

**Transatlantic Dispute Settlement:
Two-Level Games and the
Helms-Burton Act**

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Abstract

This empirical study examines the question of why the United States persisted in enacting unilateral sanctions during the 1990s, given the increasing constraints, particularly by the European Union, in trade and investment policy. It selects the Helms-Burton Act of 1996 as its case study, a bill that not only tightened the long-standing American embargo against Cuba, but also incorporated extraterritorial aspects that purported to regulate third countries' legitimate rights to trade with that island nation. The European Union was particularly disturbed by the bill's extraterritoriality, and took the decision to request a WTO Dispute Settlement Panel. Out of concern that their dispute may irreparably damage the fledgling WTO, Washington and Brussels embarked on lengthy bilateral negotiations that resulted in an accord that suspended the WTO panel. As the United States did not implement the requisite changes to Helms-Burton, the agreement remains inchoate.

This thesis argues that Helms-Burton was a particularly ill-conceived piece of legislation. It strives to understand why the United States acted in this irrational manner by opening up the 'black box' of the state to examine internal constraints on the formation of foreign policy. Putnam's two-level game provides the analytic framework within which the thesis evaluates the simultaneous responses of domestic (Level II) and international (Level I) influences. The thesis investigates the domestic American politics that led to the passage of Helms-Burton, and the intergovernmental tensions at play in the EU's decision to request a WTO panel, both Level II. It then examines the protagonists' strategies at the Level I international bargaining table, where statesmen are simultaneously constrained by what other nations will accept and by what domestic constituencies will ratify. It concludes with an analysis of how the EU successfully overcame its Level II national preferences to ratify the agreement, whilst the US defaulted. This thesis argues that Brussels' mounting of a WTO action was crucial in bringing the United States to the negotiating table and that the EU won the greater gains in these negotiations.

Acknowledgments

As a child of Holocaust survivors born in the United States, I was privileged to grow up in a home where education was paramount. My mother, who had just finished *Gymnasium* when the war broke out, always said, with bittersweet memory, that the Nazis had robbed her of her home, her parents, and her young adulthood; the only thing they could not take away was her education. My earliest memories of my father are of the gentle sweet melody he chanted as, head supported by his hand, he pored over volumes of the *Talmud* every evening. For this early appreciation of the beauty of knowledge, I am deeply grateful to my parents.

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Introduction

Research Problem

The United States passed the Helms-Burton Act on 12th March 1996, hardening the long-standing embargo against Cuba. On 5th August 1996, Washington passed the Iran-Libya Sanctions Act (ILSA), designed to deny Western technology in developing oil and gas resources to these countries. Both acts encompassed extraterritorial aspects, insofar as both sought to extend American sanctions to third countries' legitimate rights to engage in commerce and trade. This research project has chosen to focus on the Helms-Burton Act, as it was arguably a more problematic bill; ILSA targeted rogue countries that posed terrorist threats internationally, whereas Helms-Burton targeted Cuba, a poor, inconsequential country struggling under one of the last communist dictatorships in the post-Cold War world.

American foreign policy during the Cold War was overwhelmingly constrained by security concerns that relegated other interests to the back seat. Containing communism demanded multilateral cooperation and the building of strategic alliances to protect the West, sacrificing personal short-term gains for the collective good. In this respect, the US laboured single-mindedly, establishing the IMF to promote monetary cooperation, creating the NATO military alliance, financing the Marshall Plan to aid economic recovery in Europe, and promoting GATT to liberalise international trade.

The 1990s unipolar world that witnessed the rise of American unilateralism, particularly in the field of economic sanctions, represented a significant departure from US foreign policy of the previous fifty years. Samuel Huntington argues that the removal of the communist threat to the dearly-held American principles of liberty and democracy forced the US to re-define the national interest. Mighty institutions created in the Cold War were "redirected to serve narrow subnational, transnational and even nonnational purposes." American foreign policy increasingly became one of "particularism increasingly devoted to the promotion abroad of highly specific commercial and ethnic interests." Huntington quotes James Schlesinger saying that the US did not have a

coherent foreign policy, rather a "stapling together" of various objectives sought by domestic interests. (Huntington 1997: 37-48)

While not quite the isolationists of the interregnum years, Americans turned their attention inwards, preferring to focus on more immediate domestic concerns of crime, education, healthcare, and the economy. A 1998 survey by the Chicago Council on Foreign Relations found that, when asked to cite current problems facing the US, foreign policy was never mentioned; the most common response (21 percent) to identifying foreign policy issues was "don't know." Harvard's Stephen Walt links America's overwhelming preponderance to a loss of interest in foreign issues and the public perception of favourable times, as reflected in the 1994 Congress, whose "disdain for foreign affairs is almost gleeful." (Walt 2000: 65) Clinton won re-election in 1996 solely on domestic issues, providing a startling measure of American indifference to the world in his second inaugural speech, where he spoke for twenty minutes, but hardly mentioned foreign affairs at all. (Briscoe 1997)

Walt argues that America's declining interest in foreign affairs necessarily increased the influence of special interest groups. In the absence of any major threat, pandering to partisan politics and narrow interest groups ensures their support whilst not antagonising other voters. He concludes that, rather than blaming Clinton for failing to set clear foreign policy priorities, these perceived failings are attributable to Washington's "unusual international position and the political incentives this position reinforces." (Walt 2000: 66)

Finally, the 1990s witnessed an accelerated decentralisation and fragmentation along bureaucratic and institutional lines. The Founding Fathers' distrust of government led them to fashion a government designed to encourage deliberation, with separation of powers and checks and balances restricting capabilities, slowing down a government designed not to govern. The absence of any clear national threats in the 1990s encouraged a recalcitrant and fractious Congress; the President found it increasingly difficult to act purposefully and to actualise his preferences in the face of determined opposition.

Thus the 1990s were difficult and uncharted waters for American foreign policy-makers who struggled to define a new focus in the absence of a clear threat, while domestic interests took advantage of the resulting void to pursue their own agendas. This thesis argues that American domestic interests, while always a leitmotif in foreign policy decision-making, rose to prominence in the unipolar world of the 1990s. The Helms-Burton Act of 1996 encapsulated Washington's rather cavalier attitude to and carefree disregard of foreign interests in that decade.

Historical Context

The United States and Cuba have long had an ambivalent relationship. Their physical proximity, with Cuba only ninety miles from the Florida coast, has bound the two countries together in an intimate, psychologically charged love-hate association. Although attempts to buy Cuba from Spain in the nineteenth century, propelled by American visions of 'manifest destiny,' were not successful, the Republic of Cuba was born in 1902 under the American eagle, as the US implemented the Platt Amendment, under which Washington reserved the right to intervene in Cuban affairs to maintain stability. Cuba increasingly fell under American commercial and cultural hegemony; Cuban prosperity depended on American technology, capital and markets, despite American policies that discouraged anything but a sugar monoculture. Cuban elites often held dual-citizenship and sent their children to American universities; their adoption of American baseball in 1874 symbolised their affinity for 'enlightened' and modern North American culture.

By the 1950s, Cuba had the highest standard of living in Latin America after Venezuela, but suffered under the double burden of a politically corrupt regime that was culturally and economically dependent on Washington. Wealthy Americans tourists enjoyed the Cuban playground, where gambling was legal and tax laws notoriously lax. The American presence in Cuba was so blatantly associated with preserving the status quo of the propertied classes that anti-Americanism spread amongst intellectuals, nationalists, and workers. Fidel Castro rode to victory in 1959 on the romantic nationalism of the

nineteenth century to which was added a strong twentieth century anti-American component as revolutionaries were increasingly convinced that national self-determination could only be fulfilled by severing all links with the United States. Indeed, children marched daily in the streets, clad in red berets and red neckerchiefs, chanting, "*Uno, dos, tres, cuatro, Cuba sí, Yanquis no, Cuba sí, Yanquis no...*" (Eire 2003: 269)

Castro's initial liberalism attracted a degree of foreign admiration before the revolution gave way to rigid central control, censorship and large-scale nationalisation of private property. The escalating American embargo against Cuba began in the summer of 1960; American oil refineries in Cuba refused to refine Soviet oil, leading to their nationalisation and Washington reducing Cuba's sugar quota. When Washington cancelled Cuba's sugar quota, Castro expropriated all remaining American property, worth \$1 billion. The US imposed a total embargo on exports to Cuba in October 1960, followed by a ban on imports in early 1962. The entrance of a 'white knight' substantially offset the deleterious effects of a total embargo by a powerful and once-important trading partner; Moscow effectively neutralised Washington's embargo by purchasing Cuban sugar at five times the world price, and supplying Havana with heavily subsidised Soviet oil. The deepening of the Cold War and the discovery of Soviet missiles in Cuba in late 1962 intensified American antipathy, transforming Cuba into a national security threat on America's doorstep. Washington imposed a freeze on all Cuban assets under the Trading with the Enemy Act in July 1963.

The collapse of the Soviet Union in 1989 left Cuba bereft of support, and forced Castro to liberalise his command economy sufficiently to attract foreign investment. Many American policy-makers were inclined to ease Washington's hard-line Cuba policy with the end of the Cold War. Eager to open commercial links with Havana, corporate and agricultural interests lobbied for moderating the embargo. Although the Republican capture of Congress in 1994 made modification of Washington's Cuba policy difficult, there remained a palpable feeling that the Clinton administration was predisposed to slowly open the door to normalising relations with Cuba after the 1996 elections.

On the other hand, there were hard-liners, prominent among them the highly politicised Cuban-American exile community, who saw the Cuban economic distress engendered by

the loss of Soviet support as an opportunity to hammer the final nail into Castro's coffin. Senator Jesse Helms and Congressman Dan Burton introduced their bill in early 1995, intended to hasten Cuba's economic collapse by toughening the embargo. Helms-Burton faced stiff opposition in the Senate, resulting in the Senate and House passing different versions of the Act, and necessitating a conference, where all presumed the bill would languish. Castro's shooting down of two American civilian aeroplanes in early 1996, killing all four Cuban-Americans on board, propelled Helms-Burton into law.

The Helms-Burton Act

Helms-Burton extended the American embargo and put into law all existing economic sanctions against Cuba. This 'codification' of the embargo removed an important presidential prerogative, revoking his authority to lift the embargo and granting this right to Congress, which has traditionally been very sensitive to the most conservative elements in the Cuban exile community. Furthermore, the bill laid out a number of extremely strict criteria that must be met by a post-Castro Cuban government for the embargo to be suspended, including the establishment of an independent judiciary and free trade unions. Most provocatively, Helms-Burton targeted foreign companies that acquire or otherwise 'traffic' in Cuban properties that were expropriated from their American owners without compensation. Such firms could become subject to lawsuits brought by American claimants to the expropriated properties, and their executives could be denied entry visas to the United States under this extraterritorial legislation.

Having universally condemned Castro's brutality in killing civilian pilots, the international community diverted its anger from Cuba to the US. The European Union (along with Canada and Mexico) expressed dismay at the unilateral nature of the measure, particularly in view of the recent initiatives promoting consultation in matters of mutual interest.¹ Specifically, the EU argued that Helms-Burton was inconsistent with widely accepted principles of international law, contradicted WTO rules and OECD codes, and would jeopardise the reputation of the US as a safe market for foreign

¹ The New Transatlantic Agenda was signed in December 1995. (Fuller discussion in chapter 7)

investment. Furthermore, prosecuting American allies would do nothing to further the bill's stated objective of promoting democracy in Cuba. (Santer 1996b)

The European Union acted on two levels to combat the extraterritorial reach of the Helms-Burton Act. Internally, its Council of Ministers passed a 'blocking action' in October 1996 to challenge Helms-Burton: any European company cited by the United States was to ignore the charges, was prohibited from co-operating with the investigations, and could counter-claim any penalties in European courts. Externally, Brussels requested a World Trade Organisation (WTO) Dispute Settlement Panel in late 1996. Bilateral negotiations led to a suspension of the WTO action on 18th April 1997, as Washington and Brussels agreed to hold further talks to settle their differences; the United States meanwhile pledged to take no further action against European companies under the Helms-Burton.

In May 1998, the US and the EU reached a comprehensive agreement, abandoning the WTO hearing. President Clinton agreed to amend Helms-Burton so that all extraterritorial provisions would be subject to presidential discretion, further pledging not to prosecute any European companies under this legislation. Brussels agreed to exercise more caution in future investments in Cuba, to ensure that they were not expropriated American assets and to compile protocols protecting investments worldwide. The 15 member states of the EU ratified the agreement, but the US defaulted. As of 2005, Congress has not amended Helms-Burton and the EU has not implemented its investment disciplines. There is a *de facto* truce as no European entity has been prosecuted under Helms-Burton (although two British citizens remain excluded from the US), but *de jure*, the Helms-Burton episode remains unresolved.

Research question and hypothesis

Helms-Burton was problematic in manifold ways. Firstly was the substantive consideration of whether the law was likely to achieve its purpose of internationalising the embargo and toppling Castro. Why would the international community suddenly adopt Washington's embargo policy in 1996 when it had never felt inclined to do so

before? What indication did Washington have that increasing the suffering of ordinary Cubans would overturn a communist dictatorship, especially when over forty years of asphyxiation had not succeeded? Did the Washington establishment ever consider offering 'carrots' instead of 'sticks'?

Secondly, why would the US deliberately enact legislation that jeopardised significant national interests in maintaining good relations with important allies and trading partners? Surely Washington anticipated the international outcry against Helms-Burton's extraterritorial provisions? Was domestic pressure in a presidential election year so strong as to override rational legitimate international considerations?

In a wider context, Helms-Burton represented an acceleration of the 1990s trend to employ unilateral economic sanctions as a tool of foreign policy. This was disturbing, not only on a commercial level, but because it showed Washington's preference for unilateral action over engagement in multilateral institutions. Furthermore, in ignoring the reproach of the international community, the US was displaying an arrogant disregard for international law that was worryingly misplaced in an increasingly interdependent world. Why did the United States persist in enacting unilateral economic sanctions in the 1990s, given the increasing constraints, particularly by the European Union, in trade and investment policy?

Finally, how should the countries involved in commercial activities targeted by Helms-Burton have defended themselves when confronted with an onerous bill that infringed on their sovereign rights? Was the WTO the correct venue to adjudicate the dispute, and was the institution robust and mature enough to withstand the consequences of the American threat to ignore the ruling? Given the American disdain for the Panel, did the EU unnecessarily jeopardise the authority of the fledgling organisation by pursuing the case? Was the EU's WTO threat substantive or merely tactical?

These three broad areas address American domestic preferences vis-à-vis Cuba, American unilateralist tendencies, and the defensive options open to the European Union. The first two questions raise concerns over the rationality of US decision-making. Realists assume that states are rational actors; Foreign Policy Analysis (FPA) contests

this axiom and attempts to explain seemingly irrational foreign policy decisions. Realists also assume that states are unitary actors, whilst FPA opens up the 'black box' to examine relations within the decision-making apparatus, and how they affect outcomes. FPA links the micro level of domestic politics with the macro level of the international system in seeking to understand foreign policy decisions. (Light 1994: 93-94) This thesis is firmly in the FPA camp, opening the 'black box' to understand how domestic circumstances affect transactions between states, and how those transactions affect the international system.

The two central questions this thesis addresses are:

1. Why did the United States pass Helms-Burton further toughening an embargo that had little chance of success and including extraterritorial provisions that deliberately provoked disagreements with Washington's close allies?

2. How successful was the European Union's strategy of mounting a World Trade Organisation challenge in achieving European aims?

Washington's perception of Cuba policy as an extension of domestic policy begins to answer the first question. Harvard's Cuba scholar, Jorge Domínguez, argues Washington's intense preoccupation with Cuba is the modern-day incarnation of the Monroe Doctrine in the post-Cold War world. Domestic hardliners in both Cuba and the US have helped maintain the belligerent policies that characterise US-Cuban relations. (J. Domínguez 1997) Many American policy-makers could not understand why the Europeans didn't accept American leadership in its natural sphere of influence. (Noriega interview) *The Economist* understood that America's close relationship with Cuba meant that "Cuba is always domestic, not foreign policy."² Although Washington normalised relations with many former Cold War antagonists, Cuba was unique in continuing to arouse high levels of animosity from single-minded pressure groups that locked Washington into an unhealthy love-hate relationship that clouded objectivity. This thesis argues that Helms-Burton was a particularly ill-conceived and ineffective piece of legislation whose extraterritorial aspects showed alarming disregard for the

²"Survey: The Secret Life of the American Embargo – Dances with Wolves," *Economist* 338, 6th April 1996.

legitimate commercial concerns of third parties. Washington ignored significant international considerations because Helms-Burton was driven by domestic politics in a presidential election year.

With regard to the second question, the European Union sought to demonstrate resolve after repeated objections to Helms-Burton fell on deaf ears. This thesis argues that the European Union's strategic initiation of a World Trade Organisation hearing was both tactical and instrumental in bringing Washington to the negotiating table, and that it resulted in a successful challenge to American unilateralist attempts to undermine European sovereignty. It further argues that Washington and Brussels earnestly sought a compromise, as both agreed that Cuba was not worth a potentially disastrous showdown. (Roy 1997: 91)

Methodology, research design and aim

This research project explores a case study using 'qualitative' methodology, whereby inductive logic prevails as information is gleaned from actors, rather than being identified *a priori* by the researcher. Qualitative research is a discursive, comprehensive account of an event using in-depth interviews and analysis of historical materials. The research design encompasses four components: the research question, theory, data, and interpretation of the data. (King, Keohane and Verba, 1994: 4-13)

The research questions and the hypotheses have already been established. As the core questions demand both domestic and international level explanations, this thesis will combine these two levels of analysis by using Robert Putnam's two-level game metaphor. Putnam essentially argues that diplomats bargain at two levels concurrently, negotiating international agreements and seeking domestic ratification. Diplomatic strategies are constrained simultaneously by what foreign nations will accept and by what domestic constituencies will ratify. Putnam's analysis attempts to move beyond the simple acknowledgement of the effect of domestic politics on international bargaining to provide a dynamic framework within which one can analyse the simultaneous responses of domestic and international influences.

The aim of this thesis is to focus on the international negotiations and explain why the EU strategy in challenging the US at the WTO was primarily responsible for defusing the Helms-Burton dispute peaceably. Furthermore, although the EU was criticised for allowing the WTO Panel to lapse instead of forcefully pursuing its case, this thesis argues that the EU won the greater gains in this dispute with Washington. As such, this thesis justifies the EU's decision to negotiate bilaterally and conclude an agreement rather than doggedly pursue the dispute at the WTO.

This thesis will use the analytic framework of the two-level game to investigate:

- American and European domestic preferences that underpinned the passage and the reaction to Helms-Burton (Level II)
- The bilateral international bargaining that defused the dispute (Level I)
- European domestic constraints that were overcome to ratify the agreement while the US defaulted (Level II)

Academic studies of the Helms-Burton dispute have focused either on more narrow aspects of the dispute, such as legal treatises analysing extraterritoriality under international law, or economic interpretations of the investment protocols, or on a wider analysis, evaluating world-wide responses to the legislation. This thesis focuses specifically on the transatlantic dispute provoked by Helms-Burton, and proposes to use the two-level game framework to analyse the international negotiations necessitated by the European Union's WTO challenge to Helms-Burton. This approach will fill a gap in the research that should prove valuable in providing a greater understanding of the dispute by considering how domestic preferences and international pressures reverberated upon each another. This research has resonance for students of Foreign Policy Analysis and economic sanctions policy, as well as for the wider field of International Relations, and for anyone interested in gaining a better understanding of transatlantic trade relations in the 1990s.

Putnam's model demands data on the Level I international negotiations, and the Level II of both the US domestic constituency and EU national preferences. Official documents, congressional proceedings, speeches, academic journals, books and newspaper articles

were helpful but limited, as high-level negotiations take place in secret. The major research tool in accessing new data was elite interviews with policy-makers, diplomats, and interest groups on both sides of the Atlantic, many of whom disclosed confidential information, and consented to being interviewed strictly on the condition of anonymity. These elite interviews were a particularly rich source of information concerning

- the Level II interaction between the White House and Capitol Hill in enacting Helms-Burton
- the Level I talks, especially the EU's internal management of the negotiations,
- the EU's Level II ratification of the agreement.

Putnam emphasises the crucial role played by a creative chief negotiator at Level I. This research particularly benefited from interviews with the two extremely gifted Level I chief negotiators, Stuart Eizenstat for the US and Sir (now Lord) Leon Brittan for the EU, who provided valuable insights into their preferences and their respective negotiating strategies.

It is possible to glean knowledge about the world around us in social sciences, but that knowledge may be somewhat uncertain. (King et al 1994: 6) Furthermore, as a qualitative research project is necessarily interpretative, the analysis of the data can be somewhat subjective. This thesis has attempted to honestly report uncertainty and to verify the accuracy of an account through triangulation (Creswell 1994: 158) and through requesting feedback from interviewees.

Structurally, rather than consolidating all the data interpretation in one section, this thesis prefers to present the narrative and the data collection simultaneously with the data analysis. The thesis thus progresses seamlessly from the Level II American constituency supporting and opposing the Helms-Burton Act, to the Level II European constituency protesting Helms-Burton, to the Level I negotiations over resolving the impasse, and back to the domestic constituencies on both sides of the Atlantic that grappled with ratification, with interpretation and analysis following on the heels of the narrative.

The end of the Clinton Administration in 2000 is the cut-off point for this study for two reasons. Firstly, the EU's Unilateral Statement issued in conjunction with the May 1998 agreement interpreted the agreement as mandating that the EU's commitments would not apply if the US had not fulfilled its obligations by the end of Clinton's term. As the accords contained an in-built deadline for their implementation, it is reasonable to use the same time frame within which to analyse this dispute. Secondly, 9/11 re-focused the ambiguous American foreign policy of the 1990s in one devastating moment. National security became a primary national concern, as Washington struggled to shape a comprehensive response to transnational terrorism. As Washington's foreign policy emphasis has changed so completely, the decision to complete this analysis with the end of the Clinton Administration has been reinforced.

Structure of Thesis

This thesis is composed of ten chapters of more or less similar length. Chapter 1 chronicles the events leading to the passage of Helms-Burton, and examines the legislation and its implementation. Chapter 2 presents a literature review of economic sanctions, exploring how costs and multilateral cooperation affect outcomes, analysing positive and secondary sanctions, and relating all to the American sanctions against Cuba. Chapter 3 introduces Putnam's two-level game, the analytical framework upon which this thesis is built. It discusses the different levels, the centrality of win-sets and their size, and the importance of the chief negotiator before presenting some critiques on Putnam's theory.

Chapters 4-6 present the Level II American domestic constituencies interested in Helms-Burton, both those supporting and those opposing the legislation. Chapter 4 examines the drafting of Helms-Burton, the fierce debates on Capitol Hill, and the strong White House representations against the bill, followed by Clinton's hasty capitulation after the shutdown that ensured Helms-Burton's passage. It concludes with a discussion of the legal implications of extraterritoriality and rights granted to Cuban-Americans. Chapter 5 analyses the main domestic interest group that drove Helms-Burton, the Cuban-American hard-liners, exploring their influence in perpetuating Washington's harsh Cuba policy. Chapter 6 investigates the formation of business and agricultural lobby groups as

a countervailing weight to the Cuban-Americans and examines the sanctions reform legislation of the late 1990s. This chapter concludes with an analysis of Clinton's implementation of Helms-Burton in the context of the two-level game metaphor.

Chapter 7 analyses the EU's competence to conduct foreign policy, and presents the European domestic Level II constituency that demanded a defence of European rights in the face of American extraterritorial legislation. Chapter 8 investigates the Level I negotiations between Washington and Brussels, exploring the shared win-sets, and how the negotiating strategies affected the outcomes before examining the text of the agreements. Chapter 9 analyses the outcomes of the negotiations as a two-level game, focusing on the importance of an innovative negotiator in facilitating an acceptable compromise. It discusses the distribution of gains from the negotiations, and analyses whether Washington's defection could have been prevented. Chapter 10 summarises both the main and the secondary arguments of this research project before making some concluding observations.

Chapter 1

The Helms-Burton Act

"One reads about the world's desire for American leadership only in the United States,' one British diplomat observed. 'Everywhere else one reads about American arrogance and unilateralism.'" (Huntington 1999: 42)

1.1 The Shootdown

Brothers to the Rescue (BTTR) was founded in 1991 by Jose Basulto, a member of the Cuban exile community living in Miami. Its objective was to patrol the often-treacherous Straits of Florida to rescue Cubans trying to reach the American coast. It was particularly active in the summer of 1994, when more than 30,000 desperate Cubans fled the island on rafts and small boats in search of political freedom. The signing of bilateral accords in May 1995 stabilised immigration, so BTTR changed its focus from the humanitarian to the political, flying over Cuba and dropping propaganda leaflets urging Cubans to oppose the Castro regime.³ Despite formal complaints by the Cuban government to Washington, the flights continued unabated, with as many as seven in 1994-1995.

The International Civil Aviation Organisation (ICAO) report of the Cuban shootdown claimed that, following a low flight over Havana that released political leaflets on 14th July 1995, the Cuban government declared its determination to prevent further provocative flights, and warned that aircraft violating Cuban airspace may be shot down. When BTTR had the temerity to release leaflets over Cuba twice in January 1996, Cuban patience was exhausted. Havana, realising that the US government was either unwilling or unable to control the pilots, authorised its air force to intercept and shoot down if required. (ICAO 1996)

Washington chose to take almost no measures at all against BTTR, despite the fact that the Chicago Convention demands all governments ensure that aircraft flying under their

³ "EU Frames Law to Defy US Bill on Cuban Trade," International Herald Tribune, 31st June 1996.

flag comply with commonly accepted rules of aviation, such as preventing unauthorised entry into foreign airspace. Washington was conscious of numerous violations of American regulations on the part of Brothers to the Rescue, including the filing of false flight plans, yet did not revoke pilot's licences or ground planes. (W. Smith 1996a: 1-2; ICAO 1996), leading the *Independent* to charge that they operated with the tacit approval of the US government.⁴ The Federal Aviation Administration (FAA) claimed to have suspended the license of a BTTR pilot in 1994 and sought to suspend Basulto's pilot's license for 120 days for violating Cuban airspace in August 1995. However, the case was appealed, and Basulto retained his license, piloting the only plane to return safely on that fateful morning.⁵ (Phillips 1996) *The Washington Post* reported that the issue of American flights over Cuba had been the topic of diplomatic concern for months, with US officials conceding that Cuba's "legitimate rights" were being violated. (Graham 1996)

As Cuba knew of Basulto's earlier ties to the CIA, Washington's failure to curb sorties by BTTR provoked great suspicion in Havana. The fact that BTTR were able to operate almost with impunity suggested that an official operation might soon be mounted against Cuba. Misgiving was further aroused when Basulto was interviewed in January on Radio Martí,⁶ where he readily acknowledged that he had flown over Cuba and cavalierly suggested that he may well do so again. The following day, the radio commentator taunted the Cuban air force, implying that the economic crisis had led to such a deterioration of the military's capability that they could not respond to the incursions of BTTR. Cuba interpreted these irresponsible comments made on an official American radio programme as a dare. (W. Smith 1996a: 2)

On the morning of February 24, 1996 three Cessnas operated by Brothers to the Rescue set off from Miami towards Cuba. Provoked again, Castro fired at the offending aircraft, shooting down two of the planes, and killing all four Cuban-Americans on board. Although Washington claimed the planes were over international waters when hit, it did acknowledge that at least one of the planes, and possibly all three, had penetrated Cuban

⁴ "Keeping Calm over Cuba," *Independent* Editorial, 28th February 1996.

⁵ The FAA belatedly announced strict emergency measures against pilots violating Cuban airspace, including immediate forfeiture of both of license and aircraft, on 8th March.

⁶ Radio Martí and TV Martí are financed and operated by the United States Information Agency.

airspace earlier. Cuba disputed this account, claiming they had the wreckage to prove the planes were violating Cuban airspace when shot down. Moreover, Havana air control had warned the planes that they were entering Cuban airspace, but Basulto boldly replied that they knew where they were, and would continue regardless. (Ibid: 1)

The ICAO report could not "reconcile" the different accounts of the US and Cuba over the planes' position, but it did note that international law demands that states refrain from using weapons against civilian aircraft, irrespective of whether airspace has been violated. (ICAO 1996)

What were Castro's motives? Castro's hard-liners argued that the US would never respond to goodwill gestures from Cuba and indeed, would not relax the embargo while Castro remained in office. Many in Castro's ruling elite were frightened that significant improvements in civil rights of ordinary citizens would compromise their political control. Although the Cuban military was principally responsible for the economic reforms of 1993-4, this institution was wary of concomitant political reform. Finally, there were elements in the Cuban power structure that valued the American embargo as a scapegoat for all manner of economic ills, and feared that its removal, with a resulting influx of Americans to the island, would pose a greater threat than the continuing embargo. (Gunn 1997: 87) These considerations led Castro to conclude that he had nothing to lose, and even stood to gain, by provoking Washington into tightening the embargo.

1.1.1 Mobilising Incident

American officials condemned the shootdown as a blatant violation of the Chicago Convention on International Airways, which prohibits attacks against civilian aircraft under any circumstances. The Convention demands radio or visual communication, such as the tipping of wings, to warn civilian aircraft and escort them back into international airspace, none of which Castro did. (White House 1996a) The American authorities said nothing about previous penetrations by Brothers to the Rescue of Cuban airspace; the impression given was that the aeroplanes had been on a humanitarian mission, and that the Cuban action had come entirely without warning.

The international community universally condemned the Cuban shooting down of two planes. The United Nations Security Council "strongly deplored" Cuba's actions, disappointing US Ambassador Madeleine Albright, who had sought stronger language censuring Cuba.⁷ The European Union had been considering an economic agreement with Cuba that would have led to closer trade and investment ties, conditioned on political liberalisation. These negotiations were put on hold as a direct consequence of Castro's action.

Initially, President Clinton acted cautiously, announcing restrictions on travel for Cuban diplomats and cancelling all charter flights between Miami and Havana.⁸ (Clinton 1996a) The international media praised Clinton for "talking tough but wielding a very small stick" in rejecting calls for a military strike, not recalling American diplomats from Havana,⁹ not blocking dollar remittances sent by Cuban-Americans to family members on the island, and not cutting phone services. (Dunne and Fletcher 1996)

But the fallout from the shootdown created a "mobilising incident...an event that lifts some political constraints blocking action" as Helms-Burton was propelled from the back burner to enacted legislation in weeks. (J. Domínguez 1997: 61-63) In the outrage that swept the US over Castro's brutality, Congress swiftly passed the Helms-Burton Act, leaving President Clinton little choice but to sign the legislation intended to deny Castro the foreign investment that had become his regime's economic lifeline. Clinton could hardly ignore the Florida primary, with its strong Cuban-American community calling for a military response, which was only two weeks away.

1.2 The United States Embargo before Libertad

When Fidel Castro's revolution gained power on 1st January 1959, the US had substantial private investment in Cuba, totalling about \$2 billion. Castro's initial liberalism soon

⁷ "US Makes the Best of UN's Softer Denunciation of Cuban Downing," *International Herald Tribune*, 28th February 1996, p. 3.

⁸ This inconvenienced Americans more than it punished Cuba, for one could still fly to Havana, but only via a third country.

⁹ *Independent* Editorial, *Op. cit.* footnote 4.

dissipated as he began consolidating a Marxist police state, nationalising private property and supporting revolutions abroad. The US sought to isolate Cuba through a series of escalating trade embargos, culminating in the 1963 comprehensive embargo imposed by the Cuban Assets Control Regulations, under Washington's Trading with the Enemy Act. All Cuban assets in the US were frozen, and American citizens were prohibited from engaging in any commercial or financial transactions with Cuba. Travel was forbidden, as was sending money to relatives in Cuba, though clandestine remittances were sent before legalisation in the 1990s. Criminal penalties for violations were severe; up to ten years prison sentence and \$1 million in corporate fines. (Treasury 1963) This embargo had limited extraterritorial effect, principally because its application was restricted to American businesses and individuals and foreign businesses owned or controlled by American companies. Serious negotiations over compensating Americans for property expropriated by the revolution have never been held; Castro has offered limited compensation, but this is complicated by counterclaims for damage to the Cuban economy caused by the American embargo.¹⁰ (Roy 2000a: 63)

Since 1965 the United States has maintained a list of claims by American nationals against Castro's Cuba, arising out of the expropriations that occurred after 1st January 1959. These claims have been 'certified' by the United States Foreign Claims Settlement Commission, which means that there has been a pre-settlement adjudication of the claims by the United States. These certified claims would be included in any compensation negotiations with the Cuban government. There were 5,911 claims with a value of almost \$2 billion certified through this process by 1970. The Cuban government argues that the cost of the American sanctions, which it estimates at \$67 billion, must be offset against any American property claims. (Askari et al 158)

Castro benefited from intensive Soviet subsidies worth about \$6 billion a year, with 85 per cent of Cuban trade with the Soviet Bloc in 1988; this largely offset the deleterious effects of the American embargo. The collapse of communism in 1990 led to a sharp contraction in the Cuban economy. GDP declined by almost 50 per cent by 1993;

¹⁰ Cuba has compensated other countries whose assets were seized, among them Mexico, Italy, France, Switzerland and Britain. See Anita Snow, "Cuba: Long-Ignored Property Claims at Center of US-Cuba Debate" Associated Press 24th August 1996.

particularly hard hit were the foreign exchange earning sugar and nickel industries, suffering largely due the inability to import the fertilizer and fuel crucial to sustaining them. (Lisio 1996: 696) This crisis ushered in the 'Special Period', in which Castro undertook drastic economic reforms, entailing austerity measures internally, and incentives to attract foreign investors, particularly in tourism, leading to 110 joint ventures by 1993. Continuing hardship brought further reforms - legalising dollars, allowing full ownership by foreigners, and extending opportunities for self-employment.

The economic deprivation suffered by their brethren propelled Cuban-Americans to send ever larger remittances to relatives at home; estimates range to over \$1 billion by 1999. By 2003, Cuba had (quite successfully) made the transition from a highly centralised economy to a form of state capitalism, with state-owned industries increasingly decentralised, and more than 300 investment projects planned jointly by foreign investors and the government. The cost, however, has been the erosion of social equality, as there exists a two-tier society: the privileged with access to dollars and 'dollar stores', and those who are paid in pesos.¹¹ Paradoxically, the educated elite, such as doctors and professors, struggle in pesos, while chambermaids and waiters work in the dollar economy. Cuba's faltering economy is mainly a result of an inefficient centralised system, and a continuing reliance on a monocrop that places it at the mercy of the vagaries of weather and world commodity prices, rather than a direct outcome of the American embargo. (Askari et al 111-151)

In order to attract foreign investors in the 1990s, Castro staged an international fire sale of the properties he had confiscated in the 1960s. For example, Cuban government brochures advertised properties like the "Hermanos Díaz" petroleum refinery in Santiago de Cuba. The brochure highlighted the American technology, but failed to disclose that the refinery had been confiscated from Texaco in July 1960 (Sánchez 1995: 127). In 1991 and again in 1993, in reaction to the increasing foreign investment in Cuba, American embassies warned foreign companies against investing in Cuban properties subject to certified claims by American nationals.

¹¹ Castro abruptly announced an end to the dollar economy in October 2004. See David Adams, "Castro Bans the Dollar in Response to American Sanctions," *The Times*, October 27, 2004, p. 16.

In anticipation of Castro's imminent demise with the worldwide collapse of communism, the US strengthened and expanded the scope of the primary embargo through a series of new regulations in the 1990s. These moves were largely supported by Cuban-American exiles, who dreamed of returning to a post-Castro Cuba paradise, by certain American companies who had much to gain by Castro's fall,¹² and by a conservative, anti-Castro Congress. For example, in October 1991 Washington reduced the dollar amount of remittances that could be shipped to close relatives in Cuba. In April 1992 the US prohibited the entry into American ports of vessels engaged in trade with Cuba. In October 1992, President Bush signed the Cuban Democracy Act of 1992, which prohibited foreign subsidiaries of American companies from doing business in Cuba and barred foreign vessels that transported goods or passengers to or from Cuba from American ports for six months.

