shipping goods to Cuba were denied access to US ports for 180 days, which constituted a flagrant violation of freedom of navigation and which had increased shipping charges for three basic products by \$13.4 million in 1996. The US still banned trade between Cuba and subsidiaries of US companies based in third countries, which violated those countries' sovereignty, affected their economic interests and severely disrupted the Cuban economy. In 1996, Cuba had spent \$43.8 million more on four basic items than it would have if the embargo had not been in place.⁵⁵

According to Ricardo Alarcón,⁵⁶ the blockade had caused hundreds of millions of dollars in damage to the Cuban economy every year and had limited access to food and life-saving medicines, a practice rejected by international conventions and treaties even in time of war. The accelerating globalisation of the world economy had worsened its impact. He cited experts who had estimated that up to 1995, the embargo had cost Cuba over \$60 billion, and the figure was rising.⁵⁷ The Helms-Burton Act, in addition to establishing a “plan for the colonial absorption of Cuba and seriously working against the rights of other States”, had introduced an element which radically changed even the United States position. He maintained that Washington's new position was no longer the alleged defence of US citizens who had not been compensated when the Cuban nationalisation laws were enacted. Through Helms-Burton Washington had conferred non-existent prerogatives on people who were Cuban at the time of the nationalisations.⁵⁸

2. General Assembly Resolutions on the Embargo

The US embargo has been raised at the UN General Assembly (GA) every year for the last seven years and on each occasion the GA has adopted a resolution calling for it to be lifted. At its 37th plenary meeting on 14 October 1998 the GA voted by 157 votes to 2

⁵⁴ Document A/52/342 and Corr. 1.

⁵⁵ UN PR GA/9349, 5 November 1997.

⁵⁶ President of the Cuban National Assembly of People's Power.

⁵⁷ Some commentators have suggested that Cuba would be a high risk investment area with or without Helms-Burton, and one analyst has suggested that Cuban officials “admit that the US embargo has long been a scapegoat for hardships more correctly blamed on their own mistakes”, Alan Shipman, *World Today*, Aug/Sep. 1998.

⁵⁸ UN PR GA/9349, *ibid.*

with 12 abstentions to approve Resolution 53/320 on the "Necessity of ending the economic, commercial and financial embargo imposed by the United States of America against Cuba".⁵⁹ In 1997 the vote on a similar Resolution was 143 to 3 with 17 abstentions. The 1998 GA Resolution stated that the General Assembly:

Determined to encourage strict compliance with the purposes and principles enshrined in the Charter of the United Nations,

Reaffirming, among other principles, the sovereign equality of States, non-intervention and non-interference in their internal affairs and freedom of international trade and navigation, which are also enshrined in many international legal instruments,

Recalling the statements of the heads of State or Government at the Ibero-American Summits concerning the need to eliminate the unilateral application of economic and trade measures by one State against another that affect the free flow of international trade,

Concerned about the continued promulgation and application by Member States of laws and regulations, such as that promulgated on 12 March 1996 known as the "Helms-Burton Act", the extraterritorial effects of which affect the sovereignty of other States, the legitimate interests of entities or persons under their jurisdiction and the freedom of trade and navigation,

Taking note of declarations and resolutions of different intergovernmental forums, bodies and Governments that express the rejection by the international community and public opinion of the promulgation and application of regulations of the kind referred to above,

Recalling its resolutions 47/19 of 24 November 1992, 48/16 of 3 November 1993, 49/9 of 26 October 1994, 50/10 of 2 November 1995, 51/17 of 12 November 1996 and 52/10 of 5 November 1997,

Concerned that, since the adoption of its resolutions 47/19, 48/16, 49/9, 50/10, 51/17 and 52/10, further measures of that nature aimed at strengthening and extending the economic, commercial and financial embargo against Cuba continue to be promulgated and applied, and concerned also about the adverse effects of such measures on the Cuban people and on Cuban nationals living in other countries,

1. Takes note of the report of the Secretary-General on the implementation of resolution 52/10; 1/

⁵⁹ The US and Israel voted against and the following countries abstained: El Salvador, Estonia, Georgia, Latvia, Lithuania, Morocco, Nepal, Nicaragua, Republic of Korea, Senegal, Former Yugoslav Republic of Macedonia and Uzbekistan. In 1997 the US, Israel and Uzbekistan voted against a similar resolution.

2. Reiterates its call on all States to refrain from promulgating and applying laws and measures of the kind referred to in the preamble to the present resolution in conformity with their obligations under the Charter of the United Nations and international law, which, *inter alia*, reaffirmed the freedom of trade and navigation;
3. Once again urges States that have and continue to apply such laws and measures to take the necessary steps to repeal or invalidate them as soon as possible in accordance with their legal regime;
4. Requests the Secretary-General, in consultation with the appropriate organs and agencies of the United Nations system, to prepare a report on the implementation of the present resolution in the light of the purposes and principles of the Charter and international law and to submit it to the General Assembly at its fifty-fourth session;
5. Decides to include in the provisional agenda of its fifty-fourth session the item entitled "Necessity of ending the economic, commercial and financial embargo imposed by the United States of America against Cuba".⁶⁰

The Cuban Foreign Minister, Roberto Robaina Gonzalez, described the US measures as harassment "by the mightiest power ever," adding that the United Nations had witnessed abusive pressures, blackmail and threats to foil any Cuban motion. The US blockade had brought about innumerable shortages for 11 million people and had greatly interfered with human development in Cuba. The US had been unsuccessful, however, in toppling the Cuban revolution and inciting the people to rise against its leaders and the political and economic system it had freely chosen.⁶¹

The US representative, Peter Burleigh, defended his opposition to the resolution, maintaining that the Cuban Government had persistently "manipulated concerns expressed by the Assembly in order to claim support for its repressive and failed policies." Rather than accept what he considered to be the mistaken premise of the present resolution, the US urged nations committed to democracy and human rights to join it in a multilateral effort to promote a peaceful democratic transition in Cuba. In addition to maintaining pressure for change on the Cuban Government, the US believed that the Cuban people must be reached and that change must come from within.⁶²

The representative of Austria, Hans Peter Manz, speaking on behalf of the European Union, acknowledged the efforts made by the Cuban government towards economic integration. He emphasised that the EU's full cooperation with Cuba depended upon improvements in human rights and political freedom and that the EU deplored the detention those who had expressed their rights to freedom of expression and association

⁶⁰ A/Res/53/4, 22 October 1998.

⁶¹ UN Press Release GA/9479, 14 October 1998.

⁶² PR GA/9479, 14 October 1998.

in a non-violent manner. He urged Cuban authorities to liberate and fully integrate all prisoners of conscience into society and to move towards greater religious and civic freedom. Although the EU view was that the embargo was principally a matter between the two governments, it was “clearly opposed to the extraterritorial extension”.⁶³

The Russian representative, Yuri Isakov, said that the embargo was a “manifestation of an outdated mentality”, that it was “counterproductive and fraught with harmful humanitarian consequences” Cubans. He also reaffirmed Russia’s intention to continue normal trade and economic relations with Cuba, on the basis of mutual advantage and without discrimination.

The Assembly has asked the Secretary-General to prepare a report on the implementation of the resolution and submit it to the Assembly at its next session.

C. European Union

1. EU Policy and Action

The EU has insisted that sanctions against companies “trafficking” in expropriated property should not be made retroactive and has also objected to the extraterritorial application of Helms-Burton. EU objections do not relate to the policy objectives being pursued by the US. At the Florence European Council in June 1996 the Presidency expressed concern over the extra-territorial effects of Helms-Burton and stated:

In this respect, it asserts its right and intention to react in defence of the European Union’s interest in respect to this legislation and any other secondary boycott legislation having extra-territorial effects.⁶⁴

The EU’s initial response is summarised below:

The route that the Congress of the United States of America has decided to follow is a cause of widespread concern. The EU has clearly stated that it cannot accept the extraterritorial impact of the Cuban Liberty and Democratic Solidarity (Libertad) Act, which it believes to be not only inconsistent with basic principles of international law, but also harmful to the legitimate commercial interests of third parties. It also adversely affects US trade and investment relations with its allies.