Senator Jesse Helms (R/NC) and Congressman Dan Burton, (R/IN) introduced their bill to harden the Cuban embargo in February 1995. Heated opposition forced Senator Helms to delete the more controversial provisions of the legislation, resulting in the Senate and House approving different versions of the bill in autumn 1995. The bill proceeded to a conference committee to reconcile the differences, but most lawmakers assumed the legislation would simply fade away.

Support for increasing pressure on Castro was far from universal in the US. Corporate America lobbied President Clinton and key congressional leaders for further modification of the Cuban embargo as some restrictions on travel and telecommunications were eased. Many American firms undertook 'goodwill' missions to Cuba to explore possible future investments pending the removal of the embargo. (Falk 1996) The Republican sweep of Capitol Hill in 1994 made it difficult for Clinton to launch any new Cuba initiatives, but there was a feeling that his Administration would begin to normalise relations after the 1996 presidential elections. (Brenner and Kornbluh 1995: 39)

Then Castro shot down two civilian Cuban-American aircraft on 24th February 1996. Libertad's conference report was significantly harder on Castro than either of the

¹² For example, Bacardí Rum Corporation, which sought to recover nationalised sugar properties.

previous House or Senate bills. Despite Clinton's well-documented reservations over the bill, the White House and Capitol Hill reached a speedy compromise in late February, as all sides wanted to avoid a pitched legislative battle and present a unified front to Castro. The only concession granted to the President was limited authority to suspend the right of Americans to file suit in US courts against foreign businesses that 'trafficked' in expropriated American assets.

Congress passed the Cuban Liberty and Democratic Solidarity Act by overwhelming majorities - 74 to 22 on 5th March in the Senate and 336 to 86 on 6th March in the House. President Bill Clinton enthusiastically signed Helms-Burton into law on 12th March 1996, making it Public Law 104-114; while Clinton could have continued to express reservations, he had little room for manoeuvre, as he was "boxed in by Cuba's confrontational tactics and domestic political realities." (Doherty 1996a)

1.3 Text of the Helms-Burton Act

1.3.1 Purposes

The Cuban Liberty and Democratic Solidarity Act (Libertad) stated as its purpose:

- to assist the Cuban people in regaining their freedom and prosperity, as well as in joining the community of democratic countries that are flourishing in the Western Hemisphere;
- to strengthen international sanctions against the Castro government;
- 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;
- to encourage the holding of free and fair democratic elections in Cuba, conducted under the supervision of internationally recognized observers;
- 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
- to protect United States nationals against confiscatory takings and the wrongful trafficking in property confiscated by the Castro regime. (PL104-114, §3)

Three of these six purposes detailed American assistance and support for the return of democracy in Cuba, giving the impression of sincere motives behind the legislation. In fact, the bulk of the legislation was devoted to extending and strengthening the embargo against Cuba, and to protecting the property rights of American nationals.

The third stated purpose of the Act implied that Cuba presented a continuing 'national security' threat to the United States. Cuba had posed a significant threat to the US during the Cold War, particularly when Russian missiles were stationed a mere ninety miles from the Florida coast during the Cuban Missile Crisis of 1962. Cuba was also a force for destabilisation in the Western Hemisphere with its promotion of revolution. However, Cuba of the 1990s was a weak and impoverished nation; a 1995 Pentagon report confirmed that Cuba no longer posed a military threat to the US. When challenged that Helms-Burton violated fair trade regulations of NAFTA and the WTO, Washington responded that Helms-Burton was not a trade issue, but rather an issue of national security; perhaps Washington was preparing to defend Helms-Burton from its inception on the national security escape clause of those multilateral institutions.

The actual body of the Helms-Burton Act consisted of four 'titles'. Title I contained the greatest detail, dealing with the extension of sanctions against Cuba. Title II focused on the transition to democracy in Cuba. Titles III and IV dealt extraterritorially with property rights.

1.3.2 Title I: Strengthening International Sanctions against the Castro Government

Congress found that the "acts of the Castro government, including its massive, systematic, and extraordinary violations of human rights, were a threat to international peace" (§101/1). Therefore, the US intended to seek an international embargo against Cuba in the UN's Security Council. (§101/2).

Perhaps the most significant section of Title I was the 'codification' of the embargo on Cuba:

"Codification of Economic Embargo: The economic embargo of Cuba, as in effect on March 1, 1996, including all restrictions under part 515 of title 31, Code of Federal Regulations, shall be in effect on March 12, 1996, and shall remain in effect, subject to section 204 of this Act."
(§102h)

Previously, the sanctions imposed on Cuba by Washington were 'executive orders,' which could be modified according to presidential discretion. Codifying the sanctions meant that they were no longer based on executive orders, but were embedded in law that could be modified only by Congress. This had implications far beyond Cuban-American relations, weakening not just President Clinton, but the institution of the presidency itself, and setting dangerous new precedents in restricting the president's capacity to initiate and direct foreign policy. This may prove to be the most onerous and troublesome legacy of Libertad.

Title I extended and strengthened the embargo against Cuba in a variety of ways. Washington's continued opposition to Cuban membership or participation in the Organisation of American States (§105) or any international financial institution, such as the International Monetary Fund or the World Bank (§104a) was noted. Washington threatened that if any financial institution approved a loan to Cuba over the opposition of the US, Washington would withhold payment to that institution by an amount equal to the amount of the loan (§104b). The US would proportionately reduce foreign aid to any country that supported the completion of the Cuban nuclear facility near Cienfuegos (§111), and expressed its strong disapproval of Russian support of the Cuban intelligence facility at Lourdes (§106). Title I mandated an annual report by the president to Congress on all commerce with and assistance to Cuba from foreign countries, including details of Cuba's trading partners (§108). The importation into the US of any merchandise that was either Cuban in origin or had been transported through Cuba, or was even partly derived from anything produced in Cuba was prohibited (§110). NAFTA rules of origin may not diminish the Cuban sanctions programme in any way (§110b).

Title I authorised the president to "furnish assistance and provide other support for individuals and independent nongovernmental organizations to support democracy-building efforts for Cuba" (§109a). This was meant to include humanitarian assistance to victims of political oppression and their families, and support for democratic and human rights groups inside Cuba.

Finally, Title I condemned the shooting down of the two unarmed American aircraft, and claimed that the planes were shot down well outside the internationally recognised 12-mile limit to Cuban airspace. "It is incumbent upon the United States Government to protect the lives and livelihoods of United States citizens as well as the rights of free passage and humanitarian missions" (§116a/13). Congress urged the president to seek the indictment of Castro for this act of terrorism in the International Court of Justice (§116b/3).

1.3.3 Title II: Assistance to a Free and Independent Cuba

Title II expressed Washington's support and encouragement for the self-determination of the Cuban people, and promised American material assistance to ease the transition to democratic government and to welcome Cuba back into the world of nations. (§201) It set out plans for assistance to both the transition government that would lead Cuba from a totalitarian dictatorship to a representative democracy, and to a democratically elected government. (§202b)

Washington offered a Cuban transition government food, medicine, medical supplies and equipment, assistance to meet emergency energy needs (§202b/A) and help to the Cuban military to adjust to its new role in a democracy (§202b/C). The US promised to use its influence to obtain assistance for Cuba from international financial institutions and multilateral organisations (§202e). The economic embargo against Cuba would be lifted when the president had determined, and had so reported to Congress, that a transition government was indeed in place in Cuba. (§204)

Title II enumerated fairly strict criteria for a transition government in Cuba. It would have legalised all political activity (§205a/1), would have released all political prisoners (§205a/2), and would have made a commitment to free and fair elections, (§205a/4). Moreover, it would have ceased interfering with either Radio Martí or Television Martí broadcasts (§205a/5), would have made progress toward establishing an independent judiciary (§205a/6/A), would respect internationally recognised human rights

(§205a/6/B), and would allow the formation of independent trade unions (§205a/6/C). Finally, a transition government would not include either Fidel or Raúl Castro (§205a/7).

Once Cuba had a democratically elected government, America would offer financing, agricultural assistance, and Peace Corps programmes (§202b/B) and establish a United States-Cuba Council to assist in the promotion of market-based development in Cuba and to facilitate the opening of bilateral trade between the two countries (§203b). Title II's criteria for determining a democratically elected government in Cuba included a government elected in free and fair elections (§206/1), supervised by internationally recognised observers (§206/1a), that respected civil liberties and human rights (§206/2), and was committed to forming a constitution to secure civil freedoms for future generations (§206/4).

Finally, a democratic government would either return or compensate American citizens for property confiscated by the Cuban government after January 1, 1959 (§206/6). Title II concluded that, "the satisfactory resolution of property claims... remains an essential condition for the full resumption of economic and diplomatic relations between the United States and Cuba." (§207/d), diluting Washington's altruism by conditioning aid to claims settlements.

The democratic requirements mandated by Title II were very rigorous. It is doubtful whether any of the newly independent states of Eastern Europe struggling to move from dictatorship to democracy could have met such stringent requirements. Many Cubans felt humiliated by American audacity in dictating how they should govern themselves, seeing it as a throwback to the Platt Amendment, and consistent with Jorge Domínguez' analysis of US relations with Cuba determined by the Monroe Doctrine. (Roy 2000a: 41) But Cuba scholar Mark Falcoff reasons that Title II was specific to counter assertions that Castro's tentative economic liberalisation showed that political transition had begun. When genuine reform happens, the Cubans would not have to fulfil all the criteria of Helms-Burton, as the thawing of relations with Washington would develop a momentum of its own. (Falcoff 1998c: 97-98)

1.3.4 Title III: Protection of Property Rights of United States Nationals

Title III declared that the United States Constitution guarantees individuals the fundamental right to own and enjoy property (§301/1), and that confiscation of such property is wrong and undermines economic development (§301/2). Castro has trampled on the rights of his own people, confiscating their property along with that of thousands of Americans (§301/3). Desperate for hard currency, oil, investment and industrial expertise, Castro was offering foreigners the opportunity to invest in Cuban assets, some of which were confiscated from American nationals (§301/5-6). Washington has warned foreign governments against 'trafficking' in confiscated properties as this would complicate attempts to return those properties to their rightful owners (§301/7). The international judicial system lacked effective remedies for dealing with properties that were wrongfully confiscated (§301/8). Washington had an obligation to its citizens to protect them from such injustices (§301/10); American nationals should therefore have the right of redress through the American courts (§301/11).

Title III granted a 'right of action,' whereby US nationals may bring lawsuits in federal courts against foreign governments, companies and individuals who 'traffic' in confiscated property (§302a). To be eligible to sue under Title III, the amount of the claim must exceed \$50,000 (§302b). The value of the property was to be determined by either its current fair market value, or its value when confiscated, as determined by the Foreign Claims Settlement Commission (FCSC) plus interest, whichever was the greater (§302a/1/A). Helms-Burton therefore only applied to substantial claims.

Libertad took effect immediately when President Clinton signed it, on 12th March 1996. However, Title III was expressly due to take effect on 1st August 1996 (§305a), with the clear proviso that lawsuits may not be filed until 1st November 1996 (§302a/1/A). Furthermore, individuals and companies may only be held liable for 'trafficking' that took place after 1st November (§302a/1/A) so that foreign companies that were cited in August have a three-month 'grace period' in which to divest from Cuba and avoid prosecution.

Title III provided for two categories of claimants. The first category included the 5,911 American entities whose \$2 billion claims had already been certified by the FCSC. This group of claimants could file suit in federal court on 1st November 1996, three months after the implementation of Title III of the Act (§302a/1/A). The second category of claimants consisted mainly of Cuban-Americans who were naturalised American citizens, but who were not American citizens at the time their property was confiscated. This group had no claims certification, and was to wait two years, until 13th March 1998 to file (§302a/5/C).

Finally, Title III granted the President important suspension authority if "the suspension is necessary to the national interests of the United States and will expedite a transition to democracy in Cuba" (§305b/1). The President had suspension authority in two key areas: he could suspend "the effective date" for a period of up to six months (§305b/1), and he could also suspend "the right to bring an action" for six months, even after the Title had taken effect (§305c/1). The President was also granted the right to repeated suspensions in both areas of six months each (§305b/2 and §305c/2). This presidential prerogative was the only concession Congress granted to Clinton during the consultations between the White House and Capitol Hill over Libertad. Significantly, President Clinton applied this division in allowing Title III to take effect, but suspending the right to action.

1.3.5 Title IV: Exclusion of Certain Aliens

Title IV provided for the exclusion from the United States of aliens who 'traffic' in expropriated American property after 12th March 1996 (§401a/2). The broad remit affected any corporate officer or shareholder with a controlling interest in a corporation that was involved in 'trafficking' in confiscated property (§401a/3) inclusive of such persons' spouse and minor children (§401a/4). The only exemption would be granted for medical reasons, or for purpose of defending litigation under Helms-Burton (§401c). Unlike the suspension authority the President gained under Title III, the executive had no discretion in the application of Title IV.

1.3.6 “Trafficking”

The Conference Report that accompanied PL 104-114 specifically emphasised that the definition of 'trafficking' was more proscribed in Title IV than in Title III. Title III's definition of 'trafficking' was (§4/13/A):

A person "traffics" in confiscated property if that person knowingly and intentionally

- (i) sells, transfers, distributes, dispenses, brokers, manages, or otherwise disposes of confiscated property, or purchases, leases, receives, possesses, obtains control of, manages, uses, or otherwise acquires or holds an interest in confiscated property,
- (ii) engages in a commercial activity using or otherwise benefiting from confiscated property, or
- (iii) causes, directs, participates in, or profits from, trafficking by another person...

Title IV's definition of 'trafficking' was (§401/2/a):

A person "traffics" in confiscated property if that person knowingly and intentionally-

- (i) (I) transfers, distributes, dispenses, brokers, or otherwise disposes of confiscated property
- (II) purchases, receives, obtains control of, or otherwise acquires confiscated property, or
- (III) improves, (other than for routine maintenance), invests in (by contribution of funds or anything of value, other than for routine maintenance), **or begins after March 12, 1996**, to manage, lease, possess, use, or hold an interest in confiscated property
- (ii) enters into a commercial arrangement
- (iii) causes, directs, participates in, or profits from trafficking by another person..."

The bold type (my emphasis) highlights the discrepancies on which the Conference Report specifically commented:

- Title III applied to all acts of 'trafficking', but Title IV applied only to new acts of 'trafficking' that occurred after enactment of Libertad, and
- Title IV did not include the sale of confiscated assets in order to encourage persons suspected of 'trafficking' to divest of their holdings, and thereby avoid prosecution. (Conference Report 1996)

The unusual term 'trafficking' was used deliberately by Congress to link to 'drug trafficking' and thus convey a clear moral connotation to what are otherwise routine business transactions. (Stern 1997: 21; Roy 2000a: 38)

1.4 Implementation

The Justice Department published a summary of the provisions of Title III on 17th May as mandated in Libertad §302a/8, further clarifying the intent of that title. The guidelines on Title III allowed 'traffickers' to divest in order to avoid liability, but only until 1st November 1996. This was mandated in Libertad §302a/1, which stated that anyone who 'trafficked' in expropriated American property in Cuba "after the end of the 3-month period beginning on the effective date of this title" would be held liable. (Reno 1996)

The State Department issued guidelines for implementing Title IV of Libertad, on 17th June, designating the Office of Cuban Affairs at the State Department as the contact point for Title IV determinations. Foreign nationals who were "reasonably" determined to have "engaged in... trafficking after March 12, 1996" were to be notified by post that their name had been entered on the United States visa and port of entry lookout system. The notice would state that the individual would be denied a visa upon application, or have his visa revoked 45 days after the date of the notification letter. This would allow the foreign national the opportunity to divest from 'trafficking' and avoid exclusion. (Davidow 1996a) 'Traffickers' retained the freedom to escape liability whenever they divested of suspect assets, even after receiving a State Department letter. The State Department was implementing the express wishes of the Congressional Conference Report that accompanied Libertad which pointedly defined 'trafficking' more narrowly in Title IV than in Title III.

The State Department sent 'advisory letters' to three firms on 29th May 1996, warning that their commercial activities in Cuba may be constituted as 'trafficking', and that their executives may be liable to exclusion from the US under Title IV of Libertad. The letter quoted the final words of the Congressional Conference Committee Report (p63); "the sale or abandonment of confiscated property in Cuba for purposes of disengaging from Cuba is excluded from the definition of trafficking." It concluded that the State Department was "developing implementing guidelines for Title IV" and expected to be making "determinations" soon thereafter, and that it hoped that the information contained in the letter would be "useful" in making decisions concerning Cuban property. The State Department said it would not publish a "black list" of the firms it was investigating

out of respect to their rights to privacy and out of concern for "friendly governments" who would be affected by this statute. (Burns 1996)

The three companies in receipt of advisory letters were

- STET, the Italian state-owned communications firm
- Grupo Doms, a Mexican communications conglomerate

STET and Grupo Doms were joint venture partners in the Cuban telecommunications systems, and allegedly 'trafficked' on property belonging to ITT.

- Sherritt International, a Canadian mining and energy group, who allegedly used facilities belonging to Freeport-MacMoRan Co of New Orleans. (Gedda 1996a)

The executives of these three firms were sent exclusion notices (letters of 'determination') in early July 1996. The cited officials faced exclusion from the United States with effect 45 days after the date on the letter, the time allowed by Libertad to divest themselves of the Cuban properties. Grupo Doms relinquished its stake in the Cuban venture due to financial difficulties related to the collapse of the Mexican peso, although Libertad supporters proclaimed it showed the bill was a significant deterrent.¹³ STET paid compensation of some \$26m in the summer of 1997 to ITT for the use of its cables for a period of ten years. STET's action was characterised as an "immunisation" against Libertad, for ITT agreed not to sue STET under Title III and the State Department removed STET from its exclusion list. (de Jonquieres and Tucker 1997; Kavulich interview) The State Department concluded that the ITT-STET agreement "constitutes authorization of [a] United States national who holds a claim to the property consistent with Title IV." It claimed that the settlement reinforced respect for property rights and was an incentive to foreigners to seek authorisation from American claimants before investing in Cuba. (Burns 1997)

The STET deal highlighted a glaring contradiction in American policy vis-à-vis Cuba, severely undercutting the lofty principles of promoting democracy and respect for civil rights that Helms-Burton purportedly espoused. Payments transformed 'traffickers' to

¹³ "Doms Drops Cuban Phone Stake: Mexican Firm Hit by Sanctions and Financial Problems," International Herald Tribune, 1st July 1997, p 16.

legal partners of Castro, embodying the worst American stereotypes and considerably weakening Washington's position. (Roy 2000a: 113)

Of the three cited companies, only Sherritt suffered the indignity of exclusion. Nine Sherritt executives and their families were banned from the United States, including two prominent Britons, Sir Patrick Sheehy, former chairman of BAT Industries of Britain, and Rupert Pennant-Rea, former deputy governor of the Bank of England and former editor of *The Economist*. (Martin and Simon 1996) At House implementation hearings, Congressman Robert Menéndez stated, "Title IV offers companies a clear choice: observe U.S. law or have your rights to visit and conduct business in the United States revoked. Sherritt has made its choice." (Menéndez 1996: 4.)

As of this writing, the ban is still in force, prompting (Mrs.) Helen Pennant-Rea to write to *The Times*, "I and my children, who have done nothing to offend the US, have been banned since 1996. I regard this as most un-American." (Pennant-Rea, 2000). Pennant-Rea, when asked whether he had considered resigning from his position at Sherritt, answered that it was a matter of principle to stay the course and not give up, particularly when the UK was pressing the US to stop applying Libertad. (Ryle 2001) Did financial remuneration more than offset the inconvenience of exclusion from the United States?

Executives of Grupo BM, an Israeli agricultural company, received advisory letters in September 1996. In September 1997, Grupo BM announced a 10-year, \$200m project to build an office complex in Havana, under a Panama-based subsidiary called Monte Barreto, (Fletcher 1997) a move guaranteed to annoy Washington. Grupo BM received 'letters of determination' notifying them of their exclusion from the United States, dated 13th November 1997, with effect in 45 days time,¹⁴ (McClenny 1997) thus joining Sherritt in an exclusive club.

The invitation to foreign companies to divest of their Cuban holdings to avoid prosecution under Libertad had some interesting ramifications. Libertad's Title III §302a/7 mandated "an action...may be brought and may be settled, and a judgement

¹⁴ Grupo BM's Miramar trade centre was inaugurated in October 1999. See Pascal Fletcher, "Israeli Office Venture is Launched in Cuba," *Financial Times*, 13th October 1999, p 7.

rendered in such an action may be enforced, without obtaining any license or other permission from any agency of the United States..." A Cuban-American former landowner may sue under Title III, seeking damages from a suspected foreign 'trafficker'. The two sides could reach an out-of-court settlement, avoiding prolonged litigation, whereby the Cuban-American shares in the profits of the Cuban joint venture. (Desloge 1996) John Kavulich of the U.S.-Cuba Trade and Economic Council claimed there was a "new cottage industry" in the US. Companies with Cuban claims sought non-US companies that wanted to invest in Cuba, sold their claim for a pittance, and then became partners in the Cuban joint venture. In addition to STET, Kavulich claimed there have been several such quiet deals, away from the public eye, as Libertad permitted private settlements. (Kavulich interview) One could have the paradox of Cuban-Americans and certified claimants profiting from Cuban business ventures entirely legally, whilst the rest of corporate America waited impatiently for the embargo to be lifted.

1.4.1 Congressional Constraints

State Department official Michael Ranneberger outlined the procedures his department followed in investigating possible breaches of Title III to Congress. He explained that his department initially researched certified claimants who had fairly precise documents to back their claims, and had already sent "advisory" letters to Sherritt, Doms and STET. When they "reached critical mass" and could make a strong case for 'trafficking' after 12th March, they issued letters of "determination." (Ranneberger 1996: 14-15) A former US official recalled that administering Helms-Burton was a nightmare because it was incredibly difficult to identify cases of confiscation and build reasonable cases. He hinted that there were several companies who were quietly investigated, but were either found not to be in breach of Libertad, or divested to escape prosecution. (research interview) Professor Joaquín Roy argues that the State Department lacked data as many potential claimants preferred to wait until Title III became effective. (Roy 1997: 94)

State Department official Jeffrey Davidow testified that the May advisory letters had a deterrent effect, with a "significant number" of companies disengaging from Cuba as potential investors feared Libertad. He assured a sceptical Congress that more letters of

determination would be forthcoming. (Davidow 1996b) State Department spokesman Nicholas Burns had already cited the Mexican cement company Cemex as having informed the State Department that they had terminated their involvement with an expropriated American company in Cuba in May. (Burns 1996) Stuart Eizenstat maintained that Helms-Burton had "a real chilling effect" on businessmen's attitudes towards confiscated property, with a dozen firms having "ceased activities" in Cuba, and a further two dozen firms under investigation. (Eizenstat 1997c) He later declared that at least a dozen companies had either pulled out of confiscated property or, like Cemex, had suspended plans to avoid falling foul of Title IV.¹⁵ (Eizenstat 1997d) In announcing the STET deal with ITT, the State Department claimed "We remain strongly committed to vigorous enforcement of Title IV." (Burns 1997)

Notwithstanding these assurances, the Clinton Administration has implemented Title IV exceedingly sparingly, due to substantive political concerns that will be explored in this thesis. Grupo BM and Sherritt remain the only companies whose executives are still excluded from the United States, despite the evidence that there were some 200 companies from 26 countries who had commercial dealings with Cuba, many of whom were potentially in violation of Title IV. (Dodd 1996)

1.5 Suspension

The effective date for Title III was set as 1st August 1996. The complicated waiver authority brokered between the White House and Capitol Hill during the conference on Libertad, granted the President the following suspension rights:

- to suspend the effective date for six months, and to grant further suspensions of six months, if the President determined it was necessary to America's national interests and would expedite a transition to democracy in Cuba. (§306b/1-2)
- after Title III had taken effect, the President could suspend the right to bring a suit for six months, and could make further six-month suspensions, if the necessary conditions for suspension were met, as stated above. (§306c/1-2)

¹⁵ It was unclear why Cemex reversed its decision, with some suggesting it was due to a sharp drop in its share value. See Gedda 1996a.

Presidential suspension authority had to be exercised by 16th July 1996, fifteen days before the effective date of Title III's implementation of 1st August. President Clinton formulated a brilliantly creative compromise, exercising his authority to split the effective date from the right to sue in court, thus implementing Title III, but gingerly. He declared that the right of American nationals to sue for confiscated properties under Title III would become effective on 1st August, as mandated by Libertad. However, Clinton postponed the right to sue for six months, until 1st February 1997. Clinton's words were,

"The law...provides me with the authority to suspend the date on which Title III enters into force, or the date on which U.S. nationals can bring suit, if I determine that suspension is necessary to the national interest 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...At the same time, I am suspending the right to file suit for 6 months. During that time, my administration will work to build support from the international community on a series of steps to promote democracy in Cuba...At the end of that period, I will determine whether to end the suspension...based upon whether others have joined us in promoting democracy in Cuba." (Clinton 1996c)

This meant that fines would accumulate from 1st August until such time that the actual legal actions could be brought. "President Clinton has once again taken a firm stand on both sides of an important issue," fumed Jesse Helms (Gedda 1996b). President Clinton suspended the 'right of action' under Title III every six months, with consistent regularity, arguing that international efforts to restore democracy to Cuba were progressing and it was therefore not in the national interest of the United States to pursue legal actions under Title III.

There was considerable anxiety at a Congressional hearing barely a week before the President had to determine whether to suspend Title III. Congressman Menéndez claimed that the conference report clearly afforded the President "very little flexibility" in exercising the waiver. "In the judgement of the Conference Committee, under the current circumstances, the President could not, in good faith, determine that the suspension of the right of action is either 'necessary to the national interest' or 'will expedite a transition to democracy in Cuba.'" (Menéndez 1996: 6-7) Menéndez and Burton mounted a sustained grilling of Michael Ranneberger as to what recommendation the State Department would be making to the President regarding suspension of Title III,

which Ranneberger parried admirably and diplomatically, without giving anything away, leading Burton to concede, "You are very adept." (Menéndez 1996 and Burton 1996: 15-19)

1.6 Conclusion

The Cuban Liberty and Solidarity Act of 1996 was passed as a result of Castro's 'mobilising incident' in shooting down of two American aeroplanes and killing four unarmed Cuban-American civilians. Its dual aims of promoting democracy and internationalising the embargo against Cuba on the island have not been realised. Many argue that toughening the embargo in order to promote democracy in Cuba was counter-productive, for Castro has used the embargo to his advantage. Professor Joaquín Roy claims that high-ranking Cuban officials called Libertad a *regalo del cielo*, a gift from heaven for Castro. (Roy interview) Furthermore, the admirable aims of promoting democracy and respect for civil rights in Cuba, for which there was arguably an international constituency, were muddled by being placed alongside issues of sanctions and compensation. (Roy 2000a: 59) As of this writing, Castro has conceded nothing to the liberalising forces of democracy; indeed, Castro embarked on so repressive a campaign in early 2003 that many of his Western apologists have become disillusioned.¹⁶

Turning to the second objective, that of internationalising the embargo, bullying American allies by extraterritorially extending the Cuban embargo resulted only in alienating them, not in internationalising an embargo they had never supported. Many foreign governments shared American concerns over Cuba's future, but they encouraged democracy with "constructive engagement." Many scholars argue that change came about in Eastern Europe through encouragement and expanded informal contacts with the West – not through coercion or threats. Indeed, Castro's loss of Soviet subsidies represented a window of opportunity for the West to extend its influence in Cuba in a benign and non-threatening way.

¹⁶ "Cuba's Crackdown," The Times Editorial, 29th April 2003, p. 21.

International reaction to the Libertad Act was very negative. The United Nations General Assembly held annual votes calling on Washington to end its embargo against Cuba. In an extraordinary display of anger at America's Cuba policy, Great Britain voted 'yes' for the first time in 1996, along with the overwhelming majority of the world's nations. Indeed, the entire EU backed the resolution, whereas they had abstained in the previous five years.¹⁷ (Tran 1996)

Aside from the international repercussions, Libertad was problematic for domestic reasons. Firstly, Helms-Burton raised serious institutional concerns as the President abrogated a significant element of power in his ability to conduct foreign policy by allowing the Cuban embargo to be codified. A weakened executive is of particular concern as Congress is traditionally more responsive to narrow nationalist and domestic concerns than is the President.

Secondly, Libertad raised many issues under American law, both jurisdictional and constitutional. It appeared to contradict several US laws, such as the American statute that forbids American firms and their foreign affiliates from complying with foreign boycotts, like the Arab boycott of Israel. Constitutionally, Libertad may violate the 'due process clause' because the term 'trafficking' is so broad. It may violate the 'equal protection clause' because the Act confers special retroactive rights on a group of people who were not American citizens when their property was confiscated, opening the door to other groups, such as Chinese-Americans, to claim the same rights. (Fulbright and Jaworski 1996)

In conclusion, this thesis argues that the Cuban Liberty and Solidarity Act of 1996 has not achieved its purported aims. Libertad has had little effect on foreign investment in Cuba, notwithstanding Senator Helms' claims to the contrary, nor has it succeeded in promoting democracy or internationalising the embargo against Cuba. It has raised complex issues and precipitated extremely negative fallout, both domestically and internationally. The core question regarding the rationality of Washington's decision to enact Helms-Burton will be analysed through a Foreign Policy Analysis lens, as Realist

¹⁷ The only nations to vote with the United States were Israel and Uzbekistan. (Tran 1996)

theory that regards states as unitary rational actors is clearly inadequate to explain American motivation. Before opening the 'black box' of the American domestic Level II constituency, this thesis will present a literature review of economic sanctions, especially as it relates to the Cuban embargo, and the metaphor of the two-level game, upon which framework the arguments will be presented.

Chapter 2

Economic Sanctions: Literature Review

"The U.S. embargo should be held as a carrot to be lifted when Cuba changes its current system and develops a democratic society. The embargo is not an anachronism but a legitimate instrument of U.S. policy for achieving the goal of a free Cuba." (Suchlicki 2000)

2.1 Introduction

Economic sanctions were very popular foreign policy tools in the 1990s. Comprehensive sanctions, mandated by the United Nations Security Council, were in force against Iraq and the various states of the former Yugoslavia, whilst Libya, Liberia, Angola and Somalia endured arms embargoes and Haiti was subjected to UN sanctions for over a year in the early 1990s. This marked increase in activity presents a stark contrast to the history of the United Nations until 1990, when sanctions were imposed on only two occasions: Southern Rhodesia, from 1966 till just before its independence as Zimbabwe in 1979, and South Africa, who endured an arms embargo from 1977 to 1994 when a democratically elected government ending apartheid was installed. (Doxey 1996: 1)

What accounts for this increased activity? One fairly obvious explanation is that the veto power exercised by the five permanent members of the Security Council led to its paralysis, almost precluding any decisions deemed objectionable to them or their allies. The thaw in relations between East and West led to far greater levels of cooperation in international affairs. (Ibid) Significantly, this greater cohesion in international relations has not only led to multilateral agreements, but also to more cooperation in policing legislation that makes trade diversion and sanctions busting more difficult. Furthermore, the end of the Cold War saw a decline in the legitimacy of the use of force; alternatives are preferred in an age where the awesome destructive capability of modern weapons is too overwhelming to contemplate. Additionally, globalisation has meant an enormous increase in the volume of international trade, making nations more sensitive to the dislocation suffered by effective sanctions. An autarkic country is not vulnerable to

economic sanctions. Finally, sanctions provide a graduated response to conflict, which is much in keeping with the role of the United Nations as peacekeeper. (Cortright and López 1995: 5-6; van Bergeijk 1995: 445-448)

The United States dramatically increased its use of economic sanctions in the 1990s, adopting sanctions as a tool of foreign policy with almost alarming frequency. A 1997 study commissioned by the National Association of Manufacturers (NAM) cited 35 countries targeted with American economic sanctions from 1993 to 1996 alone. It seemed that sanctions became Washington's policy tool of choice in its wide-ranging attempts to promote human rights, discourage the proliferation of weapons of mass destruction, discourage support for terrorism, thwart drug trafficking, protect the environment, and oust governments.¹⁸ (Haass 1998: 1) The reasons for this phenomenon are complex. Sanctions may be favoured by liberals who see it as a powerful substitute for war. Cuba scholar Mark Falcoff believes that embargoes "are an invention of liberal statesmanship – an attempt to find a non-violent method of influencing offending countries." (Falcoff email, 26/01/01) Democratic Congressman Lee Hamilton's admission that Congressional sanctions are an unfortunate outcome of the tug-of-war between the executive and the legislature to control foreign policy (Collins and Bowdoin 1999: 10) has particular resonance for this case study.

State and local governments also adopted selective purchasing laws that prohibited public agencies from purchasing goods and services from companies doing business with such countries as Burma and Indonesia. It is widely acknowledged that the sanctions imposed by New York State against the Swiss banking and insurance sectors that were reluctant to settle their accounts with Jewish Holocaust survivors and their families finally achieved the agreement on compensation.¹⁹ The state of Massachusetts was successfully challenged by the National Foreign Trade Council (NFTC) over its Burma

¹⁸ The United States also employs trade sanctions to ensure market access for its exports or to enforce compliance with trade agreements. Examples are recent trade wars with Japan and China under Super 301, and the banana dispute with the European Union. This thesis will not include trade sanctions as they are introduced pursuant to an existing body of rules that govern trade; this thesis will focus on the use of economic sanctions for political purposes, which work in the absence of any agreed-on political or legal framework.

¹⁹ "The New Driefuss: A Symbolic Swiss President at Home and Abroad," The Times Editorial, 10th December 1998.

sanctions; a US federal district court ruled that, while the Constitution grants states the power to control commerce, it does not grant them the right to formulate foreign policy. (Dunne 1998) This ruling was upheld by the Supreme Court on 19th June 2000, which affirmed that the Massachusetts law was unconstitutional "under the Supremacy Clause." (Supreme Court of the United States, No. 99-474)

The prevailing view in the literature has been that economic sanctions have not been a very useful instrument of politics, regardless of whether invoked unilaterally or multilaterally. Margaret Doxey, writing in the 1970s, doubted the utility of sanctions, primarily due to the lack of authority of international and regional organisations to enforce them. She argued that international organisations are loath to impose sanctions, and that, even when invoked, non-participation and evasion easily diluted their effectiveness. Doxey concluded that sanctions did not produce the desired political result in any of the cases she studied, (Doxey 1971: 138-139), maintaining her scepticism later, even when supported by an organisational framework. (Doxey 1987: 92)

There was near unanimous agreement with Doxey's pessimistic assessment regarding the efficacy of sanctions (Kindelberger 1970, Knorr 1975); some scholars warned that, not only are sanctions ineffective, they may be counter-productive. (Bienen and Gilpin 1980)

Johan Galtung was one of the first scholars to study the effects of economic sanctions in his 1967 case study of Rhodesia. The literature generally groups Galtung within the sceptic group for he opened his concluding remarks with "The conclusion about the probable effectiveness of economic sanctions is, generally, negative." (Galtung 1967: 409) However, he admitted that there may be conditions that are more conducive to successful sanctions, among them overcoming the problem of universality, i.e. the fact that sanctions often fail because they are not universally imposed and can be easily circumvented by the target country. (Ibid: 410-411)

David Baldwin, in his seminal 1985 work *Economic Statecraft*, first asserted that economic tools of foreign policy serve a useful purpose if assessed through the social power literature. He argued that most analysts undervalued economic foreign policy devices, neglecting them in favour of other policy tools. Several factors contributed to this underestimation, among them the embedded economic liberalism that promoted

minimal government intervention in the economy, the 'high' politics of the Cold War period with its emphasis on strategic goals, and the mistaken belief that economic means pursue strictly economic ends. (Baldwin 1985: 3-61)

Since Baldwin, some scholars have tentatively concluded that sanctions can successfully achieve selective foreign policy objectives. Enthusiasts are aware that sanctions have limits and that measuring their effectiveness is both difficult and controversial (Carter 1988: 233) but they nevertheless see sanctions as a useful and efficient instrument for achieving significant political aims. They argue that, as sanctions rarely have a natural constituency, their successes are unreported while their failures are exaggerated. (Rogers 1996: 72) Even Doxey conceded that sanctions can be an effective, if somewhat limited tool of foreign policy, particularly since the end of the Cold War. She supports selective use of economic sanctions that convey clear political signals and avoid harmful consequences either to senders or innocent parties in the target country. (Doxey 1996: 124-126)

Gary Hufbauer, Jeffrey Schott and Kimberly Ann Elliott (HSE), researchers at the Institute for International Economics, conducted an influential study, examining 115 cases of economic sanctions from 1914 to 1990. They reported success in achieving the stated goals of the sanctions in 40 of the cases, a proportion of 34 per cent. As the only major large case study of the efficacy of economic sanctions, the HSE database has become the bedrock to which scholars and statesmen alike refer in debating this issue, and has helped immeasurably in re-shaping the accepted view of the futility of economic sanctions.²⁰ (Hufbauer et al, 1990)

A major flaw in the literature is the assumption that sanctions fail if they don't turn the clock back to the status quo ante – the situation prevailing *before* the action that brought about the sanctions. This is wrong; it is more realistic to assess projected outcomes in the absence of sanctions. If some compromise was effected, the sanctions should be judged to have had limited success. (Daoudi and Dajani 1983: 2; Drezner 1999: 18)

²⁰ Robert Pape examined the HSE database, concluded that sanctions worked in only 5, not 34, of the cases studies and rejected the HSE study as seriously flawed. He determined that economic sanctions have little success in the pursuit of non-economic goals. (Pape 1997)

The academic debate over the efficacy of economic sanctions continues. This chapter will summarise the current sanctions literature: survey the objectives of senders, analyse how costs and domestic politics in both the sender and the target influence decisions and outcomes, and evaluate the role of multilateral cooperation in the success of a sanctions episode. The chapter concludes with a review of positive and secondary sanctions. Throughout, the discussion relates to the long-standing American economic sanctions against Cuba.