The application of Title IV of the Act has already led to strong concern and unequivocal opposition on the part of European political and business leaders. The Transatlantic Business Dialogue established by the US administration and European Commission has already underlined that "extraterritorial application of

⁶³ *Ibid.*

⁶⁴ Presidency Conclusions, European Council, Florence, 21-22 June 1996.

unilateral sanctions creates an unacceptable burden for the international business community". In its June 21-22 meeting, the European Council asserted its right and intention to react in defence of the EU's interests in respect of this and other secondary boycott legislation. These concerns have already led to active consideration of retaliatory measures such as entry restrictions, freezing of assets, "claw back" suits in foreign courts to reclaim amounts awarded in the US, and the application of blocking statutes to prevent the application of US law.

On Title III, Congress has acknowledged its controversial nature by offering the President discretion with regard to the implementation of its provisions. Allowing lawsuits to go ahead under Title III would further damage bilateral EU US relations. The application of Title III would also go against the shared interests of the US and the EU in free trade and open investment markets. The controversy generated by this act is already affecting the operation of the multilateral trading system. The application of Title III would also jeopardise the United States reputation as one of the safest investment markets in the world.⁶⁵

The EU maintains that it shares with the US the objective of promoting democracy, economic reforms and human rights in Cuba. The issue between the US and the EU and its member governments is over the means by which this is achieved. In calling for President Clinton to waive the provisions of Title III, the Council of Ministers identified in 1996 a range of measures which could be deployed by the EU in response to the damage to the interests of EU companies resulting from the implementation of the Act. Among these were the following:

- recourse to a WTO dispute settlement panel
- changes in the procedures governing entry by representatives of US companies to EU Member States
- the use/introduction of legislation within the EU to neutralise the extraterritorial effects of the US legislation
- the establishment of a watch list of US companies filing Title III actions.
- instruction from the Council to the Committee of Permanent Representatives in Brussels to make the necessary preparations for urgent Union counter-measures and co-ordinated national actions.⁶⁶

In 1996 the EU proposed counter-measures which were adopted by the Council of Ministers in a Joint Action under Title V of the Treaty (Provisions on a Common Foreign and Security

⁶⁵ EU text of 12 July 1996, *Aide Memoire* July No. 41/96, "European Commission President Jacques Santer underlines EU's deep concern with Helms-Burton legislation to President Bill Clinton".

⁶⁶ "EU Council of Ministers spells out retaliatory measures", 15 July 1996, No. 42/96

Policy or CFSP) and in a Council Regulation on 22 November 1996.⁶⁷ On 2 December 1996 the EU also adopted a Common Position on Cuba under Title V (Article J.2 of the Treaty, CFSP) in which it set out the objective of helping Cuba in a:

process of transition to pluralist democracy and respect for human rights and fundamental freedoms, as well as a sustainable recovery and improvement in the living standards of the Cuban people.⁶⁸

The EU agreed in its Common Position to provide *ad hoc* humanitarian aid to Cuba during this process “subject to prior agreement regarding distribution” and to intensify “a constructive, result-orientated political dialogue” with Cuba with a review at the end of six months. An EU working party on human rights has also been established in Havana by European Ambassadors to Cuba in line with the requirements of the Common Position.

The difficulty of co-ordinating a common stance in the face of Helms-Burton was underlined in an article in the *Financial Times*, which reported that the UK had:

thrown into uncertainty European Union plans to retaliate against controversial US anti-Cuban legislation by threatening to veto some of the EU's proposed measures unless it is satisfied they do not infringe Britain's sovereignty.

UK officials said the Commission has agreed to a "stay of execution" on the draft EU statute until the end of this week, to [give] the UK time to study the provisions and check that they did not encroach on the rights of member states.

UK officials said that they did not want to weaken the EU's stance, but had always insisted there must be proper consultations before retaliatory measures were agreed.

Ironically the proposed EU blocking statute is closely modelled on Britain's 1981 Protection of Trading Interests Act. It would prohibit European companies from complying with provisions of Helms-Burton and entitle them to counter-sue in European courts for any damages which US courts awarded.⁶⁹

The EU set a date of 15 October 1997 for a resolution of differences with the US over the law. After six months of talks the diplomatic brinkmanship continued with a new round of negotiations which opened at the end of October 1997. The EU threatened to revive a complaint to the World Trade Organisation (WTO), which it had filed in April 1997, but which had been suspended.

⁶⁷ Joint Action “concerning measures protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom”, and Council Regulation 2271/96, OJL 309, 29 November 1996 (corrigenda. OJL 179, 8 July 1997, p.10).

⁶⁸ OJL 322, 12 December 1996.

⁶⁹ *Financial Times*, 24 July 1996, “Threat to EU stand on Helms-Burton”.

2. EU initiatives: WTO Disputes Procedure

Critics of the Act point out that it sits uneasily with the US government's commitments under the WTO. The EU agreed to initiate consultations in the WTO in response to the legislation and in the context of the newly created Transatlantic Dialogue between the EU and the US.⁷⁰

In March 1996 the US Trade Representative Mickey Kantor told a Congressional sub-committee⁷¹ that the measure was within US obligations under both WTO and the North American Free Trade Association (NAFTA), which have clauses allowing trade action to protect national security. Mr Kantor said: "Legally we're well within our obligations,"⁷² and is also reported as saying:

We maintain the right to use our trade laws - and this Administration is committed to using those laws. The Uruguay Round contains tougher dispute settlement rules, which are already serving US interests, but they are not the only tool to open foreign markets. We have used - and will continue to use - all of our trade laws to stand up for the interests of American workers and firms.⁷³

The EU decided to seek consultations with the US in the World Trade Organisation (WTO) under article XXIII of the GATT.⁷⁴ The request for consultations was the first step of the dispute settlement procedure of the WTO. It did not prejudice any action by the Member States in relation to protection of their nationals, and in particular by those already possessing "blocking" statutes.⁷⁵

WTO envoys said the European Union would raise the measure in the new body's Council on Trade in Goods, and would have support from other countries including Mexico and Canada.⁷⁶ An EU press release stated:

The [European] Council examined the Cuban Liberty and Democratic Solidarity (Libertad) Act, which was recently enacted by the United States of America.

The Council expressed its deep regret and disappointment at this legislation, which in its view is in conflict with international law and harms EU rights and interests in the trade and investment sectors. The Council invited the relevant experts to draw up all World Trade Organization (WTO) and other options

⁷⁰ Former DTI Minister, Ian Taylor, 2 May 1996, Speech to Caritag Conference on Helms-Burton Legislation.

⁷¹ "In the week starting the 8 July 1996", *Reuter Information Service Geneva*, 18 March 1996.

⁷² *Wall Street Journal*, 14 March 1996, "Cuba trade ban may anger WTO but US has reply: national security".

⁷³ "Kantor says WTO does not infringe US Sovereignty", 13 March 1996.

⁷⁴ This Article sets out the disputes procedure.

⁷⁵ Aide Memoire 12 July 1996, No. 41/96, "European Commission President Jacques Santer underlines EU's deep concern with Helms-Burton legislation to President Bill Clinton".