2.2 Definitions and Typologies

Policy-makers consider alternative methods for attaining specific foreign policy objectives, carefully weighing costs and benefits, before selecting an option. In 1808, President Thomas Jefferson wrote that there were three foreign policy alternatives: embargo, war, or submission and tribute. (Fisk 2000b: 111) Baldwin identified four foreign policy instruments that influence behaviour: propaganda, diplomacy, economic statecraft, and military statecraft, defining economic statecraft as relying on resources that have a reasonable semblance of a market price in money terms. While most influence attempts involve combinations of these elements, it is nevertheless possible to identify the dominant thrust of a policy decision. (Baldwin 1985: 12-14)

Margaret Doxey is critical of Baldwin's definition, arguing that it describes any politically motivated act of foreign policy that is coercive. Doxey prefers a more precise definition, "penalties threatened or imposed as a declared consequence of the target's failure to observe international standards or international obligations," that distinguishes sanctions from other violent or non-violent attempts by one state to influence the behaviour of another. Coercive economic behaviour designed primarily to effect gains to the sender is not considered a sanction, as it has no punitive rationale; Doxey's definition clearly differentiates between sanctions as a response to unacceptable behaviour and other forms of influence attempts among states. (Doxey 1996: 8-9)

James Barber defines sanctions as "economic measures directed to political objectives." Sanctions may be mandatory or discretionary, employed against a wide range of goods and services, or selectively (oil). (Barber 1979: 367-8)

Hufbauer, Schott and Elliott define economic sanctions as "the deliberate, government-inspired withdrawal, or threat of withdrawal, of customary trade or financial relations." (Hufbauer et al, 1990: 2)

In an unusual episode between allies rather than adversaries, President Bush refused to agree to a \$10 billion loan guarantee for Israel until Prime Minister Shamir agreed to freeze the construction of new housing on the West Bank, in order to move the Middle East peace process along in 1991. This sanction episode was successful, in that it brought down the Shamir government, and the new Labour government under Rabin yielded to US demands. Drezner characterises this incident as one of economic coercion as it corresponds to his definition, "The threat or act by a nation-state or coalition of nation-states...to disrupt economic exchange with another nation-state...unless the targeted country acquiesces to an articulated political demand." (Drezner 1999: 2)

It is useful to distinguish between the "target" or the actors to be influenced and the "scope" or the objectives of economic sanctions. Any application of economic sanctions often reflects a multiplicity of targets and objectives. Barber makes a functional distinction between primary, secondary and tertiary objectives of economic sanctions. The primary objectives relate to the actions of the state against which the sanctions are directed. The secondary objectives relate to the status, behaviour and expectations of the state imposing the sanctions. Tertiary objectives relate to the broader international considerations resulting from the application of economic sanctions. (Barber 1979: 370)

Baldwin considers Barber's distinction helpful, but cautions against permanently assigning targets and goals to specific categories. For instance, a teacher who chooses to 'make an example' of a student who has been misbehaving is probably more concerned with effect on the rest of the class rather than on the individual offender. The primary target is not the individual but the collective. Changing the behaviour of the embargoed state often is the primary objective, but often it is more important to influence the thoughts and attitudes of third parties. Judgement of primary, secondary, and tertiary goals should be assigned on a case by case basis, rather than embedded in a conceptual framework that ranks behaviour of the immediate target as primary and assigns lesser importance to the perceptions of third parties. (Baldwin 1985: 17-18) Similarly,

Miyagawa distinguishes between 'proclaimed' and 'hidden' goals of sanctions. The real objective, such as demonstrating resolve to allies and foes alike or sending messages to a domestic constituency, is often concealed in the rhetoric. (Miyagawa 1992: 89) This analysis is particularly relevant to the Cuban embargo.

Economic sanctions include embargo (prohibition of exports), boycott (prohibition of imports), tariff discrimination, blacklisting, quotas, freezing assets, aid suspension, expropriation of property, and the threat of the implementation of any of the above if certain behaviour by the target country is not moderated. (Baldwin 1985: 40-42) Doxey includes the restriction or cancellation of fishing rights and trade agreements, and suspension or cancellation of technical assistance. She also argues that what appear to be cultural and communications measures can nevertheless have economic ramifications as well, citing examples such as the circumscription of telephone, cable and postal links, and of landing rights and docking privileges. (Doxey 1996: 14-15)

2.3 Contexts for Sanctions

Policy-makers must define goals, select measures that relate to the vulnerability of the target, and correctly estimate the costs both to themselves and the target country. The sender must foresee the strategies the target state is likely to adopt in anticipation of sanctions being directed against it. He must also forecast how public opinion is affected, the extent of support from other countries, and the development of new patterns of commerce that result from the blocking of previous conduits of exchange. (Doxey 1971: 3) Legitimate goals include:

- *Deterrence*: Warnings that sanctions may be applied if behaviour is not moderated. However, the nature of deterrence is such that it is difficult to assess whether sanctions contributed a role in the successful outcome or whether there was another more important factor that caused the target to change its mind. For example, one cannot know with any degree of certainty whether the Soviet Union was deterred from military intervention in Poland in 1982 because of the American grain embargo imposed after its invasion of Afghanistan in 1980. Nevertheless it would seem "that economic coercion,

particularly when coupled with political pressure, may often perform a useful deterrent function." (Nincic and Wallenstein 1983: 7)

- *Compliance*: The target is expected to change some aspect of its domestic or foreign policy, for example South Africa's apartheid policy. (Doxey 1996: 55)

Illustrating both these objectives, the United States imposed an embargo against the Soviet Union and the Eastern Bloc in the late 1940s. Washington used its considerable economic power to enforce its policy upon reluctant Western European allies by threatening to cut off all economic and military aid if they did not comply. No cutback was needed, as the threat was effective. (Knorr 1975: 142-143)

Closely related to compliance is the promise of lifting sanctions as a bargaining counter. When the United States applied sanctions against Poland in 1982, Washington specified three conditions for the easing of the sanctions: the end of martial law, the release of political detainees, and the restoration of dialogue between the Church and Solidarity. The understanding was clear that the economic sanctions would be eased as relaxation of controls occurred. (Miyagawa 1992: 99)

- *Punishment*: Sanctions exact a price for international misbehaviour, e.g. sanctions against the Soviet Union for its invasion of Afghanistan in 1980. While some scholars argue sanctions may seek punishment and/or compliance, (Daoudi and Dajani 1983: 7) Galtung argues that the same action cannot simultaneously serve both purposes, and that the sender must determine whether it prefers punishment without compliance, or compliance without punishment. Believing that punishment is a sufficient condition for compliance is naïve; believing that it is necessary for compliance shows that the sender seeks the gratification of knowing that the delinquent has been punished. (Galtung 1967: 380-381)

- *Destabilisation*: Although the basic principle of state sovereignty is sacrosanct in international relations, there have been exceptional cases of sanctions for this reason, for example the United Nations sanctions against the apartheid regime in South Africa. The

United States has pursued this goal with its Cuba sanctions, hoping to instigate an internal uprising to topple Castro. (Doxey 1996: 55-56)

A more limited aspect of destabilisation is the undermining of the target nation's strategic position, such as the previously cited example of Washington's embargo against the sale of strategic goods to the Soviet Union as the Cold War deepened. 'Strategic goods' includes not only military equipment but also civilian goods that could serve to increase Soviet military strength, with the intention not to coerce, but to weaken. (Knorr 1975: 142) Another example of this sort of undermining is the enormous costs imposed on the Soviet Union to support Cuba. Cuban indebtedness to the Soviet Union in the years 1961-1967 totalled some \$1,100 million. (Miyagawa 1992: 103) Washington's Cuban embargo was a two-edged sword with regard to the Soviet Union during the Cold War.

- *Limitation of Conflict:* In cases of civil war, the Security Council has enacted neutral measures, such as arms embargoes against both sides, e.g. against the former states of Yugoslavia. Such embargoes are often employed in conjunction with peacekeeping efforts. (Doxey 1996: 56)

These five goals focus exclusively on the target nation, Barber's primary target. The following objectives relate to domestic and/or international audiences and allies, the secondary or tertiary targets.

- *Symbolism and Signalling:* Token measures may have no intent other than to signal disapproval, particularly where silence may be misconstrued as tacit approval. Scholars argue that the United Nations sanctions against South Africa were not important instrumentally for they did minimal harm to the ruling elite; their primary importance was the international message of disapproval they conveyed. (Doxey 1996: 57) Sanctions may even be inwardly directed, providing statesmen with the ability to project an image of 'doing something' that is not as provocative as military force, yet has far more substance than simple diplomacy. (Carter 1988: 4)

Scholars broadly agree that symbolism is effective in conveying strong messages to either/both the international community and domestic constituents. A 1973 Royal Institute of International Affairs study described the American embargo against Cuba as a symbolic declaration of US determination to fight the spread of communism in its 'sphere of influence'. (Schreiber 1973: 405) American Secretary of State Dean Rusk stated in 1964 that the United States was pursuing four limited goals in sanctioning Cuba, among them "to demonstrate to the peoples of the American Republics that communism has no future in the Western Hemisphere." (Baldwin 1985: 176) An important goal of Castro's foreign policy was to promote revolution through support for insurgent movements internationally, particularly in the Western Hemisphere. Cuba encouraged and assisted guerrilla groups in Venezuela, Chile, Brazil, Peru, Nicaragua, Panama, Costa Rica, and El Salvador among others. (Falk 1986) Most of these countries enjoy democratically elected governments today, possibly a successful outcome of US sanctions on Cuba in containing the spread of communism.

- *Satisfying international public opinion:* Sanctions are often imposed in order to meet the demand of friendly nations for participation. The Organisation of American States endorsed American sanctions against Cuba in 1964; while no collective action was ever taken, it demonstrated support for Washington. In the case of sanctions against Poland in 1982, NATO members agreed to join the US, albeit at a lower level of sanctions. (Miyagawa 1992: 96-99) Knorr concedes that even relatively futile sanctions may be valuable if they signal international censure. (Knorr 1975: 162)
- *Satisfying domestic public opinion:* This comment by George Sokolsky, spokesman for the National Conservatives, speaks volumes about public opinion over the deteriorating relationship between the United States and Cuba in 1960. "Many were angered... Most did not understand Eisenhower's 'policy of patience' and wanted to hit back at the 'speck of a country' which was spitting in our face." (Miyagawa 1992: 95) Sanctions may serve important domestic needs. American sanctions against Libya's sponsorship of international terrorism, which assuaged domestic sensibilities, constituted a strong moral statement, and sent a warning to future adventurers. (Hufbauer et al, 1990: 3) In Iraq

and Bosnia, giving peace a chance first through applying sanctions discredited critics of armed force later. (Pape 1997: 110)

Many scholars differentiate between instrumental behaviour, which is intended to influence other actors and is openly solution-oriented, and expressive behaviour, which seeks only the release of internal tensions. Wallenstein suggests that governments may prefer economic sanctions because they diffuse the internal tensions between radicals who prefer a military solution and moderates who prefer little or no action at all. (Wallenstein 1983: 98-100) Hoffmann's analysis of the Rhodesia crisis concludes that Britain chose sanctions in 1965 because the action eased domestic tensions. (Hoffmann 1967: 145) Baldwin believes that symbolic sanctions can be both expressive and instrumental; when a powerful nation warns a state about its conduct, other states understand that the warning is neither frivolous nor hollow. The utility of military force lies not only in its actual mobilisation, but also in the implicit threat made by its very existence and capability. (Baldwin 1985: 96-100)

Sanctions may be proposed entirely to serve the interests of pressure groups within the sanctioning country. Proponents of this view are called "public choice economists"; they explore state behaviour from the perspective of rational decision making by individual participants. This branch of economic analysis suggests that many government policies, including the levying of economic sanctions, are endogenous policies that are the direct outcome of domestic political decisions. Some of these pressure groups may gain pecuniary benefits,²¹ for example, producers of an import-competing commodity gain from a boycott, while others gain utility from taking a moral stand against an offending country's behaviour.

Public choice economists suggest that many of the selective sanctions imposed by the US and the EC against South Africa quite conspicuously served protectionist interests in those countries. (Kaempfer and Lowenberg 1995: 61-64) For instance, Washington sanctioned agricultural goods from South Africa whereas Brussels did not, as the US imports almost no South African produce, while the Europeans depend heavily on Cape

²¹ The National Foreign Trade Council, a business lobby comprised of 580 member companies, brought the court case against Massachusetts previously alluded to.

fruits during the winter. All OECD nations boycotted South African exports of textiles, iron and steel; these industries, which have traditionally benefited from protectionist policies, reaped enormous gains from barring relatively cheap South African exports. (Kaempfer and Lowenberg 1992: 44)

Public choice economists easily answer the question of why economic sanctions are used with such frequency when their effectiveness is questionable, or why sanctions are often imposed on relatively unimportant trade flows: special interest pressures. Furthermore, the actual sanctions package that emerges reflects the bargaining of interest group politics rather than a comprehensive programme of inflicting maximum damage on the target country. (Ibid: 118)

- *Other reasons:* The state may not be in a position to undertake anything else. Military power may be too costly with nuclear weapons making it highly unlikely that a nuclear state will employ military power against another nuclear state. Furthermore, powerful nations today find it much more difficult to subdue weaker countries militarily than a century ago. (Miyagawa 1992: 104) Knorr contends that the reason for this is the rapid spread of nationalism among less-developed countries and their determination to resist domination by the more powerful states. The American experience in Vietnam, and the French experience in Algeria provide vivid historical verification. (Knorr 1975: 111-112)

2.4 Bearing Costs

The success of a sanctions episode depends on the degree of commitment and resolve shown by the sender. Costs play a paradoxical role, for the willingness to bear costs is widely seen as a barometer of the degree of one's resolve. (Baldwin 1985: 107) However, sanctions may fail due to high costs making them difficult to sustain domestically. Therefore, most scholars agree that senders attempt to avoid unusually high costs. The US purchased 40 percent of Libyan oil in 1980; this had fallen to 7 percent by 1981, and continued falling further as the US bought more Mexican and North Sea oil. The 1982 Libyan sanctions were thus more of a nuisance than an effective foreign policy tool, and the more comprehensive sanctions of 1986 contained enough

exemptions to ensure a minimal effect on US firms. (Rose 1998: 131-133; 146-147) Doxey proposes that minimisation of costs may actually be a secondary objective for senders, but concedes that a sender's willingness to pay a higher price is proportional to its determination to inflict serious punitive deprivation on the target. (Doxey 1996: 66) Baldwin states, "Other things being equal, it is always desirable to minimize costs." Willingness to bear costs adds credibility. (Baldwin 1985: 372)

The domestic firms of a sender country bear the costs of the sanction when normal trade flows are disrupted, but this is rarely calculated in advance as it is so difficult to quantify, and may only become clear with the passage of time. A target may have its long-run development potential, such as building up a tourist industry, severely curtailed. Sanctions sometimes entail spill-over effects on innocent third parties; thus the United Nations sanctions against the former states of Yugoslavia cost Bulgaria \$3.5 billion, and Hungary, Romania and the Ukraine each lost \$1.5 billion in foregone opportunities for trade annually. Indirect costs of economic sanctions are generally overlooked altogether. Substantial welfare loss is incurred as sanctions undermine the mutual benefits that derive from international exchange, inducing countries to specialise less and limit external trade, so as to decrease their vulnerability. (van Bergeijk 1995: 449-452)

Although the overall impact of the sanctions on the sender's market may be negligible, the burden is rarely born evenly, and specific market sectors may suffer inordinately. The American grain embargo imposed against the Soviet Union in 1980 after its invasion of Afghanistan is a particularly apt illustration. The estimated immediate loss of \$600 million in sales to farmers was negligible in terms of the overall level of GNP of the United States, but was quite devastating to the agricultural sector. Furthermore, it took nine months for the wheat, corn and soybean prices to recover, despite increased government purchases of grain. Inelastic demand for agricultural products meant that farm income in 1980-81 fell by an estimated \$2-2.5 billion in a year that nevertheless saw agricultural exports grow by 2 percent. Higher cost sanctions may lead to higher failure rates either because these cases may entail intrinsically tougher objectives, or domestic pressures to abandon the sanction attempt may mount as costs escalate. (Hufbauer et al, 1990: 75-81)

States conduct fairly precise cost analyses when they are not enthusiastic over supporting a sanctions attempt against a country with which it would be very costly to disrupt economic ties. Great Britain steadfastly refused to support the Commonwealth sanctions against South Africa; British exports to South Africa in 1982 totalled £1300 million, and provided jobs to 70,000 people. South Africa was also a major exporter of minerals such as platinum, manganese and chrome, on which there was considerable western dependence in key sectors such as aerospace, chemicals and steel. (Doxey 1996: 69)

The rational policy-maker must compare the costs and benefits not only of the contemplated sanctions action, but those associated with the alternatives available to sanctions to reach a decision that will maximise his utility. Ignoring costs,²² failure to consider options, and misleading cost estimates can have devastating consequences; the Vietnam War was arguably the most counterproductive influence attempt ever undertaken by the United States. Knorr maintains that the US embargo against Cuba led to a considerable loss of respect and goodwill in Europe and Latin America. But how much goodwill would the US have lost regardless, and would Washington not have lost even more respect in the eyes of the world by not responding to the anti-American posturing of Castro? (Baldwin 1985: 118-129; Baldwin 1999-2000: 85-86)

Sanctions may produce unexpected and undesirable consequences. American sanctions against Haiti so intensified the economic plight of the island, that they triggered a mass life-threatening exodus of desperate Haitians to the Florida coast in 1992. In Bosnia, despite the fact that an arms embargo was imposed equally on all the warring sides, the Muslims were disproportionately weakened as the Serbs and Croats had stockpiled weapons previously. (Haass 1997: 78)

Broad international support for a multilateral action results in the target country being denied access to the supplies and markets of its principle trading partners but may be difficult to sustain. The United States used diplomatic and legal pressures to gain capitalist-bloc support for its embargo against Cuba in the 1960s. Washington was successful in negotiating a virtual ban on the export of strategic military goods to Cuba,

²² The TANSTAAFL principle: "There ain't no such thing as a free lunch."

and a substantial decline in the export of machines and spare parts. But cracks in the global blockade began to appear in the early 1970s, as the coalition participants, faced with disparate interests in Cuba, preferred different strategies. For example, Castro had expropriated all American assets in Cuba, but Canadian banking and insurance firms, who had not been expropriated, were successful in negotiating favourable compensations. The difficulty in sustaining a coalition with asymmetric problems led to its disintegration. (Morley 1984: 45-47)

Scholars who focus on systemic variables predict that sanctions outcomes will not necessarily be more successful in a multilateral context. Obtaining international cooperation is extremely difficult; sustaining that cooperation over time, and as the coalition is widened, becomes ever more complex, as there are increased incentives to break the agreement and greater risks of free riding. (Drezner 1999: 11-15) Furthermore, multilateral sanctions often fail due to the difficulty inherent in agreeing on what constitutes sanctionable behaviour, and to the bureaucratic decision-making process that grants precious time to the target to take defensive measures. (Kaplowitz 1998: 78)

Lisa Martin argues that the leading sender's credibility is crucial to explaining the level of cooperation achieved. Neoliberal theory focuses on the structural conditions that would facilitate cooperation by more or less symmetrical states. With regard to economic sanctions, however, states do not appear to have a symmetrical pattern of interests that would allow them to achieve these mutual gains, as there is generally a leading sender seeking the cooperation of lesser states. Thus the cooperation problem differs significantly from the neoliberal paradigm. Therefore, the leading sender of sanctions will attempt to gain B's cooperation through 'issue-linkage,' thereby convincing B to prefer bilateral sanctions to free riding. Issue-linkage can take the form of either positive inducements or side payments, or negative inducements in the form of threats. In building a consensus to support the sanctions against Iraq in 1990, the United States achieved significant cooperation from reluctant states such as Jordan and Egypt by offering them goods such as debt relief.²³ Threats, or counter-sanctions, differ from side payments insofar as they do not improve B's welfare, but they are cheaper and, if

²³ The United States later successfully mobilised a multilateral force to fight in the 1991 Gulf War through manipulation of issue linkages such as debt, trade and protection.

successful, they may not have to be carried out by A. The United States was unsuccessful in gaining European cooperation by threats in the pipeline crisis. (Martin 1993: 407-412)

Credibility can be enhanced through high cost sanctions and international institutions. Both mechanisms increase 'audience costs,' which refers to the "domestic political costs or loss of reputation in international settings that [a state] would have to bear if it failed to make good on threats or promises." (Ibid: 413) On the international stage, many credibility problems are eased when bargaining takes place within the context of formal international institutions, where the costs of reneging on either threats or promises is significantly increased. On the domestic level, building a consensus for high cost sanctions is itself costly and one that cannot be reversed without damage to the state's reputation. (Ibid: 413-417)

A classic case of failure to co-operate due to American failure to appreciate the relationship between resolve and the readiness to bear costs was the pipeline sanctions episode in 1982. In response to the military crackdown in Poland,²⁴ President Reagan announced an embargo on the export of American technology for the construction of the Siberian oil and gas pipeline, threatening to blacklist any firms that would not comply, and later extending the embargo to include foreign subsidiaries of American companies. The pivotal factor was Washington's refusal to bear the costs of a grain embargo, as it had done in 1980 when the Soviet Union invaded Afghanistan. The Reagan Administration choose a low cost option for itself, but one that imposed an unacceptably high burden on the Europeans, who needed the Siberian pipeline to meet their energy needs. This sent a double signal to the Europeans, telling them that American threats of counter-sanctions were not credible and raising questions over whether the real objective of US policy was to force Western compliance with its hard-line policy on relations with the Soviet Union. The Europeans correctly surmised that Reagan would be unable to invoke the threatened counter-sanctions. Thus, the pipeline sanctions were ultimately

²⁴ NATO reportedly agreed to impose sanctions if the USSR intervened militarily in Poland. The fact that the crackdown was conducted by Polish troops may be due to the deterrent effect of sanctions, and led George Kennan to highlight the significance of the fact that Soviet troops had not been deployed. See Baldwin 1985: 279.

unsuccessful due to American failure to show resolve by incurring costs and make its threats credible. (Martin 1992: 224-240; Baldwin 1985: 279-283)

International institutions facilitate cooperation among senders of sanctions; high self-imposed costs are important in establishing credibility and are strongly related to the degree of multilateral cooperation. However, domestic factors will determine the extent to which a state will commit itself to high costs. For example, policy-makers may be reluctant to impose sanctions that adversely affect influential interest groups. Furthermore, as international institutions are not homogenous, the relative distribution of power within international institutions is important. (Mansfield 1995: 576-589)

2.5 Successful outcomes

From the perspective of the sender country, a successful sanctions episode has two dimensions: the extent to which the objectives sought by the action was realised, and an assessment of the contribution made by the sanctions to that successful completion. (Hufbauer et al, 1990: 41) Often a sanctions episode is judged a failure, although hidden goals such as demonstrating resolve to the domestic audience may have been realised. Empirical assessment is very difficult indeed, for one must conceptualise the effects of the sender country's alternatives, and how the target and/or the international community may have reacted to those alternative actions. (Doxey 1971: 3)

The following variables determine the degree of success of a sanctions episode:

- *Dependence on trade is great:* A country with minimal trade ties is virtually beyond the reach of sanctions. Greater interdependence overall is a two-way sword, however, for it also means that the cooperation of many more nations will be needed in a successful multilateral action. Economic sanctions do not have to be universal to be effective against a politically isolated country. (Wallenstein 1983: 124)

The concept of 'sufficiency' is important to the success of a sanctions episode. A blockade that covers ninety percent of the target's borders may not be sufficient to

restrict imports. For example, American mining of Haiphong harbour certainly disrupted the economy, but had no effect whatever on North Vietnam's ability to wage war, given its shared border with its ally, China. Sufficiency is the ability of the sender to restrict the flow of goods to the target, and is determined by geography and alliance solidarity. Geography is a given; alliance solidarity can be manipulated, as Martin has suggested, by side payments and inducements. Thus, the most important determinants of the degree of success of a sanction may be largely outside the control of policy-makers. (Lavin 1996: 143-144)

- *Size of economy*: A target country with a small GNP relative to the sender makes it more vulnerable to sanctions. In successful cases, the average sender's economy was 187 times larger than that of the average target. (Miyagawa 1992: 24)

- *Trade partners*: Close trade ties between sender and target countries make sanctions bite fairly immediately. In 1959, the United States supplied 68 percent of Cuba's imports and bought 69 percent of its exports, mainly sugar. By 1962, US-Cuba trade was negligible. (Doxey 1980: 39; Galtung 1967: 385)

The nature of the economic relations between sender and target is also important. A country's susceptibility to sanctions is determined by the ability of the sender to restrict the flow of three essential goods: oil, hard currency, and high-technology weaponry. Analysts therefore study the degree of a target's autarky through indicators such as the dependence on importation of raw material, and the stockpiling and consumption levels of fuels. (Lavin 1996: 144-145)

- *Availability of substitutes*: Multilateral support for sanctions is important, for the entrance of a 'white knight' can seriously undermine the efficacy of sanctions. (Miyagawa 1992: 25) As Cuba's main trading partner, American sanctions would have been highly effective, were they not largely mitigated by the Soviet Union.

- *Economic system*: A state-trading system is less vulnerable to sanctions than a free market system as it can more easily re-direct production and allocation of resources. (Ibid: 25)

- *Speed of imposition*: Allowing the target no time to make adjustments increases the chances of success of the sanctions and enhances the credibility of the sender. Defensive actions include stockpiling and conserving scarce resources, developing alternative supply sources, stimulating domestic production, and forging new trade agreements. (Doxey 1980: 108) A case in point is Libya, which suffered gradually increasing American sanctions in the 1980s, culminating in UN sanctions in 1992. Having had its US investments previously frozen, Libya had ample time to transfer liquid assets out of Europe, particularly Britain and France, in anticipation of having them frozen by the EC in late 1991. (Rose 1998: 130-36, 146)

- *Modest goals*: This reduces the importance of multilateral support and lessens the chances that a rival power will offer offsetting assistance. (Elliott 1995: 53) The target country will measure the demanded concessions against the costs of the damage inflicted by the sanctions, and will resist as long as the latter appear to be smaller than the former. Furthermore, specific demands such as trade concessions are more likely to be successfully concluded than are wider ultimatums, such as resignation of a government. (Wallenstein 1983: 113)

- *Duration of the sanctions episode*: Scholars are divided on this issue. Longer sanctions are thought by some to increase the probability of success, as the costs to the target increase. In a twist on this theme, American sanctions forced an alliance between the Soviet Union and China, showing Peking just how unsatisfactory a relationship with Moscow could be. (Nincic and Wallenstein 1983: 9) Others, among them Hufbauer et al, argue that the longer sanctions are in place, the less effective they will be. Successful sanctions are imposed for a short period of time precisely because they have achieved their goals; senders find it increasingly difficult to maintain the requisite support for long periods of time. (Dashti-Gibson et al, 1997: 609-610) Furthermore, long-term sanctions

impact less on society and provide greater possibilities for circumventing them. (Wallensteen 1983: 109)

- *Concentration*: Successful sanctions are those that penalise groups benefiting most from the target government's policy or those that signal political support to opposition interest groups within the target country. (Kaempfer and Lowenberg 1988: 78) Galtung argues that the degree of vulnerability of the target country determines the outcome of sanctions. Vulnerability rests on "concentration: the more a country's economy depends on one product, the more its exports consist of one product, and the more its exports and imports are concentrated on one trade-partner, the more vulnerable is the country." (Galtung 1967: 385)

- *Confluence*: Asphyxiation can exacerbate economic problems, but is rarely successful on its own. South Africa and Nicaragua changed policies after being subjected to economic sanctions, but each government also faced pre-existing problems, lacking popular support and being engaged in costly counter-insurgency campaigns. The successful outcome of a sanctions episode is enhanced when directed at countries already burdened by other problems. Thus, supporters of a tightened American embargo against Cuba in the 1990s argued that the island's dire economic circumstances following the loss of its Soviet subsidies improved the probability of success. (Lavin 1996: 146)

- *Cohesion/proportionality*: Economic sanctions often function like a neutron bomb, insofar as they destroy the economy, but leave the politico/military establishment in tact. Did Saddam Hussein care that Iraqi children were starving and ill? Proportionality argues that because sanctions are a marginal tool, they cannot rightly be expected to topple governments, as the goal sought is vastly disproportionate to the means used. There is also the moral dimension to consider: even if South Africa and Nicaragua were examples of successful sanctions episodes, they also taught us that crippled economies do not recover easily and continued economic hardship may substantially undermine new governments. (Ibid: 147-148).

Sociological theory argues that external pressures will further reinforce cohesion in a country where it is high already. This suggests that pressures on states with low cohesion will result in disintegration. Whilst it is difficult to measure the level of cohesion in a society, some factors that could shed light are governmental control over police and the military, and the strength of the popular opposition to the government. (Wallensteen 1983: 109) American sanctions against Cuba faced a highly cohesive society, with Castro a popular nationalist leader who had successfully overthrown a corrupt dictator and who assiduously cultivated anti-American feelings.

Finally, the most successful type of economic sanction is one where the very threat is sufficient to persuade the target country to alter its policies. This rarely happens as most target countries make a determined effort to resist and overcome the negative effects of sanctions. The target may have enormous defensive capabilities of which the sender may not be aware, rendering the sender's expectations useless. Successful evasion of sanctions may yield unexpected benefits in terms of changing the structure of the economy and establishing new patterns of trade. (Doxey 1980: 106)

2.6 Unsuccessful outcomes

- *Entry of a "white knight"*: Other countries may come to the aid of the target, thus substantially diluting, if not totally offsetting, the intended effect of the sanctions. When Washington imposed the grain embargo against the Soviet Union over its invasion of Afghanistan in 1980, Canada and Argentina refused to co-operate, with Argentina even expanding its exports of grain to the USSR. (Miyagawa 1992: 61) The impact of American embargo against Cuba was largely softened by Soviet support.

- *Pressure groups within the sender country oppose the sanctions*: The American farm lobby, understandably irate over the 1980 grain embargo in which they saw prices and incomes plummet, declared, "The President took aim at the Russians with a double-barrel shotgun but hit the American farmers instead." (Ibid: 73) Thus, another grain embargo following the imposition of martial law in Poland two years later was not a politically tenable option for the Reagan Administration.