⁷⁶ 1996 Reuter Information Service, Geneva, 18 March 1996.

regarding EU action in defense of its rights and interests, including the possibility of countermeasures.⁷⁷

In March 1997 the WTO nominated the three panellists who would comprise the dispute panel in the EU case against Helms Burton. They were former GATT Director-General, Arthur Dunkel, Singapore's Ambassador-at-large, Tommy Koh, and New Zealand's former chief trade negotiator, Edward Woodfield. The EU Trade Commissioner, Sir Leon Brittan, emphasised that the naming of the panel was purely a procedural step and would not prevent bilateral talks from continuing with a view to achieving a negotiated settlement of the dispute. The US Undersecretary of Commerce, Stuart Eizenstat, responded by announcing that the US Administration would try to settle its differences with the EU directly but would not co-operate with the WTO panel, whose competence in a matter of US national security and foreign policy it rejected. The US intention was, failing a bilateral agreement and as in some previous cases of US sanctions, to invoke GATT Article XXI providing a "national security" waiver. Article XXI states:

Nothing in this Agreement shall be construed

(a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or

(b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests

(i) relating to fissionable materials or the materials from which they are derived;

(ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;

(iii) taken in time of war or other emergency in international relations; or

(c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.⁷⁸

Arguably article XXI is vague enough to allow varying interpretations, but critics of the Helms-Burton Act argue that the US action is a clear violation of the spirit of the clause.

⁷⁷ 22 April 1996, No. 23/96, "EU regrets US trade legislation on Cuba, Iran and Libya".

⁷⁸ General Agreement on Tariffs and Trade, 1947, Vol. IV, *Basic Instruments and Selected Texts*.

VIII The Prospects of a Resolution

Despite the brinkmanship and threats of an escalating trade dispute, by early 1997 the EU and the US had reached an accommodation, known as the “First Understanding”.

A. First Understanding between the EU and the US: Agreeing to Disagree⁷⁹

The "Understanding on Extraterritorial Legislation" was agreed between the EU and the US on 11 April 1997. This Understanding covered both the Helms-Burton and the Iran-Libya Sanctions Act (ILSA or the D'Amato-Kennedy Law). Essentially, it allowed the EU and the US to agree to disagree, while stepping up their efforts to develop agreed “Disciplines for Strengthening Investment Protection against expropriation”.⁸⁰

The EU agreed to suspend its WTO case against Helms-Burton on condition that the US committed itself to working towards neutralising the effects of both pieces of legislation on EU companies and individuals. If Helms-Burton were not repealed, which was the EU's ultimate objective, EU businesses and individuals would be exempt from the more damaging provisions of the Act by two specific interim measures:

- the continued renewal by the US President of the suspension of the right to file private lawsuits under Title III of the Act (the President issued the fifth waiver in July 1998);
- an amendment by Congress of Title IV of the Act, leading to a Presidential waiver of the provisions of this Title.

With regard to the Iran-Libya Sanctions Act, the aim of this was to encourage other countries to join the US in an attempt to isolate Iran and Libya economically, to persuade the EU to apply stricter measures against them because of their alleged support of terrorism, and to help limit their access to sophisticated weapons. The EU maintained that the steps Member States had already taken in the areas of anti-terrorism and non-proliferation fully justified the granting of a waiver.⁸¹ The EU also reserved the right to resume WTO panel procedures against Helms-Burton or to begin new procedures if measures were taken against EU companies under either Helms-Burton or ILSA.⁸²

⁷⁹ The full text of the Understanding is available at <http://www.eurunion.org/partner/index.htm>

⁸⁰ Since April 1997 the EU and the US have agreed to step up efforts to develop agreed disciplines and principles for the strengthening of investment protection bilaterally and in the context of the Multilateral Agreement on Investment (MAI) or other appropriate international fora. Under the “Disciplines for Strengthening Investment Protection”, expropriated properties would, amongst other things, be denied government commercial assistance. The text of the Understanding with respect to “Disciplines for Strengthening Investment Protection” is available on the Internet at <http://europa.eu.int/>.

⁸¹ Cuba (along with India, Pakistan and Israel) has not yet acceded to the Nuclear Non-Proliferation Treaty, and is under pressure from the international community to sign up to it.

⁸² From EU-US Factsheet 4, May 1997.

In May 1997 the European Parliament agreed a Resolution on Helms-Burton and ILSA, in which it:

Calls on the Commission to provide an annual written report on its activities at WTO level in order to ensure transparency in WTO matters;

Urges the Commission to reintroduce its case at the WTO against extraterritorial policies such as the Helms Burton and D'Amato Kennedy Acts of the United States unless Parliament receives a satisfactory answer in keeping with its declared policy;

Instructs its President to forward this resolution to the Council, the Commission, the governments and parliaments of the Member States, the Administration and Congress of the United States and the WTO.⁸³

In September 1997 the EP adopted a Resolution condemning Helms-Burton and urging the European Commission to “make sure that the rules agreed in the framework of the WTO apply to any international agreements on investment and the protection thereof, e.g. against expropriation, which should not have retroactive effects”.⁸⁴

On 19 March 1998 the US Secretary of State, Madeleine Albright, recommended to President Clinton that direct flights between the US and Cuba be resumed, that limited annual financial transfers be allowed to relatives in Cuba and that medicines be sent for humanitarian purposes. Seen as humanitarian aid, this would not put an end to the embargo, but would improve the situation for Cubans living in the US who wanted to help relatives in Cuba. Friends and relatives would be able to send a maximum of \$300 quarterly to Cuba. Direct flights would be permitted but only for specific purposes and for humanitarian cargo. The prohibition of tourist visits by Americans to Cuba would continue. These measures would return the situation between the two countries to that of 1996, before the shooting down of the two planes piloted by Cuban dissidents.

In April 1998 the EU announced that it would allow its WTO panel against Helms-Burton to lapse after the one-year suspension, but that it would revive the panel if the US took action under the law against any EU company. Under WTO rules panels can be suspended for up to a year, after which they lapse unless reactivated. Rather than restart the full WTO disputes procedure, and in view of the fact that no EU company had yet been penalised by the law, the EU Commission preferred to let the panel lapse but keep open the option of reactivating it if necessary. It was hoped that a negotiated solution to the dispute would be found and efforts to reach agreement were intensified before the EU-US summit on 18 May 1998.

⁸³ European Parliament Resolution B4-393/97 on the suspension of the WTO dispute settlement procedure as regards the Helms Burton Act, 15 May 1997.

⁸⁴ EP Minutes, *OJC 304*, 6 October 1997, pp. 116-7.

B. Second understanding between the EU-US: the May 1998 Agreement

During the UK Presidency of the EU (January–June 1998) efforts were made to develop a common position on Cuba, to improve links between the Union and Cuba and to encourage moves towards greater democracy. The Foreign Office Minister, Tony Lloyd, summed up the EU's role in this context as follows:

Under the UK Presidency, EU missions in Havana have broadened the range of areas in which they work closely together, including human rights, aid, commercial, environmental and consular matters, involving Cuban officials (where possible) and dissident groups. We are assessing the Pope's visit. We will evaluate progress in June.⁸⁵

In order to help negotiations with the US, the EU under the UK Presidency decided to allow the WTO Panel to lapse. At the EU-US summit on 18 May 1998 between President Clinton and the UK Prime Minister, representing the EU Presidency, a package of measures was agreed that taken together offered the prospect of a lasting resolution of the EU-US differences over the Helms-Burton and Iran/Libya Acts. The EU Unilateral Statement⁸⁶ outlines the various elements of the package:

First, Helms-Burton and ILSA would be addressed in one single package, allowing the effects of extraterritoriality inherent in the Acts to be considered simultaneously.