- *Fear that the target may be embraced by another bloc:* Castro was a revolutionary nationalist, not a communist, when he toppled Batista in January 1959. Scholars have long debated whether American hostility was responsible for pushing Castro into the arms of the Russian bear. Although Castro did not publicly proclaim himself to be a Marxist until December 1961, his purging of all moderate cabinet ministers by the end of 1959 clearly showed his authoritarian tendencies. Most scholars agree that Castro willingly went to the Soviets, but many blame Eisenhower's coercive economic policies in 1960 - reducing Cuba's annual sugar quota in July, and embargoing all exports to Cuba in October - for cementing that relationship by strengthening Castro's authority and making it easier for Moscow to accept Havana.²⁵ (Luxenberg 1988: 44-51)

- *Sanctions may hit the wrong group within the target country:* Powerful social and political elites may be able to divert the worst of the economic sanctions away from themselves onto the disenfranchised, whose lives become even more miserable. Not only is this morally questionable, it renders the economic sanctions irrelevant by skimming over the ruling class. The impoverished masses of Rhodesia, Haiti and Iraq bear testimony to this phenomenon. (Pape 1997: 107)

In an attempt to somewhat redress this anomaly and target Haitian political elites while sparing the general public further suffering, Washington imposed 'smart' or 'designer' sanctions, which denied visa access to the US to Haiti's military leaders and their families. Libertad employs similar designer sanctions, denying visa access to the US to suspected 'traffickers' in expropriated American assets in Cuba. (Haass 1997: 79)

- *Defensive measures by the target:* Adaptive measures may be taken to increase self-sufficiency and develop new ties with countries outside the sanction attempt. Rhodesia had non-participant neighbours (South Africa and Mozambique) whose support in allowing access to ports was invaluable. The target may take positive retaliatory action in the form of counter-sanctions. Because of the West's reliance on vital raw materials from South Africa, Pretoria's threats of counter-sanctions were taken seriously by the

²⁵ LSE Professor Margot Light commented that the Soviets deliberated for three months before agreeing to support Cuba. (IR504 Workshop, 11th March 2005)

multinationals operating there. Expropriation of property is another weapon; Cuba nationalised many American holdings in retaliation for Washington's cut in the sugar quota in 1960. As relations grew frostier, Cuba expropriated all US property and Washington imposed an escalating embargo on trade with Cuba. (Doxey 1980: 111-119)

- *Frequency of use:* Hufbauer et al, among others, have suggested that frequent use of sanctions by a single nation contributes to declining credibility over time. If the United States has imposed sanctions so frequently because, despite the rhetoric, there are hidden goals that are expressive, this point is irrelevant. (Dashti-Gibson et al 1997: 616)

- *Hardening the position of the target:* Imposition of sanctions may promote social and political unity, stimulating intense nationalism rather than the intended social disintegration, and reinforcing the target's determination not to comply. A strong government may actually benefit from sanctions, which it can manipulate to rally support, and eliminate opposition. (Wallensteen 1983: 111-125) Paradoxically, states may *prefer* to be sanctioned, as this provides justification for toughening state control over the economy and the opportunity to reward key supporters of the regime. Examples of this paradox are the fall in the incomes of Rhodesian blacks that was accompanied by a rise in white incomes under the Rhodesia sanctions, and Milosevic's use of the UN embargo to punish rivals and reward cronies in Serbia. (Drezner 1999: 13)

Scholars agree that the success of a sanctions episode is a reflection of the degree of disutility experienced by the target, which is a function of the sender's ability and commitment to impose costs, and the target's ability to avoid or bear those costs. (Dashti-Gibson et al 1997: 609) However, targets may have a high tolerance level, suffering tremendous economic disutility, but refusing to change their behaviour. Robert Pape observes that sanctions sometimes fail due to the fact that modern states are not fragile. Iraq had lost an astounding 48 percent of its GNP by 1997 due to the tough sanctions imposed upon Baghdad, but refused to surrender. Indeed, nationalism often makes states willing to endure extreme punishment rather than abandon their interests and may actually increase the legitimacy of an unpopular government. Strategic bombing inflicted enormous damage on the economies of North Korea, North Vietnam

and Iraq but failed to provoke the population to rise up or surrender. Modern states that can endure such extreme levels of punishment are unlikely to succumb to threats of sanctions. (Pape 1997: 106-107) Furthermore, the costs of compliance demanded by the sender country may outweigh the price of suffering the economic sanctions; for example, if compliance demands the virtual dismantling of the target country's political, economic and/or social structure, the target has no realistic choice but to stand firm and resist. (Green 1983: 64-65) No state would "choose national humiliation over economic hardship." (Lavin 1996: 147)

Failure of a sanctions episode may be due to two interrelated explanations: the sanctions themselves promote adaptation and domestic cohesion in the target state and the nature of the international community inherently allows for evasion as alternative trading partners can be found. Galtung argues it is naïve to assume that "political disintegration is more or less proportionate to economic disintegration." He contends that economic deprivation may actually encourage political integration, as the population adapts sociologically and psychologically to the perceived external threat; the tremendous satisfaction derived from being able to face up to adversity encourages greater cohesion among the population. (Galtung 1967: 391-396) Others argue that external considerations carry more weight in explaining the failure of economic sanctions. The notion of universal sanctions has become so remote as to be purely a theoretical concept rather than an empirically attainable one, requiring an impossible degree of global co-ordination. (Green 1983: 64-65)

Finally, a misdirected sanctions episode can boomerang, and have the perverse effect of lowering the costs of the objectionable policy to the target country, reinforcing rather than reducing the offensive behaviour. (Kaempfer and Lowenberg 1992: 9) For example, sanctions that mandate cutting off capital flows may remove an important source of pressure for policy reforms. Forces opposed to disinvestment in South Africa argued that foreign firms were most likely to train black workers, provide decent accommodation for them and improve their standard of living. Sanctioning foreign investment would simultaneously remove this positive influence along with incentives for local citizens to moderate their behaviour. Disinvestment is also exceedingly

difficult to reverse, as once firms have left a country and re-located, they will not easily be persuaded to return. (Ibid: 100)

Much of this analysis is relevant to the American sanctions against in Cuba. A 'rally round the flag' sentiment has promoted nationalism and social cohesion in a population determined not to capitulate to Washington. American sanctions have also provided Castro with a useful scapegoat on whom any and all economic difficulties and setbacks may be blamed, irrespective of the fact that years of economic mismanagement by the communist dictatorship account for Cuba's grim poverty today. Kaplowitz argues that "sanctions may be counterproductive and fail because they strengthen belligerent elements in the target country and increase the defensiveness of the target government." (Kaplowitz 1998: 178)

2.7 Positive Sanctions

"Positive sanctions ... are actual or promised improvements in B's value position relative to his baseline of expectations. Negative sanctions are actual or threatened deprivations relative to the same baseline." The difference may be difficult to establish empirically as this definition is based on relative values and depends on one's point of view. Furthermore, all threats imply promises, and vice versa, as a threat to punish B for non-compliance must imply a promise not to punish for compliance. To minimise costs to himself, A is more likely to use promises of positive sanctions when he thinks prospects for success are poor and negative sanctions when the reverse holds true. (Baldwin 1971: 23-29)

The sanctions literature focuses overwhelmingly on negative sanctions. However, positive measures offer much greater scope than do negative ones for flexible, incentive-oriented strategies in economic, political, military and cultural spheres. The very flexibility of inducements is one of its major strengths. For example, the West may facilitate the entry of nations into international institutions, whilst at the same time promoting their own goals of greater liberalisation and global integration. (Haass and O'Sullivan 2000: 3-6) While unilateral economic sanctions impose hardship and may provoke the target government to become more repressive, inducements promote

political and economic engagement by Western democracies and are a powerful force for positive change in the target country. (Preeg 1999: 7-9) Economic progress inevitably leads to greater socio-economic mobility, offering individuals alternatives that break the government monopoly over their lives. (Lavin 1996: 141) An excellent example of this foreign policy approach emphasising incentives rather than threats was provided by the EU in late 2004, when Trade Commissioner Pascal Lamy announced lower tariffs from January 2006 for developing countries that implement progressive labour and environmental policies. (Buck 2004) Nevertheless, scholars caution that incentives are unlikely to elicit the desired responses from closed totalitarian states, which may misinterpret such an approach as a sign of weakness. (Collins and Bowdoin 1999: 24)

Positive sanctions, variously called inducements, incentives, carrots (rather than sticks), engagement, and side payments (the preferred phrase of two-level game analysts), may be either conditional or unconditional. Unconditional engagement demands no explicit agreement for reciprocity. Examples of this approach are the 1992 Cuban Democracy Act, where Track II offered carrots of "people to people" contacts, along with the sticks of sanctions tightening, and President Clinton's easing of remittances and travel to Cuba in the wake of the Pope's visit to Cuba in early 1998. In both cases, the US offered unilateral concessions that were not tied specifically to any actions on the part of the Cuban government. Such inducements are often presented to civil society and the private sector, to encourage further cooperation.

Conditional engagement implies a contractual reciprocity, ranging from very specific objectives to fairly vague policy changes. A watershed case was the US-North Korean Agreed Framework of 1994, where Washington agreed to a wide array of economic incentives (including provision of fuel oil) in return for North Korea halting their development of nuclear weapons. It marked a significant departure from the long-standing American strategy of negotiating with an adversary in that it offered carrots rather than sticks.²⁶ The EU's programme of constructive engagement with Cuba is an example of quite a tightly focused system of reciprocity, whereby the EU conditioned investment and loan guarantees on concrete democratisation and respect for human rights

²⁶ See Curtis Martin (2000), "The US-North Korean Agreed Framework: Incentives-based Diplomacy after the Cold War," in *Sanctions and Economic Statecraft*, Steve Chan and A. Cooper Drury, ed. Macmillan Press: 86-109.

in Cuba. Whether conditional or unconditional, failure on the part of the target to respond positively often leads to an abandonment of the strategy. (Haass and O'Sullivan 2000: 4-5) As of early 2005, the EU's strategy has not achieved any significant political liberalisation in Cuba, and the North Korean understanding died as a result of its admission in late 2002 that it had pursued a nuclear weapons programme for several years, in violation of its 1994 agreement with Washington.

Policy-makers decide whether to employ positive or negative sanctions depending on their professed goals and a "tradeoff between often competing concerns about the effectiveness and externalities of using carrots versus sticks." The effectiveness of positive versus negative sanctions varies in accordance with the level of dependence of the main actors, and with the baseline of expectations each has in that relationship. Thus, incentives are more likely to work with a political adversary rather than an ally due to the lower levels of both dependence and baseline of expectations inherent in this relationship. The sender must also consider, however, the political and economic ramifications, or externalities, of a sanctions episode; the value of incentives may be outweighed by negative externalities such as political fears over relative gains. Nations will prefer incentives to coercion when the former are likely to achieve their goals and when the externalities that ensue are positive. If, however, efficacy and externalities do not reinforce each other, the sender is faced with an efficacy/externalities trade-off predicament. States prefer positive sanctions when the predicted success rate is high and the sender values efficacy over the negative externalities inherent in the action, or when the probability of success is low, but the sender values the ensuing positive externalities more. (Davidson and Shambaugh 2000: 37-38)

Applying this analysis to Cuba leads to the conclusion that further tightening the American sanctions against Cuba would be unproductive, as Cuban dependence on American trade is nil. There are, however, enormous opportunities to be exploited by Washington in offering incentives to Cuba, precisely because trade dependence is so low. The US has not offered significant inducements to Cuba for two reasons. The symbolic goal of negative sanctions against a communist enclave mattered more to Washington than the substantive objectives of those sanctions. Alternatively, substantive goals were important, but were overshadowed by potentially enormous negative

externalities such as fears of relative gains, moral hazard associated with consorting with a communist regime and ally of Soviet Russia, and strong domestic opposition from Cuban Americans. As negative externalities have diminished somewhat with the end of the Cold War, the US has been more prepared to offer timid incentives, such as Track II of the Cuban Democracy Act of 1992. This tentative approach has been derailed by domestic and international events (presidential elections and the shootdown) that have precluded the use of carrots, and created short-term benefits for the use of sticks. (Ibid: 41-59)

2.8 Counter-sanctions

Secondary sanctions, or counter-sanctions, differ from other sanctions in that they do not focus on the primary target, but on third parties, attempting to force third party compliance with the sender's objectives towards the primary target. Secondary sanctions are fundamentally an exercise in power over trading partners, and are not generally successful in securing multilateral support. Indeed, they are often counter-productive, in that they are perceived as an admission of diplomatic failure, and can severely damage relations with partners and allies. (Haass 1998: 207) The long-standing Arab boycott against Israel includes a secondary boycott of any third party that contributes to Israel's economic or military strength. Washington employed secondary sanctions during the Cold War; the export control of strategic material to the USSR succeeded largely because of American dominance in hi-tech goods, but Reagan's pipeline sanction was an example of a spectacular foreign policy failure.

Secondary sanctions may be positive or negative, and may be directed against firms and private individuals (Libertad's Title III and IV) as well as states. Secondary negative sanctions may impose fines on negligent actors, restrict access to markets or products, or deny ability to travel to the US. Secondary incentives include privileged access to technology or markets. (Shambaugh 1999: 27-29)

It can be problematic to gain the cooperation of otherwise friendly third party states and (particularly) private firms in supporting sanctions or incentives against a primary target. Third party collaboration depends on the trade dominance of the sender and the

reciprocal levels of trade dependence between the sender and the target. Thus, Washington's degree of success in moderating the behaviour of some foreign firms under Libertad lay more in the interests and susceptibility of those firms to American sanctions rather than in any defensive measures undertaken by the host (third party) countries. Discretionary use of secondary sanctions can enable a government to extend its influence beyond its geographical boundaries. But the host is likely to be strongly opposed to secondary sanctions, interpreting them as an assault on their sovereignty, as in the case of Libertad. (Ibid: 2-24)

2.9 Conclusion

Sanctions, far from being solely about punishment and reward, are essentially concerned with wealth and power, and compliance from reluctant partners. (Ibid: 6) The scholarly debate continues over the efficacy and suitability of economic sanctions in a world of complex interdependence. While some argue that sanctions can be an effective tool of foreign policy, especially when compared with adversely high-cost alternatives (Baldwin 1985), others argue that sanctions are effective precisely because the costs entailed demonstrate resolve. (Martin 1992: 250) Most academics prefer multilateral sanctions and suggest providing offsetting assistance to increase compliance. (Haass 1998: 206; Martin 1993) Some argue that dramatic power play sanctions are generally ineffective, proposing that a discreet carrot or stick may lead to more satisfactory conclusions. (Knorr 1975: 165) Some academics view sanctions as counter-productive, although even sceptics admit that sanctions can be useful when employed in conjunction with military force. In Iraq, Bosnia and Haiti, the US invoked the "American way of war," levying sanctions first, followed by military force. (Pape 1997: 110)

Operation Desert Storm showed the efficacy of sanctions as a foreign policy tool. No one naively thought that sanctions would accomplish all of Washington's objectives, but they did provide valuable time for the military build-up to be completed whilst demonstrating American resolve. The liberation of Kuwait required a combination of all of Baldwin's typologies: diplomacy, propaganda, economic sanctions, and military force.

Sanctions should not be discarded as each instrument, while insufficient on its own, played a vital role in contributing to the outcome. (Baldwin 1999-2000: 103-105)

Donna Kaplowitz's 1998 book title, *Anatomy of a Failed Embargo*, clearly conveys her evaluation of Washington's Cuba sanctions. She identifies six foreign policy goals that the US sought, arguing that it has failed to accomplish any, and noting wryly that the continuing embargo bears witness to its ineffectiveness. They are: overthrowing Castro, retaliation for nationalisation of American property, breaking Cuban-Soviet ties, demonstrating American opposition, containment (Kaplowitz argues that the USSR, not the US, successfully curbed Castro's zeal for exporting revolution) and changing the internal situation in Cuba (which is the *raison d'être* of Helms-Burton). She attributes the embargo's failure to three main factors: Soviet support, effective countermeasures developed by Castro, such as 'rallying around the flag,' and the fact that ousting Castro was too ambitious a goal for sanctions. (Kaplowitz 1998: 3-10)

This thesis disagrees strongly that the American embargo against Cuba *during the Cold War* has been an unmitigated failure. As Baldwin suggests, success is a matter of degree, not an absolute value, and alternatives, or the lack of viable ones, are important considerations. (Baldwin 1985: 371-373) Although Castro clings to power, the sanctions have served important foreign policy objectives in demonstrating US resolve to contain communism, especially in the face of Castro's promotion of insurgencies throughout Latin America, and satisfying American public opinion to be pro-active against a taunting dictator. In a more substantive area, the embargo imposed enormous costs on both Cuba and the Soviet Union, considerably undermining their strategic positions. The US has thus attained three of the four foreign policy objectives it sought in a State Department briefing in April 1964, (Baldwin 1985: 176) failing only to convince the Cuban people that "Castro's regime cannot serve their interests."

However, the case for continuing the embargo in the 1990s, with American national security no longer threatened by communist dictatorships, is problematic. The rationale for the embargo shifted from containment to regime change and the promotion of democracy in Cuba. Bearing in mind that over forty years of American sanctions failed

to depose Castro, it is somewhat astounding that Washington still professed confidence in the ability of economic sanctions to accomplish this ambitious aim. This thesis argues that focused interest groups wielding important votes in strategic states in the presidential election years of 1992 and 1996 successfully reinforced and extended the American embargo against a beleaguered Cuba under the altruistic banner of democracy-building. Indeed, both bills contained the word 'democracy' in their titles. That they were able to do this is a measure of their political clout in a foreign policy area of marginal concern to most Americans.

Chapter 3

Two-Level Games

3.1 Introduction

International relations theorists have generally been categorised according to their preferred 'level of analysis,' which focuses attention on the causes of state behaviour, and pinpoints the main determinants of state interaction. Kenneth Waltz identified three levels of analysis in the 1950s: the international-level, or the systemic, which maintains that the state's position in the international arena is paramount in understanding its interaction with other nations; domestic-level, which sees cultural, societal and political institutions and interest groups as defining a nation's relations internationally; and individual-level, which stresses the personalities and psychological makeup of individual statesmen as the most important determinant of a nation's relations with other nations. Most traditional scholars of international relations based arguments on a single level of analysis; some felt that the different levels are mutually exclusive. The two-level game synthesises all three levels.

International, or systemic level theorists, treat the state as a unitary, rational actor who responds to external stimuli much as do billiard balls on a table. This celebrated 'Realist' approach, considers the pursuit of power as the most important preoccupation of states in ensuring their continuing sovereignty. Realists see all states as essentially uniform in terms of domestic structures and preferences, with their sole distinguishing feature being their relative place in the hierarchy of the international community. As relations between states are motivated overwhelmingly by the pursuit of power in an anarchic world, Realists see little hope or reason for states to co-operate with each other. More recently, 'neo-Realists' concede the possibility of cooperation among nations when balancing external threats, but only if the problem of cheating is addressed and relative gains are evenly distributed. (Grieco 1990)

Domestic-level theorists look within the state for the determinants of its foreign policy, tracing their roots to the Liberal tradition typified by John Stuart Mill and Woodrow Wilson. Contrary to the Realist dictum that the state simply responds to the international system, domestic-level theorists contend that the state can actively set the agenda in foreign relations and that different states will react entirely differently when faced with common challenges. These theorists open up the 'black box' of the state to examine the various components involved in making decisions therein. Domestic theories can also be sub-divided into three categories: 'society-centred' theorists stress the importance of domestic social groups who exert pressure through interest groups and elections; 'state-centred' analysts see the decision-making committees of the executive branch of government as the pre-eminent source of foreign policy decisions; and 'state-society relations' focus on the institutions that bind the state and the society, such as the legislature and the educational system. (Moravcsik 1993a: 5-6)

While most traditional scholars preferred the systemic theory, employing domestic theories as a clearly secondary influence when necessary to explain irregularities, academics have increasingly acknowledged the importance of domestic actors in the formation and enactment of foreign policy decisions. Tentative attempts to correlate domestic politics with international relations began in the 1960s, as James Rosenau constructed an elaborate taxonomy called 'linkage politics,' but little research ensued as a result. Joseph Nye and Robert Keohane attributed some importance to domestic factors in international relations, emphasising interdependence and transnationalism in lieu of the state as rational unitary actor concerned solely with power, but this was soon eclipsed by their work on regime theory. The 1970's scholars of the 'bureaucratic politics' school, such as Graham Allison, Morton Halperin, Arnold Kanter and Roger Hilsman, focused attention on the importance of bureaucratic interests in decision making; unfortunately, however, this concept did not evolve into a mature and vigorous theory. More recent scholars of the 'second image reversed' school, such as Peter Gourevitch and Peter Katzenstein, reversed the causation by highlighting international effects on domestic politics. Gourevitch explored the extent to which the domestic institutions are themselves shaped by the interplay of the international system. (Gourevitch 1978: 882)

In all these scholarly analyses, however, there is no general equilibrium that accounts for the *simultaneous* interaction of both domestic and international factors. Thus, the essential question is not *whether* to combine domestic and international theories, but *how* to do so. The two-level game attempts to move beyond the simple observation that domestic politics influences international relations and vice versa, and to fashion a parsimonious theory that integrates how domestic politics and diplomacy interact. As US Secretary of Labor John Dunlap declared, "Bilateral negotiations usually require three agreements - one across the table and one on each side of the table." (Putnam 1993: 433-436; Milner 1997: 24-25)²⁷

Robert Putnam's innovative 'two-level game' provides an ideal analytical framework for the study of the Helms-Burton Act and the ensuing negotiations between the US and the EU to resolve their dispute, as it demonstrates that political actors play simultaneously to both a domestic and an international audience. Attempting to address the concerns of both arenas at the same time is no simple matter, as the two have distinct agendas that require different, sometimes contradictory, responses. Statesmen must successfully negotiate an international agreement, and then secure its domestic ratification; they are simultaneously constrained by what other nations will accept and by what domestic constituencies will ratify. As Putnam writes, "At the national level, domestic groups pursue their interests by pressuring the government to adopt favorable policies, and politicians seek power by constructing coalitions among those groups. At the international level, national governments seek to maximize their own ability to satisfy domestic pressures, while minimizing the adverse consequences of foreign developments. Neither of the two games can be ignored by central decision-makers, so long as their countries remain interdependent, yet sovereign." (Putnam 436)

The two-level game assumes that statesmen have dual simultaneous objectives - to influence both international and domestic policies concurrently. "Diplomatic strategies and tactics are constrained both by what other states will accept and by what domestic

²⁷ Robert D. Putnam, "Diplomacy and Domestic Politics: The Logic of Two-Level Games," International Organisation 42 (Summer 1988): 427-460. Reprinted in Peter Evans, Harold Jacobson and Robert D. Putnam, eds, (1993) Double-Edged Diplomacy: International Bargaining and Domestic Politics. Berkeley: University of California Press: 436-368. The references in this thesis refer to Putnam 1993.

constituencies will ratify. Diplomacy is a process of strategic interaction in which actors simultaneously try to take account of and, if possible, influence the expected reactions of other actors, both at home and abroad." (Moravcsik 1993a: 15) The role of the statesman is crucial. A diplomat who is creative, bold and innovative can profoundly affect the outcome of negotiations by adopting a strategy that takes advantage of the area of autonomy that exists even when there is no overlap between his international and domestic agendas. The creative statesman can employ international issues to change domestic constraints and successfully pursue policies that would have been entirely unthinkable previously (Putnam 448). Because the statesman is playing at two tables at the same time, domestic policies may be adopted to affect outcomes on the international stage, and international agreements may be entered into solely to achieve domestic goals. Furthermore, the clever strategist may trigger re-alignments on other boards via the moves that he plots on his own board. Unlike other theories of international relations, two-level game metaphor adopts an "interactive approach" by studying the intercourse between international and domestic constraints concurrently and the ramifications and spillover effects of developments in one on the other. (Moravcsik 1993a: 15-17)

3.2 The Analytical Framework

Putnam's two-level game commences as negotiators representing two organisations seek agreement on a matter of mutual concern. The negotiators are not independent actors; they are agents subject to the constraint of reaching an accord that is acceptable to their respective organisations. These negotiators may be heads of government engaged in bilateral/multilateral talks, trade union leaders, finance ministers in IMF talks, or party leaders in a coalition. Putnam separates the two-level game into two phases:

Level I: International bargaining between the negotiators, which leads to a tentative agreement.

Level II: Separate talks within each domestic polity over the ratification of the agreement.

Although it is convenient to split the two-level game into two sequential phases - the negotiation phase and the ratification phase - this division is not entirely accurate, due to 'expectational effects.' There will certainly have been domestic negotiations in Level II to establish a position prior to the Level I meetings, and Level I consultations will surely be guided by what can reasonably be expected to be successfully ratified at home. Indeed, expectation of domestic rejection may lead to aborted talks at Level I without Level II ever having deliberated the issue. (Putnam 438)

Level II ratification may be formal, such as the requirement that the US Senate ratifies all treaties by a two-thirds majority, or informal, such as trade unions refusing to co-operate with an austerity programme hammered out by their government with the IMF. Because both parties at Level II must ratify an identical agreement, the tentative agreement stipulated at Level I cannot be changed without re-opening the bargaining at Level I. The ratification process is therefore a straightforward yes or no vote, with any attempt at modification tantamount to rejection. Level II actors may reluctantly support an agreement, despite serious reservations, if they prefer an imperfect agreement to no-agreement at all. The metaphor underscores the importance both of prior consultation with Level II constituents, and employing a negotiating team that understands the constraints of the domestic polity. (Putnam 438-439)

3.2.1 The importance of win-sets

Putnam defines the term 'win set' as the set of all possible Level I agreements that would 'win' ratification in the Level II domestic constituency. The size of the win-sets is crucial for two reasons. Firstly, larger win-sets enhance the possibility of Level I agreement. Negotiators can achieve agreement at Level I only when their respective win-sets overlap, and the larger the win-sets, the more likely they are to overlap. For example, the Anglo-Argentine talks over the future sovereignty of the Falkland Islands reached several tentative agreements, all of which were rejected at Level II; clearly, the Level II win-sets of Britain and Argentina did not overlap, and war was the inevitable result. (Putnam 439-441)

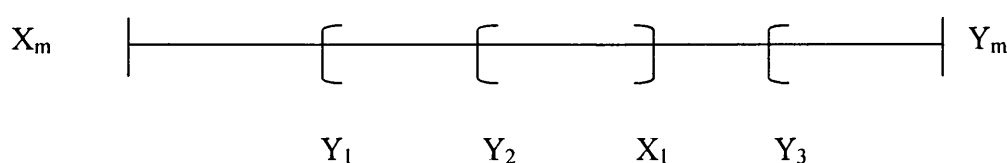
Secondly, the relative size of Level II win-sets affects the distribution of the joint gains that accrue from a Level I agreement. A larger win-set may, paradoxically, handicap the negotiator as he may be pushed around more; indeed, a smaller perceived win-set may be an advantage at the negotiating table, as the negotiator may use his domestic constraints to extract additional concessions. Putnam credits Thomas Schelling as having first recognised this principle in his 1960 work *The Strategy of Conflict*, where he wrote, "The power of a negotiator often rests on a manifest inability to make concessions and meet demands." (Schelling 1960: 19) The US used this tactic in the Panama Canal Treaty negotiations, reminding the Panamanians that the agreement would have to be acceptable to at least sixty-seven senators. (Putnam 441-442) During the Uruguay Round, French agricultural protectionist policies substantially delayed agreement, but proved a useful bargaining tool for the Commission in its negotiations with Washington. (Van den Bossche 1997: 65-66)

Failed ratification may be due to either voluntary or involuntary defection. Voluntary defection constitutes deliberate reneging on an agreement in a situation where compliance cannot be enforced. An example would be that of Iran exporting more than its OPEC-agreed quota of oil. Cooperation in an anarchic world is extraordinarily difficult to achieve, as the incentives to cheat are great, but actors who expect to meet frequently will have stronger motives to adhere to an agreement. Involuntary defection refers to the failure of an agent to obtain ratification at Level II of an agreement he has initialled at Level I; this enhances the importance of the credibility of the Level I negotiator. Both forms of defection are fatal to a contract, and uncertainty often makes it difficult to distinguish between the two. (Putnam 440-441) The agreement concluded in this case study is an example of such a contract, but whether due to voluntary or involuntary defection requires discussion.

Figure 1 below summarises a simple zero-sum game between parties X and Y, with X_m and Y_m representing the maximum returns to each, and X_l and Y_l representing the minimum agreement that each would ratify. Clearly, the win-sets overlap and an agreement is possible anywhere in the area represented graphically by the distance between Y_l and X_l . If Y's win-set were to contract to Y_2 , the range of possible

agreement would be trimmed in Y's favour to the area between Y_2 and X_1 . However, if Y were to attempt to reduce its win-set even further to Y_3 , the negotiations would be aborted, as overlap no longer exists between the two win-sets.

Figure 1: Effects of reducing win-set size (Putnam 442)



3.2.2 Critique of the importance of the size of win-sets:

Putnam's two-level game has generated a fair amount of scholarship, both broadening and challenging his assumptions. Not all scholars agree that large win-sets are crucial to successful conclusions. Frederick Mayer questions Putnam's focus on size, suggesting that a larger win-set may actually be detrimental to reaching an agreement if both sides attempt to gain the most from a large pool of possibilities. Mayer prefers to concentrate on 'location', by which he means complete information, concluding that a smaller win-set whose agenda is well known may actually encourage an early agreement, as there is no point in prolonging negotiations. (Mayer 1992: 797-798)

Keisuke Iida focuses on the issue of uncertainty, particularly as it applies in realistically evaluating the domestic situation. Iida argues that Putnam's hypotheses are contradictory in their assumptions about the level of information each side in a negotiation possesses about the other. Putnam's first hypothesis says the chances of no-agreement are greater the smaller the win-set; this implicitly assumes a degree of uncertainty about the opposition's win-set for why would the size matter if each side has complete information? Indeed, the size of the win-sets is immaterial in a world of perfect knowledge, as the two parties to the negotiations know exactly where each stands, and will only ever enter into negotiation when each knows there is some degree of overlap.

But Putnam's second hypothesis, that a small win-set can be a bargaining advantage, implies that the negotiators have fairly complete information about each other. These two hypotheses "contain different informational assumptions (imperfect information in the former and almost perfect information in the latter)." (Iida 1993: 405)

Iida further reasons that, whereas Putnam's first hypothesis requires some uncertainty, that uncertainty may derive from various sources: the opposing win-sets may not intersect, negotiators may be misinformed about the preferences of their own domestic constituency, or win-sets may vary with a change of government during protracted negotiations. Additionally, Iida highlights the problem of a potential conflict of interest within a domestic constituency. For example, negotiations between two protectionist countries who seek to mutually lower tariffs may generate strong domestic debate between free traders, who would support almost any attempt to decrease levels of protection, and protectionist elements (trade unions perhaps), who heartily oppose trade liberalisation. In such circumstances, Level I negotiations may be entered into by rational players, but successful ratification at Level II will depend on realistic informational assumptions of domestic preferences on the part of the negotiators at Level I. (Ibid: 405-407)

Uncertainty in the international arena and uncertainty in the domestic arena have entirely different systemic consequences. In Level I negotiations, asymmetric levels of information about the domestic opposition may improve a negotiator's bargaining power, but will ultimately not endanger ratification at Level II. However, asymmetric levels of information in one's own polity greatly endanger successful conclusions through involuntary defection. The size of win-sets is significant only in models that acknowledge a degree of uncertainty; failure to ratify international agreements is the result of either involuntary defection or no intersection of win-sets, either of which may happen when information of the domestic constituency is incomplete. Iida argues incomplete information renders the real world much more complicated than that implied in Putnam's work; perceptions are as important as genuine domestic constraints. (Ibid: 416-419) Iida's analysis has particular significance for this case study.

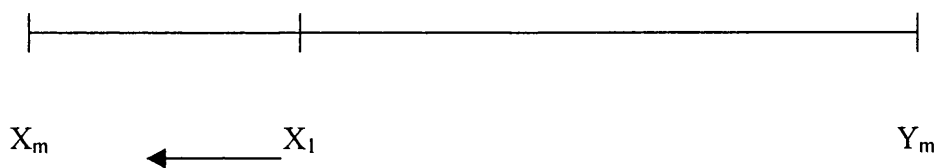
Putnam considers the issue of uncertainty in bargaining, arguing that uncertainty can be either a positive or a negative asset in a bargaining situation. Contrary to Iida's analysis that perfect knowledge is implied in his second hypothesis, Putnam argues negotiators can use uncertainty advantageously by deliberately understating their win-set, confident that the opposition does not know the real truth. However, Putnam concedes that uncertainty increases the risk of involuntary defection, and therefore lowers the expected value of the agreement to the other party. Indeed, the opposing party may demand higher concessions and side-payments to offset the cost of this uncertainty. The result is that each chief negotiator will try to convince his opposite number that his win-set is 'kinky,' that is, that the proposal under consideration will certainly be ratified, but a proposal even slightly more favourable to the opponent is unlikely to be ratified at Level II. (Putnam 453)

Jongryn Mo, focusing on the interaction between the international negotiation process and the formation of domestic coalitions, disputes Putnam's second hypothesis that a highly constrained win-set may be a bargaining advantage. He contemplates a strong domestic group that wields veto power over the ratification process at Level II and constrains the country's win-set to the range of possibilities that are acceptable to it. The existence of a virtual veto magnifies the uncertainty in the bargaining, may increase the cost to the foreign country of obtaining an agreement and, by tightening the constraints on the negotiators, increases the likelihood of involuntary defection. Possession of veto power also suggests a highly undemocratic solution to international negotiations, as an agreement may be vetoed at Level II even though it is acceptable to a majority of the domestic constituency. (Mo 1994: 412-413)

Mo challenges the assumption, implicit in Putnam's analysis, that the chief negotiator and the domestic constituency share identical win-sets, asserting the very real possibility of a divergence of interests between the two. For example, in trade negotiations to lower non-tariff barriers between the US and Japan, Congress is interested in obtaining the maximum concessions from Japan. But the chief negotiator, as an official of the executive branch of government, is mindful of other foreign policy concerns and may be reluctant to push too hard for concessions from the Japanese. (Ibid: 402-403)

One may illustrate this graphically (Figure 2) using the same notations as Putnam, with X_m and Y_m representing the ideal outcomes for each country, and X_l and Y_l representing the maximum that each country would ratify. If X's constraints increase so that X_l becomes smaller, Y must concede more in order to obtain an agreement. This argument presupposes an alignment of interests between the chief negotiator and the domestic constituency, so that the ideal outcome for the negotiator is also X_m , which lies to the left of X_l . However, the negotiator may have different preferences to his domestic constituents, and his ideal outcome X_m may actually lie to the right of X_l , as in Figure 2b. If X_l is constrained further to the left, his ideal outcome becomes even more unattainable.

(a) Aligned Interests



(b) Opposed Interests

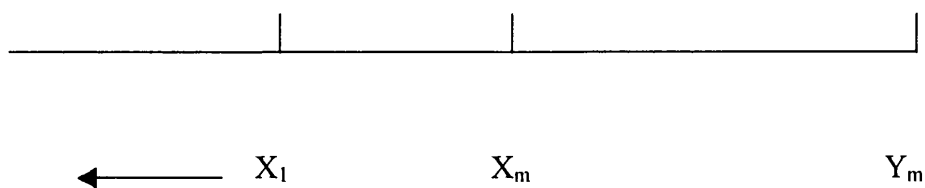


Figure 2: Aligned and Opposed Interests between the Negotiator and His Domestic Constituents (Ibid: 404)

Putnam assumes confluence of win-sets to simplify his analysis. He further argues that even if the win-sets of the chief negotiator and his constituency do not coincide, it is reasonable to assume that the chief negotiator will act as an honest broker and give

primacy to the domestic agenda, not least because he wants to be re-elected. Nevertheless, Putnam concedes that a divergence of preferences is possible. Indeed, the outstanding example of a chief negotiator exercising veto power over a possible agreement remains Woodrow Wilson, who resolutely refused to modify the Versailles Treaty, despite the evidence that both Level I and Level II parties would have acquiesced. Conversely, American public opinion was strongly in favour of a negotiated end to the Vietnam War in the early 1970s and this clearly affected the results of the Paris talks although the chief negotiator was arguably more hard-line. (Putnam 456-458)

Mo constructs a model that allows divergence between the preferences of the chief negotiator and his domestic constituency. The chief negotiator not only bargains internationally; he must also bargain with his own constituents in order to ascertain where the national interests lie. In effect, Mo adds another level to Putnam's two-level game: a 'proposal-making process', in which the negotiator enlists supporters among the domestic constituency through bargaining and concession making, and both have the authority to veto a proposal. Mo assigns a more consequential role for the chief negotiator than does Putnam, making him more of an actor than an agent. Mo's negotiator's constraints are endogenously rather than exogenously determined, whereas Putnam maintains that the domestic constraints under which the negotiator must labour are exogenously imposed for him by his constituents. (Mo 1994: 404-405; 414-415)

Mo's analysis has resonance for this case study. This thesis argues that the chief negotiators of both the US and the EU, representing divergent rather than homogeneous constituencies, were actors more than agents as both bargained with their constituents and determined the parameters of their constraints, but with entirely different outcomes. The continual consultations between the Commission and the Council during Level I talks, and the strong UK leadership in the Council ensured successful EU ratification at Level II. But despite the American negotiating team's numerous consultations with Capitol Hill, where Senator Helms held veto power over ratification at Level II, the US defaulted. This is a fundamental question that will be addressed in this thesis.

3.3 Determination of Win-Sets:

Notwithstanding the debate over the (relative) size of win-sets, all scholars agree that win-sets are central to the metaphor of the two-level game, as they form the basis upon which negotiations can proceed. Putnam argues that the following three factors determine the size of win-sets: (Putnam 443)

1. Level II preferences and coalitions
2. Level II institutions
3. Level I negotiators' strategies

3.3.1 The Distribution of Power, Preferences, and Possible Coalitions among Level II Constituents

The power and preferences of the major political actors in the domestic constituency determine the win-set. Win-sets will be smaller the lower the cost of no-agreement to the constituents. Support for international agreements is generally greater in smaller countries that have more dependent economies than in larger, more self-sufficient countries such as the US, where win-sets are smaller as the costs of no-agreement are deemed low. The ratification process is not a multiple-choice menu of different alternatives; the choice is restricted to agreement or no-agreement. Failure to ratify often means a continuation of the status quo, but it may represent a worsening option, such as the US failure to ratify the Treaty of Versailles. *Ceteris paribus*, one would expect countries like the United States to drive a hard bargain in the few international agreements they ratify. (Putnam 443-444) This thesis will argue that the high cost of no-agreement could explain American agreement to an accord over Helms-Burton whose ratification was uncertain.

Domestic constituencies may be homogeneous or heterogeneous, depending on the issue at hand. In a homogeneous polity, there are no deep divisions over what constitutes the national interest, and the debate evaluates the cost of no-agreement. The SALT talks illustrated a homogeneous American polity. In a heterogeneous situation, however, constituents bear costs unevenly, and are therefore deeply divided as to what the

agreement should include. A heterogeneous constituency is more common when the agreement involves multiple issues, such as a labour agreement that involves tradeoffs between wages and pensions, with younger workers supporting higher take-home pay and older workers opting for increased pensions. American reservations over the Versailles Treaty reflected domestic debate over the principle and degree of punishment meted out to the Axis powers. (Putnam 444-445)

Different constituencies present unique challenges to the Level I negotiator. The negotiator representing a homogeneous community will press for more concessions to assure ratification at Level II, particularly if there is a strong 'hawkish' division in the domestic constituency. The negotiator acting for a heterogeneous community, on the other hand, has a more complex task, for he cannot guarantee ratification through the simple 'the more, the better' principle. Pressing for harsher terms against Germany in 1919 would have placated some at Level II, but would have alienated others. Potential exists for transnational alliances between domestic groups of opposing countries who share preferences pressuring their respective governments to adopt the same policies such as Italian bankers welcoming IMF pressure to adopt a tighter monetary policy. (Ibid: 445)

We have implicitly assumed that all members of Level II participate in the ratification process, and that negotiations are over single issues. Relaxing these two assumptions yields some interesting variations that will affect the size of the win-set. Participation rates vary according to the topic under discussion, with some issues provoking intense debate, and some going almost unnoticed; this will depend on the level of the perceived costs/benefits of the agreement. Therefore, trade agreements carry higher participation rates than do monetary issues. Negotiating several issues at once involves trade-offs among various constituencies and the group with the greatest interest will generally hold the most hawkish views. If each group sets the conditions for its issue, the resulting win-set may be so hard-line as to be virtually non-negotiable at Level I. (Ibid: 446)

Domestic and international politics can become caught up together in ways that open new possibilities not previously available. For example, the majority of voters in Level

II oppose an issue like decontrol of oil prices, but some could be persuaded to support this measure if it were linked to an agreement at Level I to increase employment opportunities through promoting exports. An innovative chief negotiator could strike an international deal that encourages exports, thus overcoming the initial opposition in Level II to oil price decontrol. Putnam calls this type of linkage 'synergistic linkage', which works "not by changing the preferences of any domestic constituents, but rather by creating a policy option (such as faster export growth) that was previously beyond domestic control." (Ibid: 448) Synergistic linkages that promote internal reform and expand the number of feasible alternatives by linking them to international issues is only explicable in terms of the two-level game.

3.3.2 The Level II Political Institutions

Formal ratification procedures affect the size of the win-set. For example, the American Constitution mandates that the Senate ratify treaties by a two-thirds majority (rather than a simple majority as in all other legislation); win-sets will therefore be smaller in the US, to reflect this additional constraint. The Trade Expansion Act of 1974, recognising that international agreements could not proceed as long as Congress voted piecemeal on every paragraph, provided for a straight up-or-down vote on trade issues. (Ibid: 448-449) This practice has been maintained by 'fast-track' legislation, in which the President seeks a mandate from Congress, prior to negotiations for further trade liberalisation, that any trade agreement initialled by the executive will be ratified or rejected by Congress as a package deal.

Institutions that are quite strong and relatively autonomous from their electorate will have fairly large win-sets. For example, an autonomous central bank with a large win-set will be freer to enter monetary negotiations than one that is more politically accountable. Paradoxically, however, the stronger the state is domestically, the weaker it will be at the international bargaining table. Negotiators dealing with a government represented by a fragile coalition know they cannot drive a hard bargain as their win-set is small; a strong state, on the other hand, that possesses a large win-set, may be subject to great pressure to grant concessions. (Ibid: 448-450)

There can be multiple levels of ratification. In an agricultural trade agreement between the US and the EU, ratification in the US would formally require a two-thirds majority in the Senate, but also informally require the support of the major agricultural players. The Treaty of Rome mandates unanimous ratification by the Council of Ministers for any modification of the Common Agricultural Policy, followed by ratification by each of the member states. Clearly, the potential for creative negotiation strategies, issue linkages, and coalitions are multiplied in such circumstances. (Ibid: 450)

3.3.3 The Strategies of the Level I Negotiators

Whereas it is in the interest of the Level I negotiator to maximise his opponent's win-set, maximising his own win-set brings mixed blessings. On the one hand, he will find it easier to conclude an international agreement with a larger win-set; on the other hand, a smaller win-set enables him to press for greater concessions and drive a harder bargain for his country. Nevertheless, we shall assume that the chief negotiator wishes to expand his win-set so as to ensure ratification of the international agreement, and there are several means by which he can accomplish this. (Ibid: 450)

The chief negotiator can employ 'side-payments' to facilitate ratification of an agreement. Such was the strategy of the Carter Administration in facilitating the vote on the Panama Canal Treaty, where inducements such as public works projects were offered to undecided senators. Side payments may be offered domestically or internationally. Two-level games highlight the role of side payments in securing ratification, rather than the purely economic benefits that accrue from them. These payments should be targeted strategically at the swing vote, where they are likely to bring desired results, rather than as an across-the-board concession.

Furthermore, being ever mindful of both his and his opponent's domestic constituencies, Level I negotiators may collude, as each has a vested interest in helping his opponent to

ratify the agreement back home²⁸. It is in the interests of the negotiator to maintain the political standing of his opponent, as this expands the size of the opponent's win-set, enhances his own bargaining power at Level I and increases the chances for successful ratification at Level II. High-level summit meetings seek to capitalise on media attention devoted to negotiators, who are often heads of government, granting them substantial advantage vis-à-vis their domestic opponents in ensuring ratification at Level II. Finally, a chief negotiator who is extremely well respected among his domestic constituents is far more likely to successfully negotiate and ratify an agreement. Voters may not fully comprehend the fine print of a given contract, but will nevertheless ratify it if a leader in whom they have confidence and trust encourages acceptance. (Ibid: 451-452)

Ideally, the composition of side payments should be known at the outset of the negotiations. However, actors often seek to restructure the game to their advantage, even in mid-play, by wooing public opinion, offering aid to a friendly government, etc. Sometimes actions by one country will 'reverberate' within the domestic politics of another country, dramatically altering the previously held consensus. An outstanding example of a deliberate attempt at persuasion, which Putnam labels 'suasive reverberation,' was President Sadat's sensational visit to Israel. Moravcsik argues that public goods are more likely to be the subject of strategies based on reverberation, whereas private goods will call for strategies of side payments. (Putnam 454-456; Moravcsik 1993a: 29)

Frederick Mayer disagrees with Putnam's hypothesis that domestic constraints are an advantage in Level I negotiations, arguing that the outcome is debatable. He focuses on a fractured domestic constituency and the ability of domestic interest groups to make strategic side-payments to one another in order to compose a mutually acceptable bargaining agenda. He identifies three structural attributes that set the tone for a negotiating round and ultimately determine whether the constraints are beneficial or not: "the characteristics of the domestic factions, domestic political institutions governing the rules of the internal game, and the nature of the external (international) bargain." He addresses questions about who is at the negotiating table and what their interests are,

²⁸ Gorbachev benefited from Western leaders eager to enhance his domestic political standing. (Moravcsik 1993a: 26)

whether the entire society is engaged in the negotiations or whether only a few elites are involved, and whether the political institutions mandate an absolute consensus, or only a simple majority. (Mayer 1992: 793-96)

Winners in a divided constituency could partially compensate losers for what they have lost, thus gaining their support for the win-set through the use of internal side-payments. Strategic use of side-payments may encourage factions to consider options that were previously blocked, though the policy-makers must determine whether resolving the divisions at Level II are beneficial or detrimental in Level I negotiations. Some payments, though feasible in principle, may not be acceptable socially, legally, politically or morally (bribes, for example). Internal side-payments can rarely be made in hard currency, forcing actors to seek a non-monetary issue linked to the topic under discussion. For instance, in both SALT talks, Presidents Nixon and Carter bought support from the Joint Chiefs of Staff by promising new weapons systems, to which Congress reluctantly agreed in order to facilitate the SALT agreements. (Ibid: 806)

Robert Schmidt studied the Pacific Salmon Commission, charged with allocating fishing rights between the US and Canada in order to ensure the continuing health and viability of the valuable salmon fisheries. Negotiations between these two otherwise amicable neighbours broke down in the 1990s. Schmidt attributed the failure to reach agreement on the widely divergent interests and preferences in Level II, between the state of Alaska and the Pacific Northwest states of Washington and Oregon, rather than on any irreconcilable Level I differences. Exploring linking issues could have diffused the internal dispute. Alaska expressed a desire to develop oil in the Arctic region; Washington and Oregon could have supported Alaska in this endeavour, thereby obtaining concessions from Alaska on the salmon fisheries. Side-payments could have diffused the internal conflict and promoted a successful agreement with Canada. (Schmidt 1996: 95-111, 137-139)

The Cuban refugee crisis of 1994 provided an example of the efficacy of side payments. When Castro announced he would not prevent Cubans from leaving, a torrent of desperate men set out on rafts across the Florida Straits, provoking a crisis in Florida.

Clinton detained Cuban rafters rescued at sea at Guantanamo Naval Base, winning Cuban-American support through offering side payments of tougher sanctions: greater travel restrictions and a ban on dollar remittances to the island. This was followed by an agreement in September providing that the United States would admit up to 20,000 Cubans immigrants annually, while Cuba agreed to return to its policy of preventing illegal immigration. However, when warm weather brought the renewed threat of another refugee wave in the spring of 1995, Clinton resolved the refugee problem by negotiating with Castro in secret. The immigration accords of May 1995 stipulated that all the detainees at Guantanamo would be admitted to the US, but that all future rafters rescued at sea would be repatriated to Cuba, with the understanding that they would not be prosecuted. In return, Clinton vowed to oppose the Helms-Burton Act, a further example of the use of side-payments, this time internationally rather than domestically. Professor LeoGrande called the immigration accords nearly perfect from Clinton's point of view, as he managed to put a halt to the unwanted wave of new immigrants, thus maximising his Level I game, whilst at the same time controlling the Level II domestic costs in the short term through side payments to the Cuban-Americans. Clinton risked the ire of the Cuban-Americans in negotiating the status of the detainees, after having calculated that the political price of another refugee crisis was even greater. (Kiger 1997: 42-44; LeoGrande 1998: 76-80)

3.4 Limitations of the Metaphor

Level I negotiator's strategies can successfully change and/or expand domestic win-sets, when suitably applied. Washington policy-makers' dramatic attempt to use the Uruguay Round GATT talks to dismantle domestic farm price supports almost failed completely because sufficient consideration was not given to the Level II politics of the countries involved. GATT had succeeded in greatly liberalising the industrial sector, but in the agricultural sector shrinkage of production and exports would occur without the critical aid of internal price supports. Frustrated by agricultural crises in the 1980s, American officials sensed an opportunity to effect domestic reform at Level II through Level I negotiations, particularly as they understood that there was support from like-minded reformers in Europe and Japan. American policy-makers were hoping to expand their

win-set by taking domestic farm policy reforms out of the Congressional arena through playing a two-level game. (Paarlberg 1993: 39-44)

In 1987 excessively ambitious American officials proposed to eliminate all trade-distorting agricultural price supports within ten years; the proposal was far too radical for the establishment in either the EC or Japan. American farm lobbies sensed a great tactical opportunity, playing their own game by enthusiastically endorsing the plan, knowing full well that the Europeans and the Japanese would reject it. To the dismay of the American reformers who had failed to give sufficient attention to domestic constituencies, this strategy blocked internationally negotiated reforms whilst maintaining domestic agricultural subsidies.²⁹ The agricultural agreement eventually signed in the Uruguay Round was due in part to a (domestic) budget crisis in the European Community that dictated the need for urgent reform. (Ibid: 46-53)

Jeffrey Knopf writes that the two-level game is limited in failing to give adequate attention to the differences among three logically separate forms of domestic-international interaction, which he labels transgovernmental, transnational and cross-level. Knopf argues that these distinctions are significant as they may have entirely different effects on the bargaining process.

Transgovernmental interaction occurs when one or both of the negotiating teams are divided, and links are sought between one faction and a like-minded faction in the other government. These links generally involve discussion within a narrow range of policy options, as the members of the negotiating teams are part of their own executive and are therefore more or less in agreement with their government's policy. Transnational interaction occurs when domestic actors outside the Level I negotiating team establish links with like-minded factions on the other side. Cross-level processes involve establishing communication between the leaders of one side and the domestic constituency of the other side, regardless of who initiated the contacts. Because transnational and cross-level linkages involve domestic actors who are not part of the official negotiating body, they are likely to support wider, more divergent policies than

²⁹ Indeed, the farm lobby actually succeeded in boosting the level of price supports, arguing that higher levels would be useful as bargaining chips in future international negotiations. (Paarlberg 47)

those supported in transgovernmental links. Domestic groups may strategically initiate transboundary links when they are experiencing difficulty in realising their policy goals within their own political system. (Knopf 1993: 606-608) The Helms-Burton case study provided several instances of transgovernmental links as Washington and Brussels sought to narrow their differences.

The issue of side payments has been substantially addressed in the literature on two-level games. Coercive bargaining, entailing threats and sanctions, has a good deal more relevance for the study of the Helms-Burton Act, but is covered less in the literature and is more difficult to link into a two-level game. Moravcsik argues that threats widen the win-set of the target state, by raising the cost of no-agreement. He further claims that the more powerful the domestic group targeted by the sanctions, the more effective the threat of sanctions becomes. (Moravcsik 1993a: 29) John Odell explores the relationship between the strategic use of overt economic threats in international bargaining and the outcomes of such talks. He argues that the target nation will not comply with threatened sanctions if the internal political cost of compliance is greater than the cost of no-agreement. Policy-makers, primarily concerned being re-elected, will choose the alternative that most closely supports the domestic win-set. (Odell 1993: 233-234)

Whereas these hypotheses relate to the target state in a sanctions episode, there is little in the two-level games literature dealing with the coercive state as the relationship between threats and the ability to ensure the ratification of an agreement is not clear. Moravcsik suggests two possibilities. One hypothesis may be that the two vary inversely in that a narrowing of the win-set may be correlated with threats of increased credibility. A second hypothesis focuses on the credibility of the sender, reasoning that the credibility of a threat will be less the greater the power of the groups disadvantaged at home by the threat. Odell concurs with Moravcsik's hypothesis that the credibility of the threat is primarily determined by the distribution of domestic interests in the sender state; the more concentrated and powerful the factions benefiting from the threat, the more credible the threat and vice-versa. This view presupposes a high degree of domestic consensus in the sender state, and a fairly accurate level of awareness of the internal politics of the sender state on the part of the target state (Moravcsik 1993a: 29-30; Odell 1993: 233-34)

These hypotheses explain why Washington won considerable concessions against a powerful EC, whereas it was less successful against a much weaker state, Brazil. The different bargaining outcomes can be explained on the basis of the credibility of the sender nation, determined by foreign perception of US domestic politics. Washington threatened the EC with severe sanctions when Spanish and Portuguese accession to the EC meant a substantial curtailment in a profitable grain export market for the United States in 1986. The Europeans perceived the American threat as highly credible, endorsed by powerful agricultural interests, and were eager to offer important concessions in order to head off a threatened trade war. American threats over computers against Brazil, a much weaker state, carried much lower credibility as domestic computer firms were themselves divided, and many were opposed to Reagan's coercive tactics. This encouraged Brazil to successfully resist American threats of sanctions. (Odell 1993: 237-243)

The Level II politics of the target nations reinforce the variation in outcome of the two sanctions episodes, illustrating the hypothesis of the greater net cost of compliance vis-à-vis no-agreement. Washington created negative reverberation initially, both in Brazil and in the EC. But voices of accommodation were soon heard in Europe, where Washington had carefully targeted a range of goods that hurt virtually every member state. European policy-makers concluded that they had more to gain by compliance than by standing firm; thus the reverberation became positive, leading to an early agreement favouring the US. In Brazil, strong Level II interests precluded capitulating to Washington, with the result that Reagan eventually backed down. (Ibid: 243-250)

In this case study, the EU's threat to mount a WTO challenge became patently credible with the appointment of a Dispute Settlement Body in February 1997. American counter-threats to ignore the WTO procedure, as it questioned the legitimacy of the WTO to adjudicate the matter, proved hollow; American respect for the WTO forced Washington to enter serious bilateral negotiations.

3.5 Conclusion

Robert Strauss, the United States Special Trade Representative during the 1979 Tokyo Round of GATT negotiations, famously declared that he spent as much time negotiating with domestic constituents and Congressmen as he did with foreign trading partners. (Putnam 436) Relaxing the Realist assumption of unitary rational actor by investigating the domestic decision-making process helps understand that policy-makers have different agendas and leads to a significantly improved ability to predict the outcomes of international bargaining. The two-level game suggests a plausible explanation for the oft-observed sub-optimal level of international cooperation, as it highlights domestic political constraints and the interplay between domestic and international processes as erecting some of the greatest obstacles to international cooperation.

Academics increasingly recognise that it is imperative to consider the two-way flow of interaction along the domestic-international divide to acquire a degree of understanding about international bargaining. The analytical framework of the two-level game offers an encouraging answer to this challenge. Unlike state-centric paradigms, the two-level game perceives that there may be strong internal conflicts about what constitutes the national interest. Unlike the second image and second image reversed schools, two-level game acknowledges that policy-makers struggle to reconcile domestic and international constraints simultaneously. The two-level game both demands and enables international statesmen to develop creative, multiple strategies in their pursuit of the national interest. Peter Evans writes that Level I talks are not only about international relations, but also about domestic opinions and the relative distribution of costs/benefits in the constituency. "Bargaining is an inter-active process, simultaneously shaped by the pursuit of international gains and the political dynamics of domestic ratification." (P. Evans 1993: 397)

This thesis will analyse the Helms-Burton negotiations using the two-level game metaphor to consider the following:

- *Win-sets*: How large were the win-sets of the US and of the EU and how were they placed relative to each other? How transparent were the win-sets, both domestically and internationally?
- *Preferences, coalitions, and veto power*: Were Level II preferences homogeneous, or was the domestic constituency divided? In a divided constituency, were there powerful factions whose support could be gained with side payments?
- *Institutions*: The United States and the European Union have very different political institutions. What impact did the institutional framework have on the ability to conduct negotiations and deliver ratification?
- *Level I Negotiators*: How competent were the chief negotiators in strategically seizing the moment to craft creative and ratifiable agreements? Were there possibilities for transgovernmental links?

The next three chapters present the domestic Level II constituency in the United States pertaining to Libertad. Chapter 4 examines the tensions within American political institutions as Helms-Burton was drafted. The following chapters analyse the heterogeneous domestic polity seeking to determine US policy on Cuba. Chapter 5 presents the hard-line Cuban-American interest groups that lobbied to maintain pressure on Castro. Chapter 6 explores the growing consensus seeking moderation of America's uncompromising Cuba sanctions, and general reform of Washington's ability to use unilateral economic sanctions as a tool of foreign policy.

Chapter 4

Level II Tensions in the Passage of the Helms-Burton Act

"The Clinton Administration was running a peripatetic foreign policy at prey to the whims of the latest balance of forces." (Brinkley 1997: 113)

4.1 Introduction

Washington sought various Cold War objectives through the use of sanctions against Cuba, among them instrumental goals such as destabilisation of the Castro regime and expressive goals such as domestic and international signalling of disapproval of the human rights abuses in the country. With the fall of the Iron Curtain in 1989, a reasonable argument could be made for lifting the sanctions and moving toward normalisation of relations, as the US has done with many former adversaries, China and Vietnam to name but two.

However, hard-liners argued that the impact of the American embargo had been largely mitigated by Soviet support of about \$6 million annually; having now lost this crucial lifeline, the US embargo could finally bite and topple Castro. Cuban GDP was an estimated \$334 per capita in 1986, plummeting to just \$61 by 1996. The fall in living standards was accompanied by rising discontent among Cuba's military and ruling elite, and a growth of civil society opposition. Hard-liners accused Clinton of not taking advantage of the economic straits and supplementing the embargo by, for example, providing independent news information to ordinary Cubans. A key factor in the fall of the Iron Curtain was the dire economic circumstances; comparing Cuba and Eastern Europe, Radio Marti's transmissions were much weaker and less frequent than were those of Radio Free Europe. Sensing Castro's vulnerability, the end of the Cold War brought a strengthening rather than a moderation of the trade embargo against Cuba, as "expectations...moved from the realm of symbolism to the realm of substance." (Krinsky and Golove 1993: 7)

Promotion of democracy and respect for human rights provided the new rationale for the intensification of the embargo in the nineties. The Cuban Democracy Act (CDA, also known as the Torricelli Act) of 1992 stated that the policy of the US was "to seek a peaceful transition to democracy" in Cuba, hence its name (§ 3/1). Libertad stated as its purpose "to assist the Cuban people in regaining their freedom and prosperity" (§ 3/1) and "to encourage the holding of free and fair democratic elections in Cuba" (§ 3/4), hence the name Cuban Liberty and Democratic Solidarity Act. But the lofty democratic intent was no more than a smokescreen to legitimise the tightening of the embargo as Washington shifted its goalposts vis-à-vis Cuba to actively seek regime change.

This chapter focuses on the Level II tensions evident during the congressional deliberations over Helms-Burton in 1995. The preferences of the domestic constituency diverged; the Clinton Administration and the Democratic leadership on Capitol Hill questioned whether Libertad was the appropriate tool with which to promote democracy in Cuba and objected strenuously to many of its provisions. Under the powerful leadership regimen of the House of Representatives, Libertad passed on a strongly partisan vote in September. But the Senate Democratic leadership mounted a sustained filibuster to halt the legislation, forcing Senator Helms to withdraw the more controversial paragraphs, before securing passage of an emasculated bill in October. Castro's brutality temporarily united Washington's divided constituency; the shared win-set forced enactment of Helms-Burton in early 1996.

4.2 Re-defining Cuba Policy

The momentum for Libertad was generated by the confluence of several factors in the mid-1990s. The loss of Soviet support forced Cuba to sell off assets in a desperate search for foreign investors; Western Hemisphere governments like Nicaragua and Costa Rica were increasingly confiscating private property; and the Republican Party captured control of both Houses of Congress in 1994, which meant that Senator Jesse Helms, conservative cold-warrior Republican of North Carolina, assumed the chairmanship of the Senate Foreign Relations Committee. Amid growing frustration at the Administration's 'listless' Cuba policy, Helms composed a menu of ten foreign policy initiatives, giving Cuba priority listing. (Fisk 2000a: 66-67; Kiger 1997: 45) Francisco

Hernández, president of the Cuban American National Foundation, testified that Libertad "sends a message to Castro that if the White House is not sure where it is going on Cuba, the representatives of the American people in the United States Congress know where they are going." (Hernández 1995: 90)

Jesse Helms and Dan Burton, given the historical and theoretical evidence, probably knew their bill would impact little, if at all, on Castro and his regime. Their motivation was symbolic, to "demonstrate to interested parties that they still cared about ridding Cuba of Castroism," those parties being Cuban-Americans who sought redress for their properties in Cuba, and who had contributed generously to their campaign coffers. (Kaplowitz 1998: 182) Dan Fisk, who worked as a Republican staffer responsible for Western Hemisphere issues at the Senate Foreign Relations Committee from July 1994 until August 1997, was assigned the task of drafting new legislation on Cuba. Fisk acknowledged the interest of the Cuban-Americans in this bill, but maintained that, as a single constituency, they could never have imposed Helms-Burton on their own. Joining the preferences of the Cuban-Americans with Helms' staunch anti-communism and advocacy for property rights created a broader Level II consensus. (Fisk 2000a: 69-70)

Based on Clinton's political appointees, Fisk believed that the Clinton White House was slowly drifting toward moderating the Cuban embargo, a stance that put the White House at odds over Cuba policy with the State Department's career officers. (Fisk 1999: 28-29) Pamela Falk, Staff Director of the House Western Hemisphere Subcommittee, wrote that her subcommittee felt that Clinton was "predisposed to opening the door slowly" if he won re-election. (Falk 1996: 17)³⁰

Clinton's Cuba policy focused on ensuring orderly migration from the island to the US. Clinton had been governor of Arkansas when forced to take some of the 125,000 Mariel boat people from Cuba who overwhelmed Florida in 1980; he blamed his gubernatorial defeat that year partly on the violence of Marielitos at their Arkansas camp. Consequently, Clinton sought "stability", wanting nothing untoward to happen (again) with regard to Cuba during his stewardship. (Fisk interview) This view was shared by Michael Kosak of the US Interest Section in Havana, who declared in 1998 that

³⁰ Falk's analysis has been questioned by some observers, including Professor Joaquín Roy.

Washington's principle concern was continued stability in Cuba, as unrest would propel thousands of Cubans into the Florida straits. (López 2000: 359-360)

Clinton also focused on encouraging a peaceful transition to democracy by supporting the Cuban people through Track II of the CDA which saw food and medicine sent to Cuba by humanitarian NGOs and improved telecommunications between the US and Cuba. Whilst maintaining the leverage of the embargo over Castro, Clinton sought to reduce the sanctions "in carefully calibrated ways in response to positive change in Cuba."³¹ (Nuccio 1995) The Helms-Burton Act seriously compromised this last point, effectively tying the hands of the executive and inhibiting his ability to respond to positive developments on the island.

4.2.1 Senator Jesse Helms

North Carolina's Senator Helms was a staunch defender of traditional Southern values; an archconservative and nationalist, he supported the death penalty, the right to carry arms, and believed that the civil rights movement was unnecessary. Helms was a particularly firm supporter of property rights; he held up \$100 million in relief to Nicaragua in 1992 because the new government there had been slow to return American properties confiscated by the previous Sandinista government. (Kiger 1997: 46)

A long-standing member of the Senate Foreign Relations Committee, Helms was a unilateralist defender of American sovereignty and a sharp isolationist critic of free trade who voted against NAFTA and the WTO.³² Helms blocked so many nominations and bills, among them the Comprehensive Test Ban Treaty in 1999, that he has been called "Senator No," a name he cherished. (Waller 2000: 40-42) In defending America's 'splendid isolationism,' Helms campaigned against the Kyoto Protocol and sought to reduce Washington's financial commitment to the United Nations, showing a tenacious unwillingness to compromise American sovereignty for the sake of international cooperation. (Vita 2000; Hitchens 2001: 68) Helms never voted for a foreign aid bill,

³¹ This is precisely the language of the Cuban Democracy Act.

³² Helms was one of 34 senators to vote "nay" in December 1994, on H.R.5110 acceding to the WTO, which became PL103-465. Helms retired from 30 years in the Senate at the end of the 107th Congress, in 2002, aged 80.

stating with typical directness, "Americans are tired of pouring hard-earned money down those ratholes." (Walker 1997: 401)

The Washington Post sounded a warning bell early in Helms' tenure as Chairman of the Senate Foreign Relations Committee. It noted with alarm that Helms was "blithely" making sweeping changes geared to redistributing the foreign policy agenda-setting power from the Executive to the Congress. (Rosenfeld 1995) With eerie prescience, the editorial could have been referring to the power transfer effected by Libertad a year later. However, Helms enjoyed wide support as well. A scholar at the Council on Foreign Relations argued that Helms played a critical role in upholding the prerogatives of the legislative branch to 'check and balance' the executive in the conduct of foreign policy, in precisely the manner intended by the Founding Fathers. Senator Fulbright's criticism of the Vietnam War was but one example of the benefits of congressional surveillance of foreign policy. (Mead 2001)

4.3 Drafting Libertad

Dan Fisk began work on Libertad in the summer of 1994, well before Helms assumed the chairmanship of the Senate Foreign Relations Committee; Helms planned to introduce Libertad in 1995, regardless of the makeup of the new Congress. The fact that there was a Republican majority substantially increased the bill's chances of passage. (Fisk 1999: 30) Libertad promoted four broad policy objectives: to "halt the drift in US policy," to further isolate Castro, to prepare the US for the "inevitable transition," and to strangle Castro's economic lifeline of foreign investment whilst protecting and focusing "international attention" on the property rights of American citizens. (Fisk 2000a: 72)

Libertad incorporated many provisions that had previously failed to be enacted.

- Title I was similar to bills previously sponsored by Cuban-American Congressman Lincoln Díaz-Balart, R/FL, which extended the embargo and harassed Castro in myriad ways.³³

³³ H.R. 5295 to 5298, introduced 29th November 1994.

- Title II was essentially legislation introduced by Cuban-American Congressman Robert Menéndez, D/NJ, entitled "Free and Independent Cuba Assistance Act of 1993" (H.R.2758) which the Clinton Administration kept bottled up in committee. It described conditions necessary for a transition government in Cuba to merit suspension of the American embargo. It was an important component for two reasons: with Menéndez a Democrat, it showed bipartisan support for the bill, and it forced Washington to plan for a post-Castro Cuba. (Fisk 1999: 33; Kiger 1997: 46)

The new and contentious provisions of *Libertad* were Titles III and IV. Title III granted all Americans, including Cuban-Americans who were not citizens at the time their properties were expropriated, a 'right of action' to sue foreign companies 'trafficking' in their Cuban assets in US courts. Title IV denied visa access to the United States for executives of companies suspected by the State Department to be 'trafficking' in expropriated American assets in Cuba.³⁴ Helms was undaunted by the international furore provoked by the extraterritorial implications of these two titles, for *Libertad* represented a synthesis of two principles he held dear: the right to private property, and a unilateralist American foreign policy with carefree disregard for world opinion. The extraterritorial implications of *Libertad* deftly combined Helms' philosophy of "assumptions of legislative arrogance and American predominance." (Walker 1997: 392)

Fisk intended Title III to have global reach, protecting American property anywhere in the world. Helms harboured a particular interest in property rights, believing that all US citizens should enjoy equal protection under the law, regardless of when they obtained their citizenship. Furthermore, businessmen are rational actors, and *Libertad*'s provisions served to sensitise them to the dangers of investing in Cuba. (Fisk 2000a: 71-73; Fisk interview)

Fisk took advice from many members of the legal profession as he was drafting *Libertad*, prominent among them two Cuban-American attorneys, Ignacio Sánchez and Nicolás Gutiérrez, whose firms represent Bacardí and the National Association of Sugar Mill Owners of Cuba, respectively. They were particularly active in drafting Title III; both

³⁴ As originally introduced in February 1995, both S.381 and H.R.927 combined these two titles into one.

represented clients who stood to gain substantially from the retroactive rights of citizenship conferred by Libertad. (Kiger 1997: 47) Aside from these two attorneys, the Cuban-American community had almost no role in drafting Libertad.³⁵ Fisk argued that the Cuban-American's support was important, but that "they were not the driving force behind either the bill's content or its legislative strategy." It was Senator Helms' initiative, and his conviction that property rights should apply equally to all Americans, regardless of when they received citizenship, that provided the impetus for this legislation. Indeed, Fisk recalled that the Cuban-American leader, Jorge Más Canosa, was initially reluctant to support the bill, becoming an active supporter only when he realised the enthusiasm of his community. (Fisk 2000a: 71-72)

The Cuban Liberty and Democratic Solidarity Act of 1995, or Libertad, was introduced by Senator Helms, as S.381 on 9th February 1995. Congressman Benjamin Gilman (R/NY), Chairman of the House Committee on International Relations, introduced Libertad as H.R.927 on 14th February 1995, sponsored by Congressman Dan Burton, (R/IN) the Chairman of the Western Hemisphere Subcommittee. Helms reminded the chamber that the Cuban embargo had always enjoyed bipartisan support, and that, with the end of Soviet subsidies, the embargo was finally having its intended effect, so it was time to "tighten the screws" in order to bring Castro down. (Helms 1995a: S2411) It is noteworthy that, in both the House and the Senate websites, Libertad was described as strengthening international sanctions against Castro and planning for support of the transition to democracy in Cuba "and for other purposes." It did not mention the contentious extraterritorial parts of the legislation.

Supporters of Libertad were confident that it would sound the death knell for Castro's Cuba within a very short time. In urging passage of the bill, House Speaker Newt Gingrich encouraged Congressmen to make a "freedom contact with the people of Cuba." (Doherty 1996b). Jesse Helms stated that there was no mistaking the bill's intention: "'Farewell, Fidel,' that's the message of this bill," he crowed. (Doherty 1996a)

³⁵ Professor Joaquín Roy notes that several other Miami attorneys were hired, and that Helms-Burton was widely known as "the Bacardi Law," a notion that Dan Fisk brusquely dismissed in interview.

4.4 Libertad Debate: The Clinton Administration

The House Subcommittee on the Western Hemisphere held two 'markup' sessions, intended to propel the committee to further action whilst providing the members with an opportunity to refine the bill before its consideration by the full House.³⁶ Chairman Burton opened the markup on 22nd March, claiming that H.R.927 had wide bipartisan support, inclusive of the Clinton White House, although there were some outstanding issues of disagreement that he looked forward to resolving. (Burton 1995: 1)

Either Burton was unduly optimistic, or he was being economical with the truth, for the White House certainly did not share Burton's preferences. It had already voiced serious reservations at the previous week's hearing over, among other points, the apparent infringement upon the President's "constitutional responsibilities for the conduct of foreign relations." (Watson 1995.) In a CNN interview on 13th April, Clinton argued that the CDA already strengthened Cuban sanctions, and provided for support for Cuba's transition to democracy, whilst not affecting American property claims against Cuba, making Libertad unnecessary. Clinton expressed similar sentiments in a letter later that month to Benjamin Gilman, adding concerns over infringement on the President's Constitutional authority to conduct foreign policy and whether Libertad's broad definition of 'trafficking' was compatible with international law. (Galliano 1995: 199-201)

The State Department concluded an interagency study of Libertad by late April 1995. Broadly arguing that Libertad was counter-productive both to the promotion of democracy in Cuba and to Washington's wider interests, among its specific objections were:

- Title I prohibited the importation of sugar from any country that imports sugar

³⁶ The Senate Foreign Relations Committee held hearings, but no markup, an anomaly noted by Senator Dorgan (D/ND). Senator Dodd added that, whilst a minority member of committee might attempt this strategy, there was no precedent for the chair of the committee, who commanded a majority, not to have a markup to perfect a bill in his own committee. See Congressional Record 141: S15113. Furthermore, the Judiciary Committee held no hearing on Libertad, nor did it or the Foreign Relations Committee issue any reports. See Wallace remarks, Congressional Record 141: S15109.

from Cuba, but this collided with America's long-standing opposition to secondary boycotts, and raised fears of a Canadian/EU challenge under NAFTA/WTO rules.

- Title II unduly restricted the President in determining both Cuban transition to and formation of a democratic government. There should be a clearer programme of benefits the US would provide to Cuba under those circumstances.
- Title III's definition of 'trafficking' was too broad, and the right of action conferred jurisdiction "that goes well beyond accepted international practice, [and] would be difficult to defend under international law." The granting of retroactive rights to Cuban-Americans was contrary to standard US practice and principles of international law.
- Title IV's visa denial of aliens suspected of 'trafficking' in American assets could unfairly affect persons who are not directly responsible for those business decisions. (Sullivan 1995: 7-11)

As congressional deliberations heated up in the autumn, the Clinton Administration repeatedly threatened to veto *Libertad*. Senior presidential advisors recommended deletions of, for example, the section in Title II mandating the withholding of US contributions to international financial institutions that aided Cuba, Title III for its dubious standing in international law and Titles III and IV for fear of creation of friction with US allies. (Administration Policy, 1995)

Secretary of State Warren Christopher argued strongly against *Libertad*. Title II could damage a peaceful transition to democracy in Cuba by instituting an overly rigid list of requirements. Title III would create tensions with US allies, was difficult to defend under international law, could jeopardise the certified claimants' cases, and was already being used by Castro to frighten ordinary Cubans with the spectre of Cuban-Americans returning to re-claim their homes. Christopher concluded that the State Department could not support *Libertad*, and "if it were presented to the President, would urge a veto." (Christopher, 1995)

The Clinton Administration thus made its opposition to *Libertad* abundantly clear, based on constitutional, legal, and political considerations. In anticipating many of the

concerns of the international community, Clinton correctly predicted that Libertad would create tensions with Washington's closest trading partners.

4.5 Libertad Debate: Capitol Hill

Lee Hamilton (D/IN) valiantly led the opposition in the House in the intense debates over Libertad. He urged lawmakers put aside their hatred of Castro, and legislate based on the best interests of the United States, which was to engage with the Cuban people rather than to worsen their conditions in the hope they would revolt against Castro. (Hamilton 1995) Nevertheless, the House of Representatives passed Libertad on 21st September 1995, by a lop-sided vote of 294 to 130, after a restricted two-day debate.³⁷

Christopher Dodd (D/CT) led the opposition in the Senate, asking his colleagues to consider the two broad questions of whether Libertad served American interests, and whether Libertad would achieve the desired results. (Dodd 1995a) His Democratic colleagues mounted a strong filibuster, obstructing the progress of the bill by capitalising on the Senate's hallowed tradition of unlimited debate. Speaker after speaker expressed doubt over the bill's efficacy in promoting democracy in Cuba, and warned of impending clashes with allies. They successfully forced the deletion of the two contentious titles with the result that the Senate's bill was an emasculated version of H.R.927.

The House and Senate operate under very different debating rules. The powerful House leadership acts like a dictatorship in enacting legislation it favours, ensuring fairly easy passage of Titles III and IV. The House Rules allow only limited debate (Rademaker interview), as is evident from House proceedings in the *Congressional Record*, where references to time limits, and to lawmakers yielding each other part of their allotted time are many. When Congressman Díaz-Balart, from the Committee on Rules, introduced the resolution to consider H.R.927, he determined a time limit of two and a half hours for the debate, "equally divided and controlled by the chairman and ranking minority member of the Committee on International Relations."³⁸ (Díaz-Balart 1995)

³⁷ *Congressional Record* 141: H9398-9399.

³⁸ Gilman and Hamilton respectively.

The Senate conducts business more by consensus. As unlimited debate is permitted, a determined minority can block legislation through filibuster. Sixty votes (three-fifths majority) are necessary to obtain cloture on debate to move a bill forward. Helms and his supporters made several unsuccessful attempts to invoke cloture in mid- October.³⁹ Interestingly, not all who favoured cloture supported Libertad. Christopher Bond (R/MS) stated that he would be voting for cloture because he wanted to see the legislative process move on, not because he supported the bill; indeed, he warned that "the United States will find itself under immediate attack in the World Trade Organization." (Bond 1995) However, Clairborne Pell (D/RI), who usually voted for cloture as a matter of principle, felt that extended debate was warranted in the case of Libertad, and voted reluctantly against cloture. (Pell 1995)

The failed attempts at cloture forced Helms to capitulate. On 18th October, he sponsored an amendment without Titles III and IV, declaring that "if cloture is invoked, it is my intention to ... lay before the Senate amendment No. 2936, the Libertad Act, with titles I and II only." (Helms 1995b) Senate majority leader Bob Dole (R/KS), having earlier accused the Democrats of turning Libertad into a partisan issue (Dole 1995a), lamented that the White House had encouraged a determined minority to force Helms into deleting Titles III and IV (Dole 1995b). Chris Dodd rejected Dole's charge, arguing that Senators objected to the bill as they foresaw the problems it would create. (Dodd 1995b) Richard Nuccio, Clinton's Cuba advisor, claimed that he contrived the filibuster strategy. (Nuccio phone interview)

An overwhelming majority of ninety-eight Senators voted for cloture, and Libertad passed on 19th October 1995 by 74 to 24, denuded of its controversial components.⁴⁰ John Kerry (D/MA) said that he did not want his "yea" vote to be misunderstood; he was strongly opposed to Title III, terming it "the centrepiece of the legislation," and would vigorously oppose re-instatement of Title III in conference. (Kerry 1995).⁴¹

The President's Press Secretary expressed satisfaction at the Senate's action, and looked forward to working with Congress "to address those aspects of the legislation that still

³⁹ See Congressional Record 141: S14993-4; S15113; S15217; S15277.

⁴⁰ Congressional Record 141: S15325

⁴¹ Kerry was one of the 22 Senators voting against Libertad on 5th March 1996. See Congressional Record 142: S1511.

concern us." (McCurry 1995) Most policy-makers thought Libertad would stagnate in conference for an extended period. The shutdown of the two Cuban-American planes over Cuba in early 1996 virtually insured the passage of Libertad as the win-sets of the executive and the legislature merged.

4.6 The Conference Report

Helen Milner argues that politicians' essential interest is securing re-election. (Milner 1997: 34) Although the President had been publicly on record as strongly opposing Libertad, 1996 was a presidential election year and the Florida Republican primary was looming on the 20th March. In condemning Castro's attack on 26th February, Clinton announced that the US sought Security Council condemnation and sanctions against Cuba and suspended all charter flights to Cuba indefinitely. Remarkably, Clinton also stated his intention to "reach agreement" with Congress on the pending Helms-Burton legislation. (Clinton 1996a) Later that day, a senior administration official voiced "serious doubts" about whether Libertad would promote a peaceful transition to democracy in Cuba, but expressed the hope that a compromise would be reached with Congress to "improve" the legislation and "advance our interests." (White House 1996b) Congress was eager to enact legislation with strong bipartisan support and the signature of the President. The remarkable about-face executed by the President in seeking agreement with Congress on Libertad can only be explained in the context of the domestic politics of a presidential election year.

It is difficult to overstate the significance of the White House press releases of 26th February, as they were the first indication that Clinton was prepared to compromise with Congress and sign Helms-Burton. However, Clinton's confessional severely weakened his bargaining position with Congress (Nuccio phone interview). Although the White House and Capitol Hill shared an overlapping win-set of reacting swiftly to Castro's outrage, their preferences were far from identical. Clinton faced a tough bargaining round, particularly over Titles III and IV; he severely compromised his position by indicating his readiness to reach an agreement at the outset, thus revealing his win-set's location (Mayer) to Congress.

Lincoln Díaz-Balart (R/FL), Ileana Ros-Lehtinen (R/FL), and Robert Menéndez (D/NJ) were the three Cuban-American Congressmen on Capitol Hill in 1996. All took part in the drafting of *Libertad*, and participated, along with Torricelli and Burton among others, in a conference with the White House seeking a compromise on *Libertad*. Díaz-Balart was primarily responsible for Title I, modelled on his failed bill to needle Castro. His coup de grace was the codification of the embargo, which was stealthily added to Title I at the eleventh hour,⁴² Díaz-Balart having secured the support of the aforementioned Congressmen outside Menéndez's office, on Tuesday, 27th February 1996. (Díaz-Balart interview)

At eight o'clock Wednesday morning, 28th February, Díaz-Balart joined Menéndez at the latter's office for a preliminary meeting with three Administration officials, among them Richard Nuccio⁴³, who held the post of White House Special Advisor on Cuba from May 1995 to April 1996. Clinton's officials declared that the price of presidential agreement was waiver authority for Title III.⁴⁴ Díaz-Balart answered that waiver authority, though difficult, was open to negotiation; however, he demanded codification of the embargo as a non-negotiable counter claim. The White House officials were shocked, but Díaz-Balart persisted that, if they did not agree, it would be tantamount to proof that Clinton was planning to lift the embargo. As the Clinton officials denied this allegation, Díaz-Balart considered the issue of codification resolved. Díaz-Balart triumphed easily. He remains convinced that Clinton would have lifted the embargo unilaterally if not for the codification, a suspicion shared by others on Capitol Hill. (Díaz-Balart interview)

Nuccio recalled a Cabinet meeting at the White House the weekend of the shootdown, where the idea of codification was discussed, but summarily dismissed by Attorney General Janet Reno as being unconstitutional. Nuccio's mandate was solely to negotiate presidential waiver authority of Title III. Codification was overlooked, with some White

⁴² H.R.927 as passed by the House of Representatives on 21st September 1995 had no mention of the codification of the embargo. It was inserted in the final version that became PL104-114, Section 102(h).

⁴³ As a former Torricelli aide, Nuccio was responsible for the Cuban Democracy Act's Track II. (Rieff 1996: 73)

⁴⁴ Nuccio recalled that Menéndez first mooted the compromise suggestion of a presidential waiver authority for Title III in late 1995.

House officials shockingly admitting later they had no idea it was so important a principle! (Nuccio phone interview; Nuccio 1999: 27 fn9)

The full conference convened in the afternoon of Wednesday, 28th February. Menéndez was present, but, as the ranking Democrat on the Western Hemisphere Subcommittee, credited by Senator Dole as being "central in getting the Clinton administration to see the light on the legislation" (Dole 1996), left to phone Deputy National Security Advisor Sandy Berger. In the difficult talks over Titles III and IV, Congress' strategy called for Díaz-Balart to play the 'tough guy' in discussions over Title III, and for Torricelli to play the same role in negotiating Title IV. Díaz-Balart debated by phone through Menéndez with Berger, who was next to Clinton. "Negotiating every comma," was how Díaz-Balart described the tortuous talks over Title III. At five o'clock, with Title III finally agreed, the White House officials brought up the subject of a presidential waiver for Title IV, and Torricelli staged a great show of anger, as arranged, unbelievably leading the Administration to concede Title IV entirely! Díaz-Balart believed that Clinton could have won waiver authority over Title IV, but the White House team did not pursue the matter with sufficient conviction. (Díaz-Balart interview)

The wording of the presidential waiver authority of Title III was the subject of intense discussion. The Conference Report indicated that the President sought broad suspension authority on the basis that it was "important to the national interests of the United States, including expediting a transition to democracy in Cuba." The Conference Committee specifically rejected the broad language sought by the White House as it subordinated the question of expediting democracy in Cuba to the broader question of the President's interpretation of what was in the national interest. The legislators wanted the consideration of whether a suspension will expedite a transition to democracy to be the "central element" in the President's decision-making process. The Conference Committee tied the President's hands by requiring him to meet two distinct criteria before authorising suspension: firstly, that it was "necessary to national interests of the United States and [secondly] will expedite a transition to democracy in Cuba." (§305b/1) The Report expressed the belief that the President could not "in good faith" determine that suspension met these two vital standards, nor would such action expedite a transition to

democracy as it would blunt an important weapon in ousting Castro. (Conference Report 1996: 62) Nuccio agreed this language was much more restrictive than that sought by the White House, and was designed so as to make it virtually impossible to exercise. Nevertheless, the White House adopted the waiver as a face-saving gesture that allowed Clinton to sign Helms-Burton without appearing to completely backtrack. (Nuccio phone interview)

The easy White House surrender on a presidential waiver for Title IV was astonishing, particularly with the hindsight of how integral this power was to become in the resolution of the US-EU dispute over Libertad. Nuccio recalled that when a Title IV waiver was broached, the White House team was resolutely rebuffed in an abusive and contemptuous manner typical of Republicans, and particularly their staffers, when they knew they had the Democratic opposition trapped. (Nuccio phone interview)

This thesis argues that the Clinton White House were inept negotiators. Not only had Clinton conceded willingness to compromise before the start of talks, his team did not secure broad waiver authority for Title III, and failed altogether to win any presidential leverage over Title IV. The resulting Libertad bill was substantially harsher than even the original H.R.927 passed by the House in 1995, which the White House had threatened to veto.

But potentially the most damaging aspect of Helms-Burton was the provision to codify the embargo, for it transferred substantial authority to determine the foreign policy agenda from the President to the Congress. The Conference Report that accompanied Libertad specifically noted Congress' frustration and dissatisfaction with the Executive's implementation of the Cuban embargo. "The explicit mandates in this legislation make clear congressional intent that U.S. law be enforced fully and, thereby, provide a basis for strict congressional oversight of executive branch enforcement measures henceforth." (Conference Report 1996: 44). Libertad's Title I codified the embargo against Cuba, thus replacing executive 'listlessness' with a binding law, whose implementation would be supervised by a diligent Congress.

Putnam's two-level game predicts greater distributional gains accrue to the player with the smaller win-set. By reversing itself on its opposition to Libertad, the Clinton Administration enlarged its win-set vis-à-vis Capitol Hill, thus ensuring a successful compromise, but it forfeited the bargaining advantage that it would have had by maintaining its reservations. Clinton could have used uncertainty to his advantage, negotiating with Capitol Hill without revealing his intentions and obtaining a settlement closer to his ideal outcome. By disclosing early that he sought a compromise that would enable him to sign Libertad, he undermined his own negotiating position.⁴⁵

Robert Muse expressed bitter disappointment that Clinton did not threaten a veto to obtain more favourable terms, but he conceded that Clinton never knew how to 'work' the Congress. (Muse interview) As governor of a small Southern state, with no contacts in the capital, Clinton came to Washington as an outsider; though renowned for his communication skills, he never nurtured a relationship with Capitol Hill. Consequently, his presidency was plagued by strained relations with a recalcitrant legislature – narrow approval of NAFTA, failure to ratify the Kyoto agreement - even before the 1994 elections resulted in divided government.

At a news conference on 28th February, Presidential Press Secretary Mike McCurry expressed the President's "delight" that the White House and Capitol Hill had reached agreement by which the president would sign the bill and encourage members of Congress to support it. McCurry said Libertad would deal "both...with this incident [shootdown] and...promote our overall goal of democratic change in Cuba." (McCurry 1996)

4.7 Public Law 104-114

The Senate held a two and a half hour debate on 5th March (Lott 1996) and the House, a one hour debate on 6th March (Díaz-Balart 1996). Senator Dodd regretted that the Senate did not have sufficient opportunity to deliberate the bill, particularly as the conference had produced a new version replete with objectionable provisions, such as extraterritorial

⁴⁵ Putnam's analysis refers to Level I; this thesis has applied the principle to Level II bargaining.

aspects and the right of action granted to Cuba-Americans. Dodd argued the codification of the embargo (§102/h), was "very dangerous" in that it "tied the hands of this and future Presidents...in their efforts to respond flexibly to changes ...in Havana." (Dodd 1996)

Senator Bob Dole happily declared that the "critical section" deleted by filibuster had been restored in conference, and that President Clinton had endorsed the new bill. Dole read Clinton's letter, "The Conference report is a strong, bipartisan response that tightens the economic embargo against the Cuban regime and permits us to continue to promote democratic change in Cuba. I urge Congress to pass the Libertad bill in order to send Cuba a powerful message that the United States will not tolerate further loss of American life." (Dole 1996)

Senator Nancy Kassebaum (R/KS)⁴⁶ declared that she would reluctantly support the bill, as it had the endorsement of both the Republican leadership and the President. She likened her ambivalence to the story about a cowboy who worked hard all week, then rode into town each weekend and lost his entire wages in a poker game. When someone pointed out to him that the game was rigged against him, he replied that he knew, but would continue to play because it was the only game in town. "Despite its faults, this legislation is the only game in town. For that reason, I will support it." (Kassebaum 1996) The Senate passed the Helms-Burton Act by a vote of 74 to 22 on 5th March 1996.⁴⁷

Díaz-Balart opened the House debate, characterising Castro as a "gangster regime." (Díaz-Balart 1996) John Moakley (D/MA), doubted Libertad would topple Castro, worried it would only make the lives of ordinary Cubans more miserable, and cited strong opposition to Libertad from leading national newspapers. (Moakley 1996) Libertad was passed by 336 to 86 that afternoon.⁴⁸

⁴⁶ Kassebaum had changed her vote from yea to nay on the cloture vote that Helms lost by one vote on 17th October 1995, thus forcing Helms to delete Titles III and IV. See Congressional Record **141**: S15113 and S15217.

⁴⁷ Congressional Record **142**: S1510-S1511

⁴⁸ Congressional Record **142**: H1749

President Clinton signed *Libertad* into law on 12th March 1996, welcoming the congressmen who had supported the bill to the White House and declaring that he had decided to work with Congress to "reach prompt agreement" on *Libertad* after the shootdown. Alluding to the waiver compromise on Title III, Clinton singled out Congressman Menéndez as having exerted great effort to produce "a better bill...within two days." (Clinton 1996b) Robert Muse charged that Clinton asked aides what was in the bill as he was walking along the corridor to sign the bill! (Muse interview)

4.8 Legal Implications

Titles III and IV were controversial due to their extraterritorial implications, in addition to Title III's granting a right of action to Cuban-Americans. Although this is not a legal dissertation, it is appropriate to briefly discuss some of these legal implications of *Libertad*.

4.8.1 Extraterritoriality

The American position is primarily based on the *Restatement (Third) of the Foreign Relations of the United States* §§402-04 (1987), which is a collection of model rules, compiled by the American Law Institute, and extensively used by lawmakers when drafting legislation. The *Restatement* carries significant weight, particularly in the absence of any other guidance. It notes that international law acknowledges restrictions on the authority of states to legislate extraterritorially, but the rigid concepts of territoriality and nationality have been replaced by broader measures of fairness that reconcile conflicting interests of states. §402 states "a state has jurisdiction to prescribe law with respect to...conduct outside its territory that has or is intended to have substantial effect within its territory." §403 limits a state from exercising jurisdiction if doing so is "unreasonable," and, in the event of conflict arising, mandates that "a state should defer to the other state if that state's interest is clearly greater." §404 gives the state jurisdiction to punish offences such as piracy and hijacking, even when not so indicated under the 'effects' of §402. To conclude, the *Restatement's* position is "that a state may exercise jurisdiction based on effects in the state, when the effect or intended

effect is substantial and the exercise of jurisdiction is reasonable." (*Restatement* 1987: 235-54)

Libertad referred obliquely to the *Restatement* when introducing Title III, proclaiming, "International law recognizes that a nation has the ability to provide for rules of law with respect to conduct outside its territory that has or is intended to have substantial effect within its territory." (PL104-114, §301/9) Proponents of Libertad have extensively cited the *Restatement* to argue the legality of Title III under international law. Monroe Leigh, prominent lawyer and former legal advisor to both the Departments of State and Defense, testified that Title III does not contradict international law because its implementation occurs only within US territorial boundaries, as lawsuits may only be brought against 'traffickers' who enter and operate within the United States. (Leigh 1996: 22-23). Miami attorney Ignacio Sánchez concurred, further claiming that the US "is entitled to enact legislation with respect to conduct outside its territory if it has an effect within its territory." (Sánchez 1995: 136)

Washington lawyer Brice Clagett argued that the 'effects' jurisdiction has been expanding with increasing globalisation, citing the example of the EU's objection to the Boeing-McDonnell Douglas merger because of possible effects on the European aircraft industry. Supporters of Libertad also considered American interests in Cuba greater than those of Europe, not least because of the geographic proximity, concluding that Europe should acquiesce and defer to Washington, as §403 mandates. Finally, Clagett argued that a foreign nation's interest in protecting a 'trafficker' is neither greater nor more legitimate than American attempts to help its citizens recover their property, claiming that both were operating extraterritorially. Clagett concluded that, rather than violating international law, Libertad positively contributed to its further development "by reinforcing otherwise rudimentary enforcement mechanisms, which provide little deterrence to rogue states that ignore the law and violate with impunity the most elementary human rights." (Clagett 1996-7: 279-282, 296)

The State Department disagreed strongly with the legal underpinnings of Title III; it concluded that Title III was inconsistent with international law, and, without specifically

referring to the *Restatement*, argued that none of the criteria advanced by the *Restatement* were fulfilled. It was "difficult to imagine" how 'trafficking' in expropriated American assets has a substantial effect within the United States. Finally, whilst many countries legislate domestically against ill-gotten gains, 'trafficking' *per se* is not prohibited by international law, whereas Title III's broad extraterritoriality may itself be an infringement of international law. (State 1995)

The State Department robustly opposed the civil remedy proposed by Title III. It labelled the right of action "an unprecedented extra-territorial application of U.S. law that flies in the face of important U.S. interests" that would "create friction with our allies, fail to provide an effective remedy for U.S. claimants and seriously damage the interests of...certified claimants." It predicted that Title III's extraterritorial application would force many US allies to take legal action to protect their nationals. This was an oblique reference the UK's 1980 Protection of Trading Interests Act, passed in response to Whitehall's displeasure with the pipeline sanctions.⁴⁹ (Ibid)

Many countries do not accept the American interpretation of the 'effects' doctrine. Europeans accept the 'effects' doctrine only if the effect outside the territory is an integral part of the wrong, without which there would be no wrong. (Stern 1997: 13) The European Union issued a sharp statement re-iterating its position expressed many times in diplomatic demarches, that the "extraterritorial extension of US jurisdiction is unacceptable as a matter of law and policy." The EU was concerned over several aspects of the legislation, including the right of action to adjudicate disputes over expropriated Cuban property. The statement cautioned that the EU was "examining the compatibility of this legislation with WTO rules" and concluded with the explicit warning that Brussels intended to "defend its legitimate interests in the appropriate international fora." (Commission 1996b)

Libertad specifically referred to State Department notifications to foreign governments "that the transfer to third parties of properties confiscated by the Cuban Government 'would complicate any attempt to return them to their original owners.'" (PL104-114,

⁴⁹ This was the basis for the EU's blocking action, taken the following year.

§301/7) As early as 1993, Secretary Warren Christopher had ordered American diplomatic missions to alert prospective buyers "to ensure that property the Cuban government attempts to sell or otherwise dispose of is not the subject of a claim by a U.S. national." (Christopher 1993) But the 1995 State Department review reversed itself by refusing to accept that transferring assets to a third party constituted a "substantial effect" as Cuba, the expropriating state, retained responsibility for compensation or restitution. The Europeans also argued that business dealings fifty years after nationalisation neither augment nor diminish American property claims. (Stern 1997: 15)

4.8.2 Right of Action for Cuban-Americans

Brice Clagett argued that the right of Cuban-Americans to sue under Title III was justified under several grounds, among them the *Restatement* and the widely accepted notion of including property rights as an essential part of international human rights. He cited international documents such as the Universal Declaration of Human Rights of 1948 and a lengthy 1992 report prepared by the UN Commission on Human Rights to support this claim. Furthermore, Clagett contended that the EU and most of the Americas had formally accepted the legal concept of the right of individuals to be compensated for loss of property, even when expropriated by their own government. (Clagett 1996-7: 287-291)

Nicolás Gutiérrez decried the rift that developed between the certified claimants and the Cuban-Americans, for, in seeking to gain compensation from Castro "we hang together or hang separately." (Gutiérrez interview) Sánchez argued that the Cuban government did not have 'good title,' having confiscated American assets without compensation and Libertad recognised that Castro was selling 'bad title.' Sánchez cited cases that developed after the Bolshevik Revolution, in which Russian émigrés' claim to bank accounts held abroad was disputed by the new communist government. American case law acknowledged that the US could not legislate for another country; however, it was against US public policy to recognise unlawful confiscation of property, and the US therefore recognised the claims of the émigrés as legitimate. The Czech glass

manufacturers, Karl Zeiss, whose family fled to the West with the communist take-over, won their right to maintain their highly respected trademark in Western Europe. Similarly, Cubans who lost assets must be recognised as legitimate owners to enable them to obtain redress. Castro's sale of such assets unduly complicated the matter. (Sánchez interview)

Sánchez argued that *Libertad* was a continuation of a long-standing American policy, denied that Title III was extraterritorial, and claimed that international law recognises that a country may legislate outside its own borders if it is affected by foreigners' conduct, a reference to the *Restatement* §402. Sánchez argued that the certified claimants received a tax write-off of \$1.8 billion in 1960 dollars for their losses in Cuba, and Cuban-Americans received a tax write-off, spread over twenty years, for their losses; both groups must repay these monies to the US Treasury when those assets are recovered. The US government is therefore directly affected by the unresolved issue of American assets in Cuba, and can legitimately legislate in this area. (Sánchez interview)

The retroactive right granted to Cuban-Americans was hotly contested. During the final debate before passage of *Libertad*, Senator Dodd quoted from a legal brief prepared by Washington attorney Robert Muse that clearly stated the limits of protection under international law of Cuban-American losses in Cuba. "If international law is to apply to a governmental taking of property, a party claiming the loss must occupy at the time of loss the status of an alien with respect to the Government that took the property. The injured person must be a foreign national." (Dodd 1996)

Muse argued that the US should not use its courts to institute a mass restitution of properties to Cuban-Americans for several reasons; this entitlement represented a "profoundly undemocratic" solution in not allowing the Cubans to decide the matter, and such judgements could hinder normalisation of relations between Washington and Havana. (Muse 1996-7: 229-31) Senator Dodd also worried that Title III was an alarming reversal of long-standing American precedent in that Title III would transform the judicial system, "the principal duty of which is to adjudicate legal disputes, into an instrument of U.S. foreign policy, something we have always tried to avoid." (Dodd

1996) But Ignacio Sánchez argued that the inclusion of Cuban-Americans "is imperative to accomplish the foreign policy goals" of Libertad, for the certified claimants represented a mere 5 percent of saleable Cuban properties; including Cuban-Americans broadened the range of properties enormously. (Sánchez 1995: 135)

Robert Muse had ulterior motives in objecting to the right of action granted to Cuban-Americans. Corporations whose claims had been certified were horrified by the idea of thousands of Cuban-Americans being granted the right to sue in US courts by Title III, and they lobbied vigorously against it. Muse⁵⁰ represented Amstar Corporation, the corporate descendant of American Sugar. Amstar owned extensive sugar plantations and two sugar refineries in Cuba, and, despite having divested itself of its sugar interests (selling out to the British firm of Tate and Lyle) and diversified into electrical tools, retained its \$81 million certified claim against Cuba. In Muse's words, reflective of the feelings of the other 5,911 certified claimants, "We drown in a pool of Cuban-American claims." (Kiger 1997: 51) David Wallace, the chairman of the Joint Corporate Committee on Cuban Claims representing most of the \$1.6 billion in certified claims, lobbied strongly against Title III. He predicted that Title III would overwhelm the courts with 300,000 to 430,000 lawsuits,⁵¹ and threaten the property rights of the certified claimants. "This unprecedented conferral of retroactive rights upon naturalized citizens is not only contrary to international law, but raises serious implications with respect to the Cuban government's ability to satisfy the certified claims." (Wallace 1995a; 1995b)

To conclude, the judiciary is the final arbiter of conflicting interpretations in domestic law, but international law enjoys no such final referee. It is significant that the *Restatement* upon whose authority supporters argue Helms-Burton's legality is purely an American interpretation of international law. It was hardly surprising that foreign countries disputed the legal premises of the *Restatement*, when the debate raged among American legal experts as well; adjudicating the legality of Libertad rested as much on political as on legal considerations. Muse warns that blasé American attitudes

⁵⁰ Muse was one of the key lobbyists responsible for the emasculation of Libertad in the Senate in 1995. (Kavulich interview)

⁵¹ Some observers feel Wallace's prediction may be exaggerated, due to the enormous cost involved in documenting the claims and mounting the court action.

questioning whether there is such a thing as international law could rebound with severe consequences, as American national interests lie in promoting compliance. (Muse 1996-7: 267-268)

4.9 Conclusion

The decision-making process can be quite different from the ideal paradigm of rational choice deliberation. Policy-makers who are burdened with enormous workloads and tight schedules rarely have time to consider comprehensive policy options. Henry Kissinger protested that leaders have no time to reflect. "They are locked in an endless battle in which the urgent constantly gains on the important. The public life of every political figure is a continual struggle to rescue an element of choice from the pressure of circumstance." (Kegley and Wittkopf 1995: 50)

In response to Domínguez's 'mobilising incident' of Castro's brutal shootdown of American planes, the Helms-Burton Act was summarily resurrected, hastily enacted by overwhelming majorities on Capitol Hill and signed into law by President Clinton on 12th March 1996. Although Clinton lauded bipartisan lawmakers for producing a "better bill" (Clinton 1996b), Public Law 104-114 retained all the objectionable passages that had worried the executive, mitigated only by the face-saving presidential waiver of Title III. This thesis contends that Clinton fully intended to use the waiver, ignoring the legislative intent designed to make it unworkable. The president knew he faced Hobson's choice in reconciling the constraints of his Level II domestic constituency with his obligations to allies in the Level I international arena. Title III waiver authority was the equivalent of an 'escape clause' that Clinton would use with consistent regularity.

This thesis argues that Clinton's representatives showed appalling negotiating skills in their bargaining with Congress. While it is true that Clinton had little room for manoeuvre - domestic constraints demanded he sign Helms-Burton - he conceded a great deal to Congress in his haste to present a unified response to Castro's brutality. This thesis argues that Clinton erred in two specific areas that had entirely different political consequences. He agreed to the codification of the embargo, which set an important institutional precedent and significantly enhanced congressional authority in determining

foreign policy at the expense of the White House. And he did not obtain waiver authority for Title IV, which virtually guaranteed friction between Level II domestic considerations and Level I international obligations.

The United States Constitution is deliberately obtuse in delegating power to conduct foreign policy to two branches of government. The President is commander-in-chief of the armed forces and charged with the power to negotiate treaties, but the Congress controls the purse strings and the Senate must approve treaties and presidential appointments by a two-thirds majority. The result has been an institutional power struggle over prerogatives in the conduct foreign policy. Jesse Helms famously told visiting United Nations dignitaries that "it has been suggested ...that the president alone speaks for the United States in foreign affairs. And in most of the nations...that is indeed the case. Not so in the United States." (Vita 2000)

The Cuban embargo had, until Helms-Burton, been an executive order, to be renewed annually by the president. Clinton's concession embedded the Cuban embargo into a formal statute under congressional control. In view of the intergovernmental tensions over foreign policy decision-making, codification of the embargo rescinded an important presidential right to provide flexible responses to changing events.

The separation of powers that characterises American political institutions charges the executive with implementing legislation passed by Congress. Clinton had the option to implement Libertad energetically or sparingly. Clinton chose the latter, implementing Title IV so fastidiously that only four companies of the potentially dozens doing business in suspect property were cited under Title IV. What irony that the same Administration that was so hesitantly applying the bill at home had to defend this rash and irksome bill on the international stage.

To conclude, this chapter has documented the Level II domestic divisions over Libertad; Clinton and Democratic leaders on Capitol Hill predicted Libertad would not achieve its dual aims of internationalising the embargo or promoting democracy in Cuba, and worried that Libertad was not conducive to Washington's broader interests. Castro's brutality altered the domestic context, temporarily uniting the disparate groups with a

shared win-set to enact Helms-Burton, and thereafter condemning Clinton to endure irreconcilable domestic constraints and international obligations.

Chapter 5

Level II: US Domestic Politics and the Cuban-Americans

"Fidel drove me out of Eden...and he stands there still, clutching a fiery sword, to keep me from reclaiming the knowledge that should be mine." (Eire 2003: 248)

"As the United States is a representative democracy, its foreign policy must, to some extent, reflect domestic values and institutions." (Purcell 1998: 37)

"It is unseemly in a democracy as strong as America's for a single pressure group to dictate policy, especially one that is so wrong-headed." (Zimbalist 1993: 167)

5.1 Introduction

This thesis argues that non-state actors were primarily responsible for the hardening of the Cuban embargo in the 1990s. In a policy area of marginal interest to most Americans, domestic pressure groups, essentially Cuban-American hard-liners, hijacked Washington's Cuba policy. This thesis does not argue that the Cuban-Americans were solely responsible for Helms-Burton; a confluence of interests between state and non-state actors resulted in Libertad. But it does argue that the Cuban-American *comunidad* manipulated the agenda vis-à-vis Cuba to reflect its rabidly anti-Castro interests. Their formidable influence waned in the late 1990s as pressure on Washington to soften its Cuba stance was fuelled both by the international controversy created by Helms-Burton and by a coalition of US domestic non-state actors who sought modification of the Cuban embargo.

The next two chapters examine the American Level II non-state actors that jostled for primacy in shaping Cuba policy. This chapter investigates the Cuban-American interest groups, analysing their legitimacy as policy brokers and their ability to set national policy agendas and negotiate outcomes. Chapter 6 explores pressure groups from the business world that advocated general sanctions reform, including moderation of the Cuban embargo, and analyses their effectiveness.

5.1.1 Non-state Actors

The argument that non-state actors have become increasingly significant in the world, both politically and economically, has its roots in the 1970s interdependence literature of Keohane and Nye, which argued that the state-centric view of the Realists was becoming increasingly anachronistic in a world of more permeable borders. Globalisation perforce led to increased interdependence among states, with transnational actors, particularly multinational corporations, gaining dominance in the international political economy at the expense of the state. Moreover, even civil society NGOs, such as environmental groups, have also grown increasingly influential through transnational alliances facilitated by widespread use of modern communications technology. The disruption of the 1999 WTO talks in Seattle by the environmental/labour coalition was a remarkable illustration of this.

Interest groups representing civil and business interests in Washington have grown exponentially. In 1955, there were approximately five thousand national associations; by 1999, the number had climbed to over twenty-three thousand. There has been growth not only in business and trade associations, but also in pressure groups with a foreign policy agenda. (Hula 1999: 3) Some analysts worry that this phenomenon indicates a fragmentation of America's political system. But interest groups do not seek to restructure the government or challenge egalitarian values; they work within the political institutions to increase the "representation of the unrepresented." (Berry 1999: 28)

The uniqueness of the American democratic structure promotes growth of interest groups in the US more than in the European democracies. The US has a strong two-party system, based on plurality and single-member districts, rather than proportional representation. Thus it is extremely difficult for a new party to emerge on the national scene; indeed, the last new party to elect a president was the Republican Party in 1860. Whereas environmental concerns have spawned numerous green parties in Europe in recent decades, American environmentalists have organised lobby groups to advance their platform in Washington. (Ibid: 16)

Institutional changes in American government have encouraged the proliferation of interest groups. As the federal government has grown and new programmes have been created, the opportunities for influence by lobby groups have grown concomitantly, creating a 'supply side' to interest group formation. Furthermore, Congress itself has become more decentralised, resulting in a proliferation of subcommittees offering greater access to interest groups. Lobbyists perform an important function for government officials, in the way that they gather and disseminate information, conduct research, mobilise public opinion, and educate lawmakers through expert testimony in congressional committees. (Ibid 19-33)

Helen Milner focuses on the much-neglected role of information in the domestic polity. The uncertainty that results from incomplete or asymmetric information leads to less than optimal levels of cooperation and political advantage for the owner of more information, who is generally the executive (particularly in foreign affairs). By providing policy-makers with information in the course of attempting to influence policy, interest groups unintentionally eliminate both the inefficiencies and the political advantages caused by incomplete information, thus facilitating cooperation and agreement. (Milner 1997: 20-23) The presence of an 'endorser', an interest group that provides reliable information to the legislature about a particular issue, greatly enhances the chances of ratifying an agreement. Multiple endorsements from opposing groups guarantee congressional acceptance of a proposal. (Ibid: 239)

The traditional role of interest groups, however, is to act as pressure groups; lawmakers decide policy based on the preferences of their constituents, and neglecting the preferences of interest groups may lead to loss of financial or electoral support. Interest group pressure has consequences in both the domestic and the international domains, as their preferences may determine the essence of domestic policy and the extent of cooperation internationally.

5.2 The Cuban-Americans: Demography

The Cuban-American exile community has an obvious and enduring interest in Washington's relations with their island home, and has been credited with perpetuating and indeed strengthening America's continued sanctions against Cuba. Their leitmotif has been a resolutely uncompromising hostility towards Castro and a refusal to engage in negotiation with his regime. The militancy and intolerance that characterise the exile community have been underscored by a Manichaeian vision of stark black and white: the wonderful days of pre-revolutionary Cuba contrasted with the absolute evil of the Castro regime. This mindset perforce prevents hard-liners from conceding that the revolution has accomplished anything of value, and perpetuates the *comunidad's* resistance to dialogue or compromise with Castro on pain of charges of treason. (Castro 1997: 93)

The first Cuban exiles to flee Castro and arrive in the US in the early 1960s were mostly white, middle-class, urban professionals,⁵² who settled mainly in the Miami metropolitan area (Dade County) where their cultural enclave is called 'Little Havana.' They built up a hugely successful Spanish-speaking economy in banking, construction and trading, living in a sort of limbo of being physically in the US, but culturally and psychologically in Cuba. Subsequent waves of immigration brought a broader representation of Cubans, with regard to ethnicity, race, and socio-economic status, to American shores. Today's exile community is somewhat divided along class and generational lines with the earliest wave of exiles, who are the oldest and the most economically successful, tending to be the most conservative and the most virulently anti-Castro. The majority of this Cuban-born community remains concentrated in Miami, close to their place of birth, all of which gives the Cuban exile community "an unusually high degree of cohesion, and a concentration of political weight, greater than that of other diasporic communities." (Molyneux 1999: 292)

⁵² Substantial emigration from Spain made Cuba the most Spanish of Latin countries by 1959. Castro's revolution simplified Cuba's complex socio-economic structure, as the descendants of these émigrés fled. Present-day Cuban society closely resembles Caribbean ethnicity, with the majority of Cubans black, although the party leadership remains overwhelmingly white. (Falcoff 1998b: 568-569)

In a beautifully evocative memoir of his Cuban childhood, Carlos Eire writes,

It was early 1961. March, to be exact. About one half of my classmates had vanished without saying a word. One day they'd be there, and the next day they'd be gone. Teachers vanished too. Off to the United States or some other country. The rest of us knew why they were vanishing and why they couldn't say good-bye, but it hurt all the same to see the empty desks.

By April the school had to close because there were too few students and teachers, and because so much had changed for the worse.

We children of the Revolution had much to learn when I was in fifth grade. Everything changedas bombs fell from the sky, and bullets flew, and money evaporated, and Fidel laid claim to our souls, and everyone I knew and cared about vanished quietly....
(Eire 2003: 266-267)

Second generation Cuban-Americans born in the US put down firmer roots, seeing themselves more as ethnic Americans rather than as exiles, and plunging purposefully into the political arena. Cuban-American leaders, quick to recognise the political leverage that citizenship would confer, began promoting naturalisation in the mid-1970s. The Republican Party supported this crusade, which culminated in an extraordinary event at Miami's Orange Bowl in which over 5,000 Cubans were naturalised. This was conveniently just before voter registration closed for the 1984 presidential election, and was attended by the incumbent, President Reagan. Naturalisation rates among Cubans have been among the highest among immigrant groups, and have helped them achieve political influence. (DeSipio 1996: 153-154)

By the 1990s, two Republican Cuban-Americans were serving in the House of Representatives from the Miami area: Ileana Ros-Lehtinen (elected 1988, 18th congressional district) and Lincoln Díaz-Balart (elected 1994, 21st congressional district), with many Cuban-Americans serving as elected officials in the townships of Dade. The 13th congressional district in New Jersey (Union City, Bayonne, Newark) boasts the next most important concentration of Cuban-Americans, and they, too, elected one of their own, Robert Menéndez, a Democrat, to the House of Representatives in 1992.⁵³

In addition to their elected representatives, Cuban-Americans wield considerable political clout by exploiting the geopolitical fact that their voting power is highly

⁵³ Mario Díaz-Balart, brother of Lincoln, was elected to represent Florida's 25th congressional district in 2002. Florida elected the first Cuban-American Senator, Mel Martínez, in 2004.

concentrated in the two politically important states of Florida and New Jersey.⁵⁴ Cuban-Americans account for only eight percent of the population of the state of Florida but, as their voter participation rates are so high, they account for 14-16 percent of the vote in the state. (García interview)

Contrary to other Hispanic groups (and immigrant groups in general) that vote Democrat, Cuban-Americans are exceptional in supporting the Republicans.⁵⁵ The Institute of Public Opinion Research (IPOR) of Florida International University (FIU) and the Miami Herald have conducted a 'Cuba Poll' biannually since 1991. One of the most significant results to emerge was the fact that the domestic spillover effect of the exile community's concern over Washington's Cuba policy is manifested in their loyalty to the Republican Party. The 1997 poll found that 70 percent of Miami exiles registered as Republicans and only 16 percent as Democrats (with 14 percent Independents). Analysts attribute this atypical voting pattern to Cuban exile concern over foreign policy issues with 70 per cent admitting that the local candidate's position vis-à-vis Cuba determines their vote in local elections. (Grenier and Gladwin 1997: 2-4) These figures notwithstanding, there is a significant degree of asymmetrical bipartisanship and strategic voting among Cuban-Americans, which has figured importantly in presidential elections since 1992.

'Diaspora' is an apt description of the Cuban-American community as they are an ethnically distinct minority group of migrant origins, residing and acting in host-countries, but maintaining strong sentimental and material links with their homeland. Although diaspora groups are citizens of their host country, they often feel they retain the right to influence political/economic events in their homeland either directly or indirectly, through lobbying the host country, in what has been labelled 'long distance citizenship' (Ostergaard-Nielsen 2001: 218-20; Molyneux 1999: 292).

The Cuban-American diaspora in the 1990s numbered in the region of nearly two million people; it was a highly cohesive unit, especially the three-quarters of a million souls

⁵⁴ 87% of all Cuban-Americans live in four states: 65% in Florida, 8% in New Jersey, and 7% each in New York and California. (Molyneux 1999: 307)

⁵⁵ They blame President John Kennedy, a Democrat, for the Bay of Pigs fiasco.

resident in the greater Miami area, who comprised an astonishing 29 percent of Miami's population in 2000.⁵⁶ The Cubans who fled Castro's regime over the last 40 years see themselves as 'exiles'⁵⁷ or 'political refugees' rather than as 'immigrants', an appellation unique among the many immigrant groups that form the American melting pot. This has resonance in their resistance to assimilation and in their relationships with other immigrant groups, especially other Hispanics. (Castro 1997: 93) The first wave of immigrants sincerely viewed themselves as temporary residents in the US, confident in the imminent overthrow of Castro; the geographic proximity of Miami to Cuba only served to encourage the dream that they would soon return. Castro's fear of a concerted American attack after the failure of the Bay of Pigs invasion is cited as one of the reasons for the build-up of Soviet missiles in the summer of 1962; President Kennedy pledged to respect Cuba's sovereignty in the resolution of that crisis. (Allison 1971: 47) Nevertheless, subsequent administrations tacitly encouraged the dream of many exiles of a military foray into Cuba, and most pretended not to notice attacks by para-military Cuban-American groups launched from South Florida.⁵⁸ (Rieff 1995: 77-80)

5.3 Cuban American National Foundation: Hard-liners

The first successful attempt to influence American policy on Cuba through conventional means was the formation of a pressure group called the Cuban American National Foundation (CANF). Founded by Jorge Más Canosa and Raúl Masvidal in 1981, CANF specifically sought to lobby Congress against a negotiated settlement with Castro and to increase support for policies that put pressure on Cuba. Más Canosa almost single-handedly moulded CANF into a powerful and sophisticated pressure group, which virtually monopolised American policy towards Cuba through the nineties. The source of CANF's clout was both its sizeable donations to favoured political candidates, and its

⁵⁶ The Miami Cubans accounted for 56% of the Cuban-American population in 1997. (Molyneux 1999: 307) According to the 2000 Census, the Cubans were the largest Hispanic nationality both in Florida and in Miami. Florida's population was 17% Hispanic, with 31% of that group Cuban. Miami-Dade's population was 57% Hispanic, with half of that Cuban. See www.miami.com/herald/special/news/census2000/docs/hispanic_pop.htm (downloaded 30/01/02)

⁵⁷ The 1966 Cuban Adjustment Act treated Cuban immigrants as political refugees, affording them special status not accorded any other group and encouraging their self-image as exiles. This changed in May 1995, with a new accord limiting Cuban immigration to just 20,000 annually. (Rieff 1995: 87)

⁵⁸ For a fuller discussion of terrorist attacks mounted by militant Cuban-Americans in the 1970s, see Robbins 1992: 171.

ability to ensure the block votes of Cuban-American exiles. CANF helped President Reagan solidify his political base in Florida in the 1980s, donating substantial sums to Republican coffers and delivering thousands of Cuban exile votes. Furthermore, CANF's influence was magnified by the strategic geographic location of the Cuban exile communities in New Jersey and Florida, "where every vote is critical."⁵⁹

Jorge Más Canosa was a genuine American success story, arriving penniless to the United States in 1960, and building up a multimillion-dollar telecommunications company in South Florida. Más Canosa was catapulted to political prominence as he spoke fluent English, enjoyed a close personal relationship with President Reagan, and knew the "ins and outs Capitol Hill." By 1986, Más Canosa was regularly testifying before congressional subcommittees in Washington, forcefully articulating his hard-line, anti-Castro view. Más Canosa was also dictatorial and aggressive, allowing no dissent from his hard-line policies at CANF; he waged 'war' against *The Miami Herald* in the early 1990s when he disagreed with their editorials urging a more moderate approach to Cuba, sponsoring billboards and bumper stickers that proclaimed "I don't believe the *Herald*." (Davison 1997; Zengerle 1997)

President Reagan created Radio Martí to broadcast uncensored news to Cuba in 1982, and appointed Más Canosa chairman of its Advisory Board, a post he held until his death in November 1997. Its stepsister, TV Martí, created in 1992, was plagued by transmission problems and so easily jammed on the Cuban side that no one saw it. By 1996, Radio and TV Martí had benefited from over \$280 million in federal funds and, despite reports questioning their efficacy, financial and managerial practices by the General Accounting Office and various congressmen, Radio and TV Martí's broadcasts continued through the 1990s. Congress actually voted to end the \$16 million annual funding of TV Martí in 1994, but President Clinton intervened to save it. In 1996, Más Canosa succeeded in quietly transferring the operation away from the probing eyes of Capitol Hill to Miami. A rumour claimed that Más Canosa struck a deal with President Clinton. In return for permission to re-locate and for continued federal financing, CANF would not object to Clinton's second waiver of Title III of Helms-Burton due in January

⁵⁹ "Obituary of Jorge Más Canosa, Cuban Exile Who Insisted on American Boycott of Castro," Daily Telegraph, 26th November 1997.

1997, nor would CANF protest if Title IV was not strictly enforced. (Manitzas 1996; W. Smith 1996a: 3) If true - and indeed, CANF's objection to Clinton's ambivalent implementation of Libertad was particularly muted - this was a remarkable quid-pro-quo, and a brilliant example of the efficacy of side payments.

5.3.1 Campaign Donations

CANF boasted a large treasure chest, which it used selectively to promote its agenda. The Foundation's sixty-five directors each contributed \$10,000 annually, in addition to pledging a further \$10,000 in political campaign contributions.⁶⁰ In 1992, CANF's Free Cuba Political Action Committee (PAC) donated over \$55,000 to twenty-six congressional candidates. Congressman Robert Torricelli of New Jersey, who sponsored the Cuban Democracy Act, was the largest beneficiary, receiving the maximum legal contribution of \$10,000 from PAC, in addition to personal contributions of many more thousands by individual CANF members. (Robbins 1992: 165) The remarkable transformation of Torricelli from a 1980s liberal to a 1990s conservative is an intriguing question whose answer would seem to be linked both to the congressman's close association with CANF, from whom it is claimed he received more than \$120,000⁶¹ (Kiger 1997: 3), and to his ambitions for higher office. Torricelli's Bergen County has few Cuban-American voters, but the state of New Jersey boasts 85,000 Cuban-Americans, many in next-door Union City. (Kaplowitz 1998: 151; Robbins 1992: 166-173) New Jersey elected Robert Torricelli to the Senate in 1996; he abruptly withdrew from his re-election campaign in 2002 just one month before polling day amid allegations of improperly having accepted gifts.

The two sponsors of Libertad benefited hugely from Cuban-American support in Miami. Facing a tough re-election campaign in 1996, Helms was guest of honour at several fund-

⁶⁰ The Center for Responsive Politics claims that CANF contributed over \$250,000 to four congressmen between 1987 and 1994: Dan Burton \$12,150; Robert Torricelli \$53,150; Robert Menéndez \$69,873; and Ileana Ros-Lehtinen \$127,565. (Kaplowitz 1998: 182)

⁶¹ The 1997 investigative report by the Centre for Public Integrity claims that Torricelli has received \$26,750 from CANF's Free Cuba PAC and a further sum of at least \$93,900 in private contributions from CANF members since 1987. (Kiger 1997: 34)

raising events in Dade County.⁶² *The Miami Herald* reported that Helms gained more than \$48,000 for his campaign coffers from these engagements. According to attorney Nick Gutiérrez, speaking on behalf of the exile community, "We all feel down here that Helms more than earned whatever money he made." (Kiger 1997: 65) A 1997 investigative report claimed that Helms was one of the greatest beneficiaries of CANF's over \$3 million in campaign contributions since 1980. (Ibid: 2) Senator Helms' spokesman, Marc Thiessen, famously growled, "Believe me, he [Helms] doesn't have to be paid to fight communists." (Gedda 1997)

The Cuban American National Foundation, through vigorously espousing three principles - opposition to negotiations with the Castro government, refusal to moderate or lift the embargo, and support for policies that continue and even increase pressure on Castro - was widely perceived as an effective power broker in Washington. Although CANF did not publicly support strategies aimed at destabilising the Castro government, many members were privately not averse. (Molyneux 1999: 295)

5.3.2 Presidential Election Politics

The influence CANF cultivated under Reagan continued in the 1990s Bush White House, primarily through the president's son Jeb, a Florida businessman (elected Governor in 1998). Nevertheless, Robert Torricelli's 1992 Cuban Democracy Act (CDA, also known as the Torricelli Act), designed to tighten the embargo and be the final nail in Castro's coffin, received a mixed reception from Bush officials. Bush was concerned about the extraterritorial provision reinstating the ban on trade with Cuba by foreign subsidiaries of American companies, which had been lifted by President Ford. This provision was similar to the 'Mack Amendment,' introduced by Florida Senator Connie Mack in 1989 and vetoed by Bush in 1991. Bush opposed the CDA for the same reasons that he had opposed the Mack Amendment, arguing that attempting to apply the US embargo to third countries would "lead to unproductive and bitter trade disputes with our allies." (1989 State Department cable quoted in Kaplowitz 1998: 151; J. Domínguez 1997: 61).

⁶² Helms represented North Carolina, some 800 miles north of Miami; Burton's Indiana is 1500 miles northwest of Miami. Neither state has appreciable Cuban-American populations.

But 1992 was a presidential election year. Democratic presidential nominee Bill Clinton, courting votes by attempting to outflank Bush on the right, endorsed the CDA after meeting with CANF officials, by declaring "I like it." at a Little Havana fundraising dinner that earned the Democrats \$125,000.⁶³ It was alleged that Más Canosa propositioned Clinton, promising entrée into the wealthy political club of Little Havana in exchange for support for the CDA. Although this alliance meant abandoning the Republican Party, Más Canosa was foremost a pragmatist; his close association with Clinton was to endure until his death. (Brenner and Kornbluh 1995: 34) Faced with Clinton's endorsement, President Bush felt compelled to support the CDA (thus ensuring its passage) albeit with some modifications, but with the ban on foreign subsidiary trade that would come back to haunt future administrations intact. (Robbins 1992: 165-167; Rieff 1995: 83-86) Bush had no choice, for "neither he nor Clinton could afford to write off Florida's 25 electoral votes and New Jersey's 15." (Purcell 1998: 44) The smooth passage of the CDA was nothing short of a triumph for CANF. Remarkably, President Bush signed the CDA into law in *Miami*, (PL102-484) acknowledging the key influence of Más Canosa and the CANF in its passage. (Krinsky and Golove 1993: 155)

The Cuban Democracy Act was remarkable in that it not only intensified the Cuban embargo, it also contained 'sweeteners,' known as Track II, which attempted to strengthen elements of civil society in Cuba through increased contacts, cultural exchanges, and humanitarian aid programmes. Track II allowed links with Cuban NGOs in the provision of American food, medicines, and support for individuals promoting non-violent democratic change in Cuba. Furthermore, it provided direct phone links and postal services between the US and Cuba for the first time in decades. Paradoxically, hard-line Cuban-Americans who sought tougher sanctions against Castro welcomed the opportunity to directly phone relatives in Cuba. They had also surreptitiously been sending large sums of money to family in Cuba⁶⁴ (Rieff 1995: 84), although this became legal following Clinton's relaxation of the embargo in January 1999. This seemingly contradictory behaviour is due to the *comunidad* discriminating between publicly

⁶³ Clinton's endorsement of the CDA brought him \$275,000 from Cuban-Americans. (Kiger 35)

⁶⁴ A conservative estimate valued annual remittances sent by Cuban-Americans at \$800 million in the mid-1990s, rising to \$1 billion by 2000. To understand the impact of these donations by way of comparison, the largest single foreign investor in Cuba was Sherritt International, whose revenues were \$250 million in 1995. (Rieff 1996: 65)

maintaining support for the embargo as a symbol of continuing resistance to Castro, and privately empathising with relatives struggling under his tyrannical regime. The exiles see ordinary Cuban families as hostages of the Castro regime whose plight is somewhat eased through the dollar remittances. (Grenier interview; García interview) Professor Suchlicki argues that the hard-liners do not send dollars, so there is no contradiction. (Suchlicki interview)

Track II was extremely threatening to Castro, perhaps more than the embargo, for it encouraged dissident movements within the Cuban totalitarian state. Castro's belligerence seems to support this argument. In February 1996, he abruptly cut short his 'constructive engagement' talks with the EU, began a severe crackdown on Cuban dissidents who had been meeting the EU delegation, and shot down the two American planes. Castro thus forced Clinton's hand in signing the Helms-Burton Act, an embargo tightening law that he could handle. (McFayden 1996: 5; Nuccio 1999: 15-17) Furthermore, Castro had achieved a degree of success in his economic liberalisation programme of dollarisation and relaxation of state control over enterprise, which put Cuba in a favourable position to attract foreign investment. This led alarmed hard-liners in Washington to support passage of Helms-Burton. (Muse 1996-7: fn 45, 222)

The 1992 presidential election was significant for it witnessed the first concerted Democratic effort to woo votes from this group of committed Republicans; Clinton supported the CDA and assured Cuban-Americans of his commitment for a hard-line policy on Cuba during his many visits to the state. The Democrats believed they could win Florida if they reduced Cuban support for the Republicans to 66 percent, which would translate into two to three percentage points state-wide. The polls predicted that the Democrats would meet their expectations, with Más Canoşa proclaiming that "any fears that the Cuban-American community may have of the Clinton administration with regard to Castro's Cuba have dissipated," although he admitted that he would vote Republican out of loyalty. Confounding the predictions, Bush retained 70 percent of the Hispanic precincts in Miami in 1992, and carried the state, but by a much-reduced majority of 86,000 compared to one million votes in 1988.⁶⁵ While Clinton garnered

⁶⁵ Bush should have overwhelmed the state, having spent \$5-6 million campaigning, far more than Clinton. (García interview)

only 22 percent of the Cuban-American vote, he succeeded in making significant inroads into that staunchly Republican community. (Moreno 1992; Moreno 1996)

During his first administration, it was Clinton's political staff, not his foreign policy staff that dictated Cuba policy with the specific aim of winning the state of Florida for the Democrats in 1996. State Department official Richard Nuccio confirmed this when he stated that Clinton lost 85 percent of the Cuban-American vote in 1992, but that he would have won Florida if he had lost only 75 percent. "Our goal is to get that 10 percent." (Brenner and Kornbluh 1995: 35) According to another index, Clinton's share of the Cuban-American vote rose from 22 percent in 1992 to 36 percent in 1996. (Kaplowitz 1998: 183; Grenier interview) By Nuccio's measure, he gained more than an extra ten percent of the Cuban-American vote, and secured Florida in 1996. This was only the second time in the last eight presidential elections that Florida fell to the Democrats, effectively turning the state into an important swing state in the 2000 elections.

It is difficult to assess the impact that the defection of large numbers of Republican Cuban-Americans had on the outcome of the 1996 presidential election; many scholars acknowledge the critical influence of the *comunidad*, but several scholars contend that it was nil. Moreno argues that it was not the "decisive factor in Clinton's Florida victory" though it had important ramifications for the Republican coalition in the state. (Moreno 1996: 4) Wayne Smith, head of the US Interest Section in Havana during the Carter Administration, argued that Clinton's courtship of Florida's Cubans in 1992 made no difference in that election's outcome, and that "the Cuban-American vote does not and probably never will determine the electoral outcome in Florida or even in Dade County" (W. Smith 1996b:109). Professor Grenier of FIU shares this sceptical view, arguing that Cuban issues *never* determine voting in Florida, and that CANF's power is highly overrated. Grenier contends that CANF and Washington happen to have a confluence of interests with regard to Cuba, which is mistakenly perceived as a sign of CANF's strength, but that Washington would change its Cuba policy if it so desired *despite* CANF. (Grenier interview) Finally, some attribute Clinton's winning margin to the support of Florida's ageing population who were concerned with social security and

health benefits rather than to the Cuban-American Republican defectors. (LeoGrande interview). Indeed, exit polls showed the most important issue concerning voters was Medicare (19%) followed by taxes and the economy/jobs (17%).⁶⁶ (The Vote '96)

While Clinton's significant inroads into the Republican Cuban-Americans are open to various interpretations, the shift away from single-issue focus became apparent. By 1996, the *comunidad* had broadened its agenda to include domestic issues such as immigration and welfare reform, with CANF announcing that, for the first time ever, it would lobby for maintaining social welfare programmes. Grenier claims that the Cuban-Americans were far more to the right on foreign policy issues than on domestic policy, with the result that their populist tendencies were vastly underrated. Therefore, many Cuban-Americans voted strategically rather than along partisan lines, supporting the Democratic platform in far greater numbers than in any previous presidential election. (Moreno 1996; Grenier interview).

5.4 Level II Analysis

It is never easy to methodologically quantify an individual lobbyist's input into legislative outcomes. Nevertheless, members of Congress on both sides of the political divide acknowledge CANF's sway over US-Cuban relations. For example, Más Canosa's easy access to Congress and the White House meant that he flew to Washington on the day the planes were shot down. (Kiger 1997: 28-44) According to Gutiérrez, "Nobody lobbied the bill as methodically and in as well-funded a fashion as CANF." (Ibid: 52) This thesis notes that CANF had no involvement in the drafting of *Libertad*, becoming a staunch supporter only after the shutdown. Nevertheless, Congresswoman Ros-Lehtinen, referring to both the CDA and *Libertad*, credited Más Canosa's Washington activities, saying, "Without Jorge Más Canosa none of that legislation would have been enacted into law." (E. Domínguez 1998).

The rise of a powerful and sophisticated lobby like the Cuban American National Foundation provides a compelling example of the domestic influences at Level II determining US-Cuba policy. There was no significant group opposing CANF's agenda,

⁶⁶ Only 2% of voters named foreign policy as their major concern.

as no domestic group stood to benefit from a normalisation of relations with Cuba. The moderate groups who advocated dialogue with Castro tended to be poorly financed, loosely organised, and subject to intimidation by the hard-liners in the Cuban exile community. (Kiger 1997: 3) To paraphrase Putnam, "When the political costs of an international agreement fall disproportionately on a domestic group that is cohesive and politically mobilized, and the benefits from the agreement are diffusely distributed, the mobilized group often has the power to block ratification." This does not mean that the entire Cuban-American exile community supported CANF, nor does this mean that there was no opposition to the continued embargo amongst the general population. Indeed, polls in the late 1980s and early 1990s showed that a 'silent majority' of Americans favoured normalisation of relations with Cuba. It simply means that, as there was little or no perceived gain from normalising relations with Cuba, there was no effective countervailing lobby to the CANF. (LeoGrande 1998: 74-75)

Molyneux agrees with this assessment (even though she cites broad support on the part of the general population for a continuation of the trade embargo against Cuba).⁶⁷ She claims that the *comunidad* has maintained pressure to ensure continuing support for the embargo, and "in the absence of any remotely comparable lobby on the other side, their interests have prevailed." (Molyneux 1999: 305) Kaplowitz observes that the fact that the Cuban embargo has been tightened twice in the 1990s, both times in a presidential election year is no accident. She does not doubt that Clinton's signing of Libertad was domestically motivated, and that Clinton cited four companies under Title IV in the spring and summer of 1996 after being censured by Robert Dole, the Republican presidential candidate, for lax implementation of Helms-Burton. (Kaplowitz 1998: 184-186)

5.4.1 Monolith or Symphony?

Wayne Smith credited Más Canosa with having almost single-handedly blocked normalisation of relations with Cuba and CANF with being the unchallenged spokesman of the Cuban-American community. However, as CANF faced an uncertain future upon

⁶⁷ A 1993 poll found 66% of the American public favoured continuation of a trade embargo on Cuba. (Molyneux 1999: 305)

the death of Más Canosa in late 1997, Smith sensed a change in Miami, as more moderate Cuban-Americans felt increasingly free to express their views. The symbolism of the fact that Castro outlived Más Canosa has not been lost on the *comunidad*. The younger generation, many born in the US, began to challenge the 'establishment,' advocating a more liberal Cuba policy, modification of the embargo, dialogue with Cuban leaders, and cultural exchanges in seeking to promote democracy in Cuba. (E. Domínguez 1997)⁶⁸. Indeed, one prominent liberal Miami attorney described himself as an 'exile' for he left Cuba because his civil rights were curtailed, but describes newer arrivals as 'immigrants' for they have come for economic, rather than political reasons. (Durán phone interview) As the millennium approached, there was growing evidence that the hard-line Miami monolith, if it ever existed, was crumbling.

The 1997 Cuba Poll confirmed that the most contentious question dividing the Miami exiles was over the issue of opening a dialogue with Castro in order to promote change in Cuba. Significantly, 51.6 percent of respondents favoured opening a dialogue with the Cuban government in 1997; this rose from 36 percent in 1995 and 39 percent in 1993. This was striking evidence of a major shift in Little Havana's thinking, with the fault line lying along the generational/cultural/racial divide. The poll compared the opinions of different waves of immigrants, concluding that Cubans who arrived in the US after 1979 were far more liberal on a range of issues, and more likely to support a negotiated solution than were the earlier immigrants. For example, 78 percent of Cuban-Americans overall supported continuation of the embargo; this reflected support of 90 percent from exiles who had arrived before 1964, but only 65 percent support from second-generation Cuban-Americans. (Grenier and Gladwin 1997)

Although the 1997 Cuba Poll found that only 25 percent of Cuban-Americans felt the embargo had worked well, a decisive 75 percent saw the Helms-Burton Act as a good vehicle to promote change on the island. Most astounding of all was the level of support, 66 percent, for an American invasion of Cuba! These seemingly contradictory results are difficult to interpret. One possible explanation is that, although a majority of the exile community supports dialogue, perhaps they perceive direct talks as both an agent of

⁶⁸ See also "Miami Cubans – Patriarch's Death Opens Door for Dialogue with Castro," The Independent, 25th November 1997.

positive change and a tool to bring Castro down. (Ibid) One analyst, observing similarly contradictory results of an earlier (1995) Cuba Poll, proposed that perhaps Cuban-Americans are prepared to consider all manner of different alternatives, in their frustration at the continuing impasse. (Elliston 1995: 41)

In contemplating who speaks for the Cuban-Americans, it seems that the era of the monolithic, uniformly conservative exile community is something of the past. A symphony of voices advocating different means to the same end increasingly typified the Cuban-American community of the late nineties. Geoff Thale of the Washington Office on Latin America think tank rejected the monolithic characterisation of the exile community, arguing that the hardliners were seen as an "intolerant and obsessed minority." (MacSwan 2000) Much of the political influence that CANF enjoyed hinged on the singular style and political access that Más Canosa was able to provide. Grenier credits Más Canosa's outstanding organisational skills with making CANF seem like a monolith by sharply focusing on a single agenda. Not only has CANF not found a new leader of his calibre, it has been plagued by corruption and fraud charges⁶⁹, while the Pope's 1998 visit focused the nation's attention on the moral dilemma of withholding food and medicine from ordinary Cubans. The cumulative effect has altered the political climate in Miami and has encouraged open espousal of a more moderate line. (Hamman 1998; Grenier interview)

Molyneux, however, argues that CANF was representative of the exile community in the late 1990s (a qualified "yes), especially as CANF began moderating its hard-line stance, with Más Canosa opening a dialogue with Cuban leaders before his death. With the authoritarian and dictatorial Más Canosa gone, she predicted CANF would continue to relax its attitude and pursue a more conciliatory line, concentrating on supporting dissidents in Cuba and advocating respect for human rights. (Molyneux 1999: 295-298) CANF has mellowed with Más Canosa's son, Jorge Más Santos at the helm; it has also changed focus, primarily supporting cultural exchanges, education, endowment for Cuban studies and humanitarian programmes on the island, with political lobbying a very small part of the organisation's activities. Joe García was appointed executive director in

⁶⁹ The US Coast Guard stopped a cruiser near Puerto Rico in October 1997, and found it contained an enormous cache of weapons; both the cruiser and the weapons were registered to members of the CANF executive board. Four men were charged with conspiring to kill Castro. (Hamman 1998)

2000, determined to continue CANF's liberalisation programme and change the public perception of CANF as an extremist group, despite considerable opposition from older, more conservative exiles. (García interview)

5.5 Cuban-American Moderates

Perhaps the most important moderate voice to emerge was the Cuban Committee for Democracy, Inc. (CCD) founded in 1993, to represent progressive members of the Cuban-American community who advocated diversity, dialogue, tolerance and reconciliation with Cuba, rather than confrontation and hard-line opposition. It promoted mutual respect for sovereignty and civil rights through a variety of projects including a daily Miami radio programme, publication of a newsletter with updates and discussions, and hosting conferences featuring prominent guest speakers on Cuba related issues. CCD's twofold goal was "to support a peaceful transition to democracy in Cuba and to promote the democratization of politics on the island as well as within the Cuban-American communities in the United States," (a veiled censure of CANF's intolerance?)⁷⁰ Its members included many prominent professionals and academics from the exile community that sought to redress public perception of the Cuban-Americans as being a monolithic, uniformly conservative group. The CCD was active in both Miami and Washington, attempting to air more moderate Cuban-American views by "opening a political space". (Elliston 1995: 41)

The CCD was anti-embargo, arguing that ending the isolation of Cuba would deprive Castro of a scapegoat for his failures and hasten his demise. Its president in 1995 was Alfredo Durán, a Miami lawyer active in local Democratic politics; as a former hard-liner, Durán was evicted from the Bay of Pigs Veterans Association for being a *diálogo*. Durán compared the Cuban embargo to the Berlin wall insofar as it has kept Cuba from being "contaminated" by the political and economic freedoms of the West. He argued that honest hard-liners acknowledge that the embargo has not worked, but endeavour to maintain it as a bargaining chip to reclaim their properties. (Durán phone interview)

⁷⁰“Statement of Goals and Principles,” CCD, <http://www.us.net/cuban/goals1.htm> (accessed 14/10/99)

The CCD was actively opposed to Libertad in 1995. Durán's testimony urged the US to take advantage of the economic concessions Castro had made and respond positively in order to accelerate the peaceful transition to democracy. US moderation could disarm Castro and "reveal the barrenness of his policies." (Durán 1995: 103)

Another important moderate voice was that of Eloy Gutiérrez Menoyo, a former revolutionary commander who fought alongside Castro, became disillusioned with the communist regime and emigrated to Florida where he helped found Alpha 66, a paramilitary exile group. Gutiérrez Menoyo was arrested on a mission inside Cuba, jailed for twenty-two years, and released into exile in 1987. Like Durán, his experiences moved him from being a hard-liner to seeking a more conciliatory approach. In 1993, Menoyo founded "Cambio Cubano" (Cuban Change), a moderate group that supported an end to isolationism and confrontation, favoured lifting the embargo and saw dialogue as the best way forward to securing a democratic government in Cuba. Cambio Cubano's charter advocated achieving Cuban freedom peacefully, without revenge or hatred. In June 1995, Menoyo spent a week in Cuba, talking to Castro, other government leaders and dissidents, presenting a strategy for transition to democracy. Although little progress resulted, Menoyo remained optimistic because he perceived Castro had treated him with tolerance and respect. Cambio Cubano's focus has been primarily on the political future of Cuba itself, rather than on the politics of the diaspora, and for this reason, few in Miami considered Menoyo's project realistic. (Elliston 1995: 40-41; Molyneux 1999: 304-305)

Finally, the Cuban-American Alliance Education Fund (CAAEF) was a small non-profit organisation dedicated to education on issues of hardship related to the American embargo on Cuba.⁷¹ It was particularly interested in the humanitarian implications of the embargo on food and medicines to Cuba. CAAEF formed coalitions with business and civic organisations, supported cultural exchanges between the US and Cuba, held organisational workshops, and published a newsletter on Cuban-American issues.⁷¹

⁷¹ Many of its members are active in other Cuban-American organisations. For example, Dr. Delvis Fernández Levy, president of CAAEF was also a board member of Americans for Humanitarian Trade

5.6 Conclusion

The influence of the Cuban American National Foundation was based on substantial campaign contributions to select candidates, its perceived ability to sway important votes in Florida and New Jersey, and Más Canosa's easy access to Congress and to the White House. CANF can claim credit for the creation and continued federal funding of Radio and TV Martí and the drafting and passage of the Cuban Democracy Act. The inspiration for the Helms-Burton Act came from Senator Helms himself, with CANF supporting the measure only after the shutdown in February 1996. Indeed, the question of why Más Canosa did not support Libertad earlier continues to vex this researcher.

The Bush administration whispered rather than shouted when opposing CANF, as illustrated by the fact that Bernard Aronson, the highly respected Assistant Secretary of State for Inter-American Affairs, chose not to testify against the Cuban Democracy Act, sending a deputy instead. The general feeling of timidity on the subject of changing US policy toward Cuba, and the well-entrenched practice of having to administer Cuba policy from the right continued under the Clinton presidency. Clinton officials referred constantly to the Torricelli Act, reinforcing the impression of continuity in Washington's Cuba policy. Clinton showed a marked reluctance to discuss Cuba policy openly; he rarely announced decisions on Cuba himself, delegating such pronouncement to spokespersons. (Robbins 1992: 166-167; Nuccio 1999: 12) CANF's objection to Clinton's appointment of Mario Baeza, a Cuban-American investment lawyer perceived as 'soft on Castro', to the post of Assistant Secretary of State for Inter-American Affairs led to the nomination being withdrawn. Even Clinton's early opposition to Helms-Burton in April 1995 was muted; he bifurcated by saying that, although there were sections of the legislation that he could not support, these concerns could be resolved through negotiations. (Brenner and Kornbluh 1995: 39) Washington's win-set was constrained by the clout of the hard-line Cuban-American community, especially as represented by the Cuban American National Foundation.

Many scholars disagree with this contention. Professor Grenier argues that CANF's influence has been grossly exaggerated. As board members contribute huge sums to its coffers, CANF stands accused of being an exclusive businessman's club, rather than one that enjoys broad popular support in the Cuban-American community. Furthermore, CANF's reputation as an effective lobby and power broker showed how unimportant Cuba was to the post-Cold War national debate. The fact that Washington policy-makers' interests converged with those of CANF was serendipity, not indicative of CANF's clout. (Grenier interview) Professor Suchlicki broadly agrees that the Cuban-Americans influence, rather than determine policy, drawing parallels with Washington's general affinity towards Israel, regardless of Jewish clout. (Suchlicki interview) Mark Falcoff reasons that the hard-line Cuban-American attitude towards Castro enjoys broad support in the wider American community, downplaying their exploitation of power in determining Washington's agenda. (Falcoff 1998c: 96) Krinsky and Golove agree that the Cuban-American hard-liners have benefited from a confluence of interests with powerful right-wing elements in the Washington security establishment, including the CIA and the Pentagon. The hard-liners have also been supported by businessmen who dream of restoring Cuba to its pre-Castro heyday as a tourist playground and investors' paradise, devoid of government regulations and taxes. (Krinsky and Golove 1993: 8)

By the end of the nineties, CANF's hard-line message had moderated in response to shifting demographic trends within the Cuban American community, for second generation exiles born in the United States saw themselves as American as they are Cuban. It became acceptable to advocate dialogue, tolerance and reconciliation without being branded a *gusano* (worm).⁷² Furthermore, CANF endured negative political fallout over Elián González, the six-year-old Cuban refugee who survived the treacherous crossing of the Florida Straits in late 1999, but whose mother tragically died. Castro demanded return of the boy to his father in Cuba, but CANF campaigned loudly for him to remain in Miami with his extended family. The case was headline news for months as various courts adjudicated, sparking a national debate over the rights of the

⁷² This term was coined to describe the 'counter-revolutionaries' of the Bay of Pigs invasion. "Worms. Crawling vermin, returning to reclaim their property and privilege, returning to enslave all other Cubans once again. Fidel wanted everyone to think that all of the invaders were the sons of the rich and powerful." (Eire 2003: 293)

father as opposed to the morality of returning the child and denying him the freedoms that his mother had paid for with her life. Elián was forcibly taken from his Miami family in April 2000, reunited with his father, and returned to Cuba. CANF was described in the media as irrational and intransigent, emerging from the episode with much-diminished prestige, but with a commitment to modernise its image. CANF's transformation has not been easy, as rival factions of hard-liners compete for influence, and many activists defected from the organisation rather than temper their philosophy.⁷³

Cuba analyst Gillian Gunn writes that Washington's national interest remains to promote a peaceful transition to democracy, to stabilise immigration from the island, to improve regard for human rights in Cuba, and to realise a rapprochement between the Cuban-American exile community and the islanders. But many Cuban-Americans, ambivalent about a peaceful transition to democracy in Cuba as this could cut them out of any future definitive role on the island, promote a hard-line policy that flies in the face of America's national interests. Adopting their hostile and confrontational position gives Cuba no incentive to liberalise. Indeed, the US has never responded reciprocally to any small steps Cuba has taken in the past - for example, the legalisation of dollars in 1993 - despite having undertaken to do so under the CDA. Cuba perceived that nothing would satisfy Washington short of the fall of Castro from power. (Gunn 1997: 73-89)

The next chapter charts the growing influence of the Level II domestic constituency seeking moderation of Washington's hard-line policy towards Cuba. It concludes with the application of two-level game analysis to Clinton's Cuba policy.

⁷³ Some twenty hard-line board members resigned from CANF in protest at the evolving moderation of the Foundation. See Elaine de Valle, The Miami Herald 22nd September 2001; Jacob Bernstein, Miami New Times, 1st November 2001.

Chapter 6

Level II: US Domestic Politics of Sanctions

"[State Department spokesman Nicholas] Burns said the United States hopes to implement the law in a way that maximizes pressure on the Cuban government and minimizes its effect on friendly governments." (Gedda 1996a)

6.1 The Cuba Lobby

The 'Cuba Lobby' was the name given to the loosely knit and greatly disparate groups opposed to the American embargo against Cuba. It combined vastly dissimilar organisations whose interests in Cuba were commercial, humanitarian, or religious, and whose agenda incorporated anything from slight modification of the embargo to its complete repeal, and from support of the Castro government to vehement anti-Castroists. The Cuba Lobby included many elite and highly focused groups that often had substantial funds with which to promote their agendas, despite appealing to limited audiences. In contrast to the concentrated voting blocs of the Cuban-American exile community, the Cuba Lobby was hampered by the almost impossible task of organising an effective opposition from diverse groups who had never developed a trusting working relationship before.⁷⁴ It was distinctive in that it had minimal Cuban-American support, aside from the Cuban Committee for Democracy and Cambio Cubano. (Horowitz 1998: 553-557; Kiger 1997: 53)

The Cuba Lobby consisted of four discrete wings, each of whom had a different strategic agenda vis-à-vis Cuba, but sharing a common goal of seeking to end the American embargo. It often disregarded the human rights abuses, the lack of civil liberties and the harassment of dissidents that are characteristic of Castro's repressive regime, focusing primarily on a coherent American foreign policy as a goal in itself. Its arguments included:

⁷⁴The Center for Foreign Policy, a liberal think tank, failed in an attempt to organise an effective coalition opposed to Helms-Burton in 1995. Among those contacted were corporate executives, certified claimants, religious organisations, and foreign diplomats. (Kiger 1997: 53)

- The Cold War is over and Cuba no longer poses a security threat to the US nor does it export revolution abroad as it did in the 1970s;
- The US embargo hurts the Cuban people and leaves the elites still in power; moderating the embargo may stimulate positive changes in Cuba; and
- The US should pursue a consistent foreign policy that treats all the old adversaries, such as China, Vietnam and Cuba, in a similar manner. (Horowitz 1998: 558-559)⁷⁵

The four broad components of the Cuba Lobby were:

- Intellectual-academic circles, which supported a limited but quite specific agenda including relaxing travel restrictions to Cuba, expanding academic exchanges and increasing collaboration on scientific projects. Among their members was the American Association for World Health, the American branch of the World Health Organisation, who was concerned about the effect of the embargo on the health and nutrition of the Cuban people. (Ibid: 554)
- Policy-oriented think tanks, the most amorphous and least effective group in the Cuba Lobby who shared no consensus on Cuba or Cuba policy. This spacious umbrella offered room to anti-Castroists, who saw the end of the embargo as the first step towards democracy on the island, as well as Castro supporters, who interpreted ending the embargo as an endorsement of the Castro regime. The staunchly conservative Cato Foundation shared this platform with the World Council of Churches, although they have little else in common. It included humanitarian groups that promote peace through reconciliation, such as the Council on Hemispheric Affairs, as well as groups that support the Castro regime, such as the Center for Cuban Studies and (more mildly) the Center for International Policy.⁷⁶
- Foundations and grant-making agencies, which funded research projects that advocated specific agendas, and was the most inchoate group in the Cuba Lobby. It included the Arca Foundation, a partisan pro-Castro group, who spent nearly \$2 million

⁷⁵ This argument is a bit facile, for it assumes that the US has identical national interests in different areas of the world, which is patently untrue.

⁷⁶ CIP is headed by Wayne Smith, former staffer of US Embassy in Havana before the Castro revolution, and head of US Interests Section in Cuba 1979-82. (www.ciponline.org)

in the three years leading up to 1996, promoting their agenda,⁷⁷ and the Ford Foundation, which spent \$1.8 million in the same period but with no specific focus other than increasing understanding between Washington and Havana. (Ibid: 556-557) Both foundations funded the Center for Public Integrity's investigative report on Cuba, *Squeeze Play*, published in early 1997. (Kiger 1997: ii)

- Business-commercial circles which sought to expand trade (and aid) to Cuba, in areas as wide-ranging as agriculture, livestock, transportation and communication. These executives studiously ignore the human rights abuses of the Castro regime, arguing that Cuba's human rights record is no more dismal than China's, yet Washington trades with China. Members include large umbrella organisations such as the United States Chamber of Commerce, the National Association of Manufacturers, and the National Foreign Trade Council, in addition to entities such as Alamar Associates, who provided consulting services to American companies interested in conducting business with Cuba. (Horowitz 1998: 554-555)

One of the most high profile organisations in this last group was the U.S.-Cuba Trade and Economic Council (USCTEC), established in 1994 to facilitate the flow of economic and commercial information to American businessmen about Cuba. A private organisation supported by some 200 companies, many of them certified claimants, USCTEC received no government funding and never took a political position with regard to US-Cuba relations. Its president, John Kavulich, was regarded as somewhat of an expert on potential business ventures in Cuba, often quoted in the media and testifying on Capitol Hill.

Kavulich predicted that up to 2,500 American executives would visit Cuba in 1998 to assess business opportunities there, in the belief they would soon have access to the Cuban market. He argued that *Libertad* had precipitated fundamental changes in the way large American corporations viewed Cuba, creating a justification for companies to seek to open markets in Cuba whilst initiating a national dialogue over the use of unilateral sanctions. (Kavulich 1998; Kavulich interview) Kaplowitz broadly concurred with

⁷⁷ See Kiger 1997: 38.

Kavulich. Until Helms-Burton, the business community's interest in trade with Cuba had waxed and waned in response to the easing/tightening of the comprehensive embargo. Libertad provoked the first open challenge by the business community to Washington's authority in the thirty-five year long Cuban embargo, as it began to lobby Capitol Hill to moderate the embargo. (Kaplowitz 1998: 187)

The Cuba Lobby was politically insignificant until 1998, when the visit of the Pope to Cuba focused attention on the island, and the death of Jorge Más Canosa left a void in the leadership of the Cuban American National Foundation. (Nuccio 1999: 9) The Clinton administration supported the businessmen's agenda as the only effective antidote to the unrelenting pressure from the conservative Cuban-American exile community. The business-commercial group became the most effective wing of the Cuba Lobby by the late 1990s, warranting more in-depth analysis.

6.2 Business Lobbies

Business groups are a powerful source of influence in Congress, using to full advantage their corporate expertise, their access to large membership, and their abundant wealth. Their strategy is based on gathering information, activating their membership, targeting individual Congressmen, and using widespread advertising to convey their message to the public. (Hrebennar and Scott 1982:26)

Prominent business groups such as the National Association of Manufacturers (NAM) and the National Foreign Trade Council (NFTC) fretted over the proliferation of unilateral American sanctions that limited or prohibited American companies from engaging in commerce in major markets. The US Chamber of Commerce argued that unilateral embargoes "further isolate U.S. foreign policy, reinforce rather than weaken hostile regimes, and diminish economic opportunity for U.S. firms and workers." (Helms-Burton Conference 1997: 1-2)

Corporate America cited independent surveys to support the core argument that sanctions were both costly and ineffective as foreign policy tools. The International Institute for

Economics in 1997 conducted a widely quoted study⁷⁸ in 1997, computing the direct and hidden costs of sanctions on the 1995 American economy in terms of jobs and wages. Re-iterating its previous findings that sanctions fail 80 percent of the time in attaining their foreign policy objectives, it concluded that sanctions cost the United States \$15 to \$19 billion annually in lost exports.⁷⁹ Furthermore, between 200,000 and 260,000 jobs in export related industries were lost due to sanctions. And, because the export sector paid premiums of 12 to 15 percent higher than average wages in the manufacturing sector, this translated into a loss of \$800 million to \$1 billion to US workers. (Hufbauer et al, 1997)

In addition to supporting general sanctions reform legislation, corporate America lobbied specifically for more targeted reforms exempting food and medicine from such policies. Predictably, they were supported by farmers and the pharmaceutical industry. A unique coalition of businessmen and former government officials was founded in 1998, Americans for Humanitarian Trade with Cuba, advocating the sale of food and medicines to Cuba. Although the rhetoric was cloaked in humanitarian concern, the objective was clearly the pragmatic goals of gaining valuable export markets and protecting jobs. (Kaplowitz 1998: 187)

There was a widely held feeling during Clinton's first term that the White House was predisposed to slowly open the door to normalising relations with Cuba, but only after the elections in November 1996. (Brenner and Kornbluh 1995: 39-40) On the strength of this sentiment, corporate America took two concrete actions. Dozens of Fortune 500 companies booked fact-finding trips to Cuba, with over 1,300 American executives meeting with Cuban officials in 1995 alone; and executives intensified their efforts to ease the Cuban embargo by increasingly lobbying the president and key members of Congress. (Falk 1996: 14-16)

⁷⁸See testimonies by Kittredge 1998 and Schott 1998.

⁷⁹A Congressional Budget Office report disputed these figures. It found sanctions had an inconsequential effect overall on the US economy, registering a loss of perhaps \$1bn in 1997. (Rennack and Shuey 1999)

6.2.1 USA*Engage

The National Foreign Trade Council launched USA*Engage on 16th April 1997, specifically to lobby policy-makers about the economic cost of sanctions and "to build support for alternative policies." USA*Engage was a broad-based coalition of 670 businesses, agriculture groups and trade associations seeking to slow the proliferation of unilateral American sanctions and promote engagement instead. USA*Engage rapidly achieved a high profile through extensive advertising, testifying before congressional subcommittees, and liaising with think tanks and religious organisations to increase its appeal. (Kittredge 1998)

Clinton apparently encouraged the creation of USA*Engage to provide a countervailing weight to the hard-line Cuban-Americans (although USA*Engage promoted wider sanctions reform). This potent lobby was first organised by Anne Wexler, a "powerful Democratic insider," Washington lobbyist and former aid to President Carter. USA*Engage carefully nurtured a patriotic image by stressing the negative impact sanctions have on the economy in terms of lost export markets and American jobs, portraying sanctions as "undesirable, unworkable, and, above all, *un-American*." (Heilbrunn 1998: 22)

A compelling example of USA*Engage's style was an open letter on the eve of Pope's historic trip to Cuba in January 1998, printed as full page advertisement in the *Wall Street Journal*. It proclaimed "...the United States has an opportunity to demonstrate leadership through engagement...We believe the time is right to explore new initiatives to promote freedom in Cuba...Leadership is something all Americans respect." (USA*Engage 1998) Laced with emotive words like 'freedom' and 'leadership,' the letter urged an end to the ban on exports of food and the sale of medicines to Cuba, its commercial agenda camouflaged beneath lofty ideals.

Many heralded the historic visit of the Pope to Cuba in January 1998 as a catalyst for a review of Washington's Cuba policy. *Washington Post* columnist Thomas Lippman argued that changing circumstances within the Cuban-American community warranted a

fundamental change in US-Cuba policy, citing the death of Más Canosa in November 1997, and poll data showing growing willingness among younger Cuban-Americans to engage with Cuba. Lippman also cited corporate America's strategy to promote sanction reform, concluding that the challenge was to build momentum in support of greater flexibility so that Clinton had the political support to institute change. (Lippman 1998a)

Powerful lobbying and the papal visit resulted in Cuba becoming the test case for those seeking to modify US sanctions policy. However, the Clinton administration was markedly hesitant. The greatest obstacle for the reformers remained convincing an irresolute, timid White House that there was substantial political support to reform.

In conclusion, the Cuba Lobby gained significant support from moderate sectors in the Cuban-American exile community and from corporate America in the late 1990s. The demographic changes within the *comunidad* led to growing support for dialogue, travel, cultural exchanges and engagement with Cuba. Business executives were frustrated by continuing sanctions, particularly as they witnessed rival European, Canadian and Japanese firms winning coveted contracts. Encouraged by the Clinton White House, corporate America lobbied for reforms under an ostensibly patriotic and humanitarian banner to promote democracy to oppressed people through engagement.

6.3 Sanctions Reform Legislation

The late nineties saw intense debate over the proliferation of unilateral sanctions by Washington. Richard Haass, of the Brookings Institute, argued eloquently against unilateral sanctions, citing a National Association of Manufacturers study that revealed that Washington had imposed an astounding 61 episodes of unilateral sanctions against 35 different countries between 1993-1996. Senator Jesse Helms refuted Haass, based on a study he had commissioned by the Congressional Research Service, claiming that the total number of new sanctions during those years was only nine. (Haass 1997: 74; Helms 1999)

Fuelled by intense corporate lobbying, the sanctions debate spawned numerous attempts to reform America's sanctions policy, with little substantive results. The most comprehensive legislation was Senator Richard Lugar's Sanctions Reform Act; Lugar proclaimed that his bill was the "legislative component" of the attempt to slow sanctions by USA*Engage. (Lugar 1998)

6.3.1 The Lugar Bill

The Hamilton-Crane-Lugar Sanctions Reform Bill, 'The Enhancement of Trade, Security, and Human Rights through Sanctions Reform Act,' was introduced as S.1413 by Senator Richard Lugar (R/IN) and H.R.2708 by Representative Lee Hamilton (D/IN) in the autumn of 1997. It sought to clarify the use of unilateral economic sanctions as a foreign policy tool by both the executive and the legislature, mandating that:

- sanctions be targeted as narrowly as possible,
- a cost-benefit analysis be conducted whereby the economic costs (both short and long-term) on American industry would be calculated,
- a two-year sunset provision automatically terminated the sanctions after two years unless renewed by Congress,
- presidential authority to waive a sanction if he determined that it was in the national interest,
- the President consult with Congress, publish advance notice of sanctions in the *Federal Register*, and make periodic reports to Congress,
- farmers are compensated for loss of markets due to a sanctions episode.

Despite powerful lobbying from USA*Engage, business and agricultural groups, and strong bipartisan support, the bill was sidelined as a result of an anticipated Senate Sanctions Task Force report in 1998. It was subsequently re-introduced with relatively minor changes under the same name in the 106th Congress in March 1999 by Senator Lugar (S.757) and Congressmen Crane, Dooley and Manzullo (H.R.1244). USA*Engage again lobbied fiercely, urging Congressmen not to be side-tracked yet again, declaring, "This year, we are looking for tangible results." (Swift 1999) No sanctions reform legislation had been passed by the millennium. Fieldwork in

Washington discovered that this was primarily due to the fact that the bills did not enjoy the 'right' support in Washington: neither of the White House, nor of the Republican leadership on Capitol Hill.

Stuart Eizenstat testified that the Lugar bill had much to commend it, but argued that it hampered the President's ability to conduct foreign policy by imposing more "inflexible restrictions" on the President than on the Congress, even though the proliferation of sanctions legislation had come from Capitol Hill. He argued that the President needed flexibility in order to respond judiciously to changes in the international order, citing the waiver authority granted to the President by Helms-Burton (and ILSA) as being the key in defusing the dispute with the EU. Eizenstat sought broader presidential powers to waive sanctions in the national interest, applicable to existing and future sanctions laws (Eizenstat 1998), leading *Washington Post* columnist Thomas Lippman to write that Clinton was seeking "blanket authority...to waive any sanctions, existing or future, in the 'national interest.'" (Lippman 1998c)⁸⁰ Eizenstat later re-iterated many of his administration's earlier objections to "excessive procedural constraints...hamstringing the Executive Branch," proposing that, instead of a rigid two-year sunset clause, the president review sanctions annually and determine whether they should be continued. (Eizenstat 1999c)

Congressional Research Service analyst Dianne Rennack concurred that the lack of White House support was critical. The bill was indeed inflexible by, for example, mandating the 45 day notice before enacting sanctions (even though this could be suspended in an emergency), and the fairly stiff reporting rules to congressional committees. The reporting requirements, including analyses and on-going assessments, were enormous. Rennack mused that perhaps Congress mandated such stringent reporting requirements because Clinton was so slippery and adept at "fudging" issues. (Rennack interview)

Andrew Semmel, Legislative Assistant for Foreign Policy for Senator Lugar, had the primary responsibility of drafting the reform bills and shepherding them through the

⁸⁰ Eizenstat sought presidential waiver authority to waive Title IV to fulfil his obligation under the US-EU Understanding negotiated the previous May.

legislative process. Semmel denied the personalisation of the reporting requirements of the bill, maintaining it had nothing to do with Clinton per se. He argued that S.757 responded to some of the objections against S.1413, by softening some of the presidential requirements, for example, by allowing the President to impose sanctions and report to Congress later. But he acknowledged that the Lugar bill never enjoyed the support of the White House, so Democrats, who might have been open-minded about supporting the bill, had no reason to do so. Semmel was convinced the bill enjoyed backing from some members of the Clinton administration, but not at the top, where "they are more political." Despite a Republican Congress, it would have been exceedingly difficult to enact a controversial piece of legislation without the support of the Democrats. (Semmel interview) Brian Mohler, Director of the Office of Economic Sanctions Policy at the State Department, had the clear impression the White House did not want a comprehensive statement of policy with regard to sanctions reform. Mohler felt that a political decision had been made by Clinton's National Security Advisor Sandy Berger, but would not speculate as to the reason. (Mohler interview)

Furthermore, Lugar (a Republican) never had the backing of the powerful Republican kingmakers in Congress, Jesse Helms in the Senate and Benjamin Gilman in the House, who, as chairmen of the relevant committees, were in a position to impede the legislation. Sensing the 'groundswell' of support for the bill in the summer of 1998, the Republican leadership deftly thwarted the momentum by announcing the formation of a Bi-Partisan Task Force, effectively shelving the bill pending their report. This group held hearings and issued a summary report, but by then the 105th Congress had ended and the bill died. (Rennack interview)

Semmel concurred with Rennack's analysis of the strong bipartisan opposition, particularly by Helms, although Helms did try to work out a 'disingenuous compromise' in the Ashcroft Amendment permitting the sale of food and medicine, which was later emasculated. Semmel also cited strong opposition from a variety of ideological as well as political objectors, including protectionist groups, like organised labour and anti-free traders, and NGOs such as human rights activists, whose 'bread and butter' is imposing sanctions. Finally, commenting on Capitol Hill politics with the savvy of an insider,

Semmel mused that legislators prefer to cite a 'neutral' reason for supporting or opposing a bill, as this is politically safer. It was convenient to oppose sanctions reform on substantive matters of policy, but those protestations may have masked more controversial political grounds. (Semmel interview)

6.3.2 Cuban Sanctions Reform Initiatives: Capitol Hill

Numerous Cuba-specific initiatives of the late nineties suffered the same fate as the Lugar bills. In the 105th Congress, Representative Esteban Torres (D/CA) sponsored H.R.1951, called the Cuban Humanitarian Act of 1997, mandating exempting food and all manner of medicines from the Cuban embargo. Senator Chris Dodd introduced similar legislation, the Cuban Women and Children Humanitarian Relief Act, S.1391, which had strong bipartisan support led by Senator John Warner (R/VA). And Representative Charles Rangel (D/NY) sponsored an ambitious bill in the 106th Congress, H.R. 229, calling for the repeal of the Cuban embargo completely. None of these became law.

Senator Jesse Helms introduced S.2080 on 5th May 1998, called the "Cuban Solidarity (Solidaridad) Act of 1998", which authorised support under Libertad for "increased humanitarian assistance directly to the oppressed people of Cuba to help them regain their freedom..." Helms' new bill was the brainchild of CANF, who proposed to send up to \$100 million in food and medicine to Cuba to be distributed by NGOs like the Catholic Church. It lacked the support of Miami's two Cuban-American congressmen, Ros-Lehtinen and Díaz-Balart, who were concerned that it would lend credence to arguments to lift the embargo against Cuba entirely, whereas they argued that there was no embargo on humanitarian aid to Cuba in the first place. (E. Domínguez 1998) The *Times* wrote that Helms hoped his legislation would strengthen independent non-governmental institutions in Cuba. Helms' spokesman, Marc Thiessen remarked the Helms bill "puts Castro in a Catch-22," for accepting the aid would strengthen Cuban civil society, but refusing the aid would be difficult to justify to 11 million suffering Cubans. "He's damned if he does and damned if he doesn't." (Rhodes 1998) The bill was not enacted.

Senator John Ashcroft (R/MO) introduced legislation to exempt food and medicine from all unilateral American embargoes, in an amendment added to the domestic farm bill, FY2000 Agricultural Appropriations. This would have allowed American farmers, food processors and pharmaceutical companies to sell *directly* to Cuba. The amendment would have modified the Clinton executive order of April 1999, which allowed such sales to take place, but mandated that they must be under special licenses to ensure that independent NGOs benefited rather than the government. In a communist country still tightly controlled by central government, the restriction over dealing exclusively with NGOs rendered the bill almost useless. It was precisely this drawback that the Ashcroft Amendment sought to redress. Confounding predictions that the Ashcroft Amendment would face tough opposition from the Cuban-American congressmen and their allies, it passed the Senate by 70-28 in August 1999. (Fletcher 1999b)

CANF immediately expressed satisfaction that the amendment had passed the Senate. This was puzzling. Apparently, after negotiations with Florida Senators Bob Graham and Connie Mack, and New Jersey Senator Robert Torricelli, along with staff from the Helms' Senate Foreign Relations Committee, a compromise was reached with Ashcroft, to require the following:

- A license must be obtained before transactions of food and medicine are carried out with countries that have supported international terrorism, and
- Federal financing, direct export subsidies, and any other form of federal assistance programmes will not be available to such transactions.

These two compromises allowed CANF to claim victory for the continuation of America's hard-line sanctions policy against Cuba. Jorge Más Santos declared that the Senate had "stood firm on the side of democracy and respect for the human rights of the Cuban people." (Más Santos 1999)

In September 1999, Senator Ashcroft reported that the conference committee had killed his amendment, even though it had been approved unanimously in the Senate (S.1233, 05/08/99) and in a stronger version in the House (H.R.1906). Apparently, the Republican leadership in Congress decided to 'strip' the Ashcroft Amendment out of the agricultural appropriations bill, disregarding the clear intentions their colleagues

(Ashcroft 1999). Although several lawmakers regretted the conference's summary execution of the Ashcroft Amendment, such action is not uncommon in the face of determined opposition of the majority leadership.

Clinton signed an \$80bn agriculture bill in the twilight of his administration, PL106-387, in what could have been the most significant change to the comprehensive embargo in forty years had it not suffered from similar machinations to the Ashcroft Amendment. Its Title IX was the Trade Sanctions Reform and Export Enhancement Act of 2000, which relaxed the embargo on food and medicine to Cuba, but with impossible restrictions rendering the bill virtually useless. (Nakashima and Fletcher 2000; Rennack 2000: 6)

A bill to exempt food and medicine from sanctions regimes was introduced as H.R.4461 in May 2000, but was adamantly opposed by both the Republican leadership and the Miami Cuban-American legislators. The House passed the amendment in late June, after a coalition of farm state lawmakers, headed by George Nethercutt (R/WA) succeeded in drafting an acceptable compromise insuring Castro would not qualify for any credit in the purchase of food and medicines. (Panin 2000a; 2000b) Nevertheless, the GOP leadership summarily stripped the Nethercutt Compromise from the spending bill in July, to howls of bipartisan protest both from conservative lawmakers representing farm states and liberal representatives seeking moderation of the Cuban embargo. (Anderson 2000) Díaz-Balart worked solidly to replace the Nethercutt Amendment in Conference but, because it prohibited any US government or commercial credit or any barter arrangements such as Cuba enjoys with many countries, Cuba's purchasing ability was almost nil. (Rennack interview)

6.4 Clinton's Cuba Policy

President Clinton presided over a divided domestic constituency with regard to Cuba, which became increasingly fractured as his presidency progressed and the Cuba Lobby gained ascendancy. He endured criticism from the left for failing to moderate the embargo, and criticism from the right for not complementing the embargo with further

measures to destabilise Castro. Clinton attempted to please all factions by supporting the tough anti-Cuba line espoused by the Cuban-American exile community in the difficult presidential election years of 1992 and 1996, but hinting at moderating the embargo, lobbying strongly against Libertad in 1995, and supporting the nascent USA*Engage to counterbalance the hard-liners. The passage of Libertad added to Clinton's woes, burdening him with international constraints that united with the Cuba Lobby in arguing for restraint and moderation in Cuba policy. This thesis argues that Clinton's personal sentiments leaned towards moderation; his ambiguous Cuba policy reflected his impossible struggle to accommodate divergent domestic preferences and international constraints simultaneously.

The Clinton Administration's Cuba policy was succinctly stated on the State Department's website. The policy statement contains clear references to strengthening both the embargo and the elements of civil society in Cuba, indicative of the Janus-faced policy Clinton employed.

"The fundamental goal of United States policy toward Cuba is to promote a peaceful transition to a stable, democratic form of government and respect for human rights. Our policy has two fundamental components: maintaining pressure on the Cuban Government for change through the embargo and the Libertad Act while providing humanitarian assistance to the Cuban people, and working to aid the development of civil society in the country." (State 1999)

Clinton stands accused of mortgaging a sensible Cuba policy for short-run political gains. Legitimate US interests regarding Cuba should include managing immigration flows, regulating drug trafficking and seeking peace and stability with its neighbours in the Caribbean basin. But these goals were secondary to the domestic political concerns of money and votes. Clinton reasoned that maintaining hard-line policies on Cuba, while annoying moderates and liberals, would not drive them away from the Democratic Party. "Therefore, greater flexibility marginally hurts Clinton's electoral prospects, while maintaining a tough stance has a neutral to slightly positive impact." (Gunn 1993: 26)

Support for maintaining the stubbornly hard-line policies espoused by the Cuban American National Foundation against Castro was steadily eroded as the nineties progressed, with the remarkable confluence of interests shared by CANF and

Washington's foreign policy and national security establishment a distant Cold War memory. American businessmen travelled to Cuba on 'goodwill' missions as restrictions on travel and telecommunications were eased. American firms explored possible future investments pending the removal of the Cuban embargo, worried that foreign competitors had already become well entrenched in Cuba before them. (Falk 1996) Even the right-wing *Washington Times* suggested that it was time to bomb Havana – with Big Macs, and American ideas and products. It suggested 'killing' Castro while still alive, by showing his irrelevance and lifting the embargo unilaterally without negotiating with him. This strategy would reveal Castro's personal accountability both for the sorry state of Cuba's economy and for a tyrannical regime with no respect for human rights, and encourage a more peaceful transition for Cuba after Castro. (Ratliff and Fontaine 1993)

A behind-the-scenes debate took place early in Clinton's first term over a moderate relaxation of sanctions against Cuba. No clear shift on Cuba was discerned, and Clinton continued to waffle, still held hostage to the money and votes of the Cuban-American exile community. Then the Republican sweep of both Houses of Congress in the elections of 1994, resulting in a 'divided government', made any modification of Washington's Cuba policy more difficult. Nevertheless, there was a feeling that Clinton would tentatively begin to 'normalise' relations with Cuba after the 1996 elections. Clinton's fairly active involvement in emasculating Libertad in the Senate debate in October 1995 corroborated this impression.

The passage of the Helms-Burton Act in 1996 caught the Clinton administration between two 'policies of appeasement': appeasing international governments irate over Libertad's extraterritorial implications, whilst trying to appease the domestic constituencies that demanded continuing harsh sanctions against Castro. Many anticipated that Clinton, as chief executive, "would implement provisions of the law with constraint instead of expansively." (Kavulich 1998)

In choosing engagement over embargo, Clinton 'fudged' the issue, seemingly enforcing Libertad, yet regularly announcing waivers for Title III every six months, declaring "a suspension is necessary to the national interest and will expedite a transition to democracy in Cuba." (Clinton 1996c) Clinton endured stinging attacks from Libertad

supporters with each suspension. Congressman Díaz-Balart charged that Clinton was blackmailed by "unscrupulous interests" who profited from stolen property, and accused Clinton of being a "systematically weak Chief Executive."⁸¹

Clinton showed similar restraint in implementing Title IV. Despite many dozens of companies entering into joint ventures with the Cuban government and potentially in violation of Title IV, the State Department conducted scrupulous, deliberate investigations before authorising letters of warning. Only four companies received State Department letters, and only two have suffered exclusion of their executives, Sherritt International, a Canadian mining company and Grupo BM, an Israeli agricultural group.

Clinton's second term saw several timid 'executive order' initiatives, as the president announced new regulations designed to marginally ease the Cuban embargo and support individuals without strengthening the government. But these were cautiously tempered to emphasise that Washington remained fully committed to the embargo, and that any modifications of the Cuban embargo were wholly consistent with both the CDA and Libertad.

In response to the Pope's highly publicised visit to Cuba in January 1998, Clinton eased the conditions for issuing licences for the sale of medicines, and allowed Cuban-Americans to send money to their families in Cuba (which they had surreptitiously been doing anyway). Secretary of State Madeleine Albright pointedly declared that the measures "do not reflect a change in policy towards the Cuban Government. That policy has been, and remains, to seek a peaceful transition to democracy."⁸² (Albright 1998a) A senior White House official declared that the new measures needed only a change in the licensing procedures for implementation, and that the intent was to focus on post-Castro Cuba, "not to abandon the embargo." (Dobbins 1998)

Clinton announced further relaxations a year later, allowing remittances of up to \$1200 annually to individual Cubans or Cuban NGOs by any American resident (not only those

⁸¹ "Mixed Reaction among Cuban Exiles on Helms Decision," *Reuters*, 16th July 1996.

⁸² Secretary Albright also stated that the administration was working with Jesse Helms and others to develop a bipartisan bill to ease the humanitarian needs of the Cuban people.

with family in Cuba), authorising charter flights from cities other than Miami to cities other than Havana, establishing a direct postal service (as authorised under Track II of CDA), and expanding the sale of food to individuals and NGOs. Clinton emphasised that the new modifications were humanitarian measures that supported ordinary Cubans, but were absolutely consistent with the CDA and Libertad policy of maintaining pressure for democratic change. (Clinton 1999)

Richard Nuccio, White House Special Advisor on Cuba, met with the President less than five times, although he held this post for nearly a year, from mid-1995 to mid-1996. Nuccio confided that he never knew conclusively what Clinton's final position on Libertad was, so reluctant was he to take a position on Cuba, due to the domestic constraints which made it "troubling." (Nuccio phone interview) He charged Clinton with having abdicated his responsibility as chief executive, speaking about Cuba policy as if someone else were accountable for its implementation. Nuccio concluded that Clinton was "unwilling to do the hard work necessary to lead the country toward a more responsible Cuba policy." (Nuccio 1999: 22)

In conclusion, caught between two irreconcilable camps, Clinton prevaricated rather than articulating a clear policy. Clinton promoted measures to ease the embargo, particularly in the humanitarian areas of the sale of food and medicine, and paid lip service to foreign policy goals of promoting the growth of democracy and the protection of human rights. But his administration also "deferred to the entrenched Cuban-American lobby which opposed any policy change... [and] confined itself to a timid extension of 'people-to-people' contacts with Cuba."⁸³ Remarkably, in the twilight of his administration, Clinton expressed regret over having signed Libertad, saying that Congress had gravely erred in removing presidential leverage, for it "tied the hands of the executive so much that it's hard for us to use the full panoply of pressures we had." Clinton felt that promoting a transition to democracy would have been better served by offering carrots, and empowering ordinary Cubans struggling for political freedoms.⁸⁴

⁸³ "Cuba: Food for Talk," *Economist*, 353, 21st August 1999.

⁸⁴ "Clinton Says 1996 Incident Undercut Plans to Weaken Castro," *Miami Herald*, 9th November 2000.

6.5 Two-Level Game Analysis: Managing Win-sets in a Divided Constituency

The domestic constituency with interests in Cuba policy was vastly heterogeneous. Castro's 'mobilising incident' fused the disparate domestic preferences into a shared hard-line win-set that resulted in Libertad's enactment into law. But the shared win-set was ephemeral. Domestic groups supporting engagement increasingly shared a win-set with Washington's allies, as both opposed energetic implementation of Libertad. There was thus both a divided domestic constituency and a divergence between the executive's win-set and that of the domestic constituency.

Jongryn Mo is disturbed by the implicit assumption that the chief negotiator and the domestic constituency have identical win-sets. Putnam concedes that there may be a divergence of opinion between the two, but argues that there are compelling forces for the executive to submit to the will of his constituency, not least because he wants to be re-elected. Mo, however, argues that there may be reasons for the divisions to persist. He cites the example of trade liberalisation talks, where the US Trade Representative may promote his agenda of lowering trade barriers, whilst Congress traditionally reflects the more narrow, protectionist sentiments of its constituents, particularly if they represent strong labour or agricultural districts. (Mo 1994: 403-404) This case study would support Mo's hypothesis that there may be deep divisions between the executive and the domestic constituency for precisely the same reasons. Nevertheless, Clinton's courting of the hard-line vote in 1992 and again in 1996 lends credence to Putnam's argument that those divisions may dissipate in the face of elections.

6.5.1 Structure of Political Institutions

Putnam argues that the size of win-sets is determined by the structure of political institutions. Helen Milner focuses on the issue of divided government, by which she means "a divergence between the policy preferences of the executive and the median legislator." (Milner 1997: 37) Milner argues that divided government is a phenomenon found sporadically in presidential systems, where the executive and the legislators are elected entirely independently of one another. In a two-party system, the president may

be of one party, but the majority in Congress may be in hands of the rival party, with party affiliation a proxy for policy preferences. A divided government can have serious repercussions on the degree of cooperation the executive can expect from his legislature; and the more divided the government is, the more constrained it will be by its domestic politics and the less likely it will be to enter into international agreements. (Ibid: 37-42)

The extent of divided government will depend not only on how wide is the divergence between the preferences of the political parties, but also on the political institutions within which they operate. Regardless of whether a country has a presidential or parliamentary system, the distribution of legislative powers may favour either the executive or the legislature. Whereas Britain and Canada have strong executives, the United States has a more powerful legislature. Milner asserts that cooperation is *least* likely when the distribution of powers within the political institutions empowers the more hawkish domestic actor (whether that is the executive or the legislature). She maintains that, given a divided