Second, the EU would be permanently exempt from the effects of Titles III and IV - the two most controversial Titles of Helms-Burton.⁸⁷

Third, until the "Disciplines for Strengthening Investment Protection" are implemented, and a waiver is granted to the EU under Title IV of the Helms-Burton Act, the EU would abide by the Understanding of April 1997.⁸⁸ Thereafter, the EU would implement the "Disciplines for Strengthening Investment Protection" and would not establish a WTO Panel against the US provided that:

⁸⁵ HC Deb, 9 March 1998, c.57W.

⁸⁶ EU Unilateral Statement, dated 18 May 1998

⁸⁷ As noted above, Title III allows US nationals to sue anybody suspected of trafficking in expropriated assets, whereas Title IV allows officers of businesses to be excluded from the US.

⁸⁸ See earlier. Implementation of the Disciplines should inhibit and deter the future acquisition of investments from any State which has expropriated or nationalised such investments in contravention of international law, and subsequent dealings in such investments.

- 1 the waiver of Title III of Helms-Burton remained in effect;
- 2 the US Government pursues with Congress the authority to grant an indefinite waiver to the EU of Title IV;
- 3 no action is taken against EU companies or individuals under the ILSA, and provided waivers under the Acts are granted;
- 4 infrastructural investment in the transport of oil and gas through Iran can be carried out without impediment; and
- 5 the EU's commitment would not apply if one of the conditions is not fulfilled or, if by the end of the President's term of office, no waiver without a specific time limit has been granted.

The EU was generally pleased with the agreement since it confirmed its stand against the use of secondary boycotts and legislation with extraterritorial effect and retroactivity. A positive signal was sent to the US when the EU Commission reviewed a number of cases of alleged expropriation by the Cuban government, details of which had been provided by the US. In a letter to Secretary of State, Madeleine Albright, Sir Leon stated that the EU was:

able to identify a number of cases where, having regard to the discriminatory provisions of Cuban law 851, it appears that the expropriations were contrary to international law.

Accordingly, in cases it is reasonable to assume that the provisions of paragraph 1.B.2 agreed between the US and the EU in the framework of the Understanding with Respect to Disciplines for the Strengthening of Investment Protection, on 18 May 1998, would be applied.

If, as the US indicates, the cases mentioned above are typical of the other expropriations, in our view, it is reasonable to assume that, if those other expropriations were reviewed as provided for under paragraph 1.B.3, this would lead to a similar result.⁸⁹

The May 1998 Understanding had to be approved unanimously by the Council of Ministers and by the US Congress. A bill to amend Helms-Burton to give the President authority to waive Title IV for countries implementing the Understanding has not yet been approved. Throughout the episode the EU was more concerned with the effects of the ILSA than Helms-Burton, not least because of the higher levels of trade and investment with Iran and Libya than with Cuba.⁹⁰

⁸⁹ EU Commission, May 18 1998

⁹⁰ The ILSA brought the US and the EU into conflict over the successful exploitation of oil and gas resources in the Caspian Basin. The EU and US set out their common position in a statement on Caspian Energy Issues, which underlined the importance of developing the Caspian Basin oil and gas resources. However, a notable exception and an area of possible future conflict is that the US continues to object to the establishment of a trans-Iranian pipeline.

For Fidel Castro the agreement on Helms-Burton was politically unacceptable and still potentially damaging to the Cuban economy, since the agreement contained the so-called “disciplines” to discourage future investment by European companies in expropriated property in Cuba. Other countries, such as Canada, Mexico and Australia are likely to seek similar exceptions from the Helms-Burton Act and ILSA. It is difficult to envisage how the US can legitimately justify exceptions for the EU alone.

Appendix 1: Summary of US Sanctions Acts

Summary of current US Acts applying sanctions against third countries investing in Cuba, Iran and Libya:

1. National Defense Authorization Act for Fiscal Year 1993, Title XVII of “Cuban Democracy Act 1992”, sections 1704 and 1706:

The requirements are consolidated in Title I of the “Cuban Liberty and Democratic Solidarity Act of 1996” (Helms-Burton, see below)

2. Cuban Liberty and Democratic Solidarity Act of 1996 (Helms-Burton)

Title I

Under this Title countries are required to comply with the USA economic and financial embargo against Cuba by *inter alia* not exporting to the US any goods or services of Cuban origin or containing materials of goods originating in Cuba either directly or through third countries, dealing in merchandise that is or has been located or transported from or through Cuba, re-exporting to the USA sugar originating in Cuba without notification by the competent national authority of the exporter or importing into the USA sugar products without assurance that those products are not products of Cuba, freezing Cuban assets, and financial dealings with Cuba.

Titles III and IV

Countries are required to terminate ‘trafficking’ in property formerly owned by US persons (including Cubans who have obtained US citizenship) and expropriated by the Cuban regime. Trafficking includes: the use, sale, transfer, control, management and other activities to the benefit of a person.

2. Iran and Libya Sanctions Act of 1996 (ILSA)

This Act requires that countries do not invest in Iran or Libya any amount greater than US\$ 40 million during a period of 12 months that directly and significantly contributes to the enhancement of Iranian or Libyan ability to develop their petroleum resources (investment covering the entering into a contract for the said development, or the guaranteeing of it, or the profiting therefrom or the purchase of a share of ownership therein). Investments under contracts existing prior to 5 August 1996 were exempted. It also required that the embargo against Libya established by UN Security Council Resolutions 748 (1992) and 883 (1993) be respected.

Table 1

EU Trade with US, Cuba, Iran and Libya*(£ millions and % change)*

		1994		1995		1996		1997	
		<i>value</i>	<i>94/93</i>	<i>value</i>	<i>95/94</i>	<i>value</i>	<i>96/95</i>	<i>value</i>	<i>97/96</i>
			<i>%</i>		<i>%</i>		<i>%</i>		<i>%</i>
Total Exports		405,169	10.4%	469,118	15.8%	501,391	6.9%	495,127	-1.2%
<i>of which to:</i>	US	80,215	12.7%	84,595	5.5%	91,776	8.5%	97,045	5.7%
	Cuba	449	18.9%	583	29.9%	634	8.8%	635	0.1%
	Iran	3,148	-33.0%	2,827	-10.2%	3,103	9.8%	3,355	8.1%
	Libya	1,671	-24.5%	1,866	11.7%	2,013	7.9%	1,907	-5.3%
Total Imports		401,191	9.6%	446,425	11.3%	466,403	4.5%	460,278	-1.3%
<i>of which from:</i>	US	77,342	9.6%	84,877	9.7%	90,464	6.6%	94,131	4.1%
	Cuba	250	21.1%	281	12.4%	320	13.9%	303	-5.4%
	Iran	4,302	-9.1%	4,456	3.6%	4,811	8.0%	3,539	-26.4%
	Libya	4,726	-2.7%	4,749	0.5%	5,662	19.2%	5,262	-7.1%
Trade Balance		3,978	<i>n.app</i>	22,692	<i>n.app</i>	34,988	<i>n.app</i>	34,849	<i>n.app</i>
<i>of which with:</i>	US	2,873	<i>n.app</i>	-282	<i>n.app</i>	1,312	<i>n.app</i>	2,915	<i>n.app</i>
	Cuba	199	<i>n.app</i>	302	<i>n.app</i>	314	<i>n.app</i>	332	<i>n.app</i>
	Iran	-1,154	<i>n.app</i>	-1,629	<i>n.app</i>	-1,709	<i>n.app</i>	-184	<i>n.app</i>
	Libya	-3,055	<i>n.app</i>	-2,883	<i>n.app</i>	-3,649	<i>n.app</i>	-3,355	<i>n.app</i>

Notes:

The following ecu=£1 exchange rates have been used:

1993 (1.2845), 1994 (1.2924), 1995 (1.2211), 1996 (1.2467) and 1997 (1.4499)

Source: Eurostat, Monthly Statistics, July 1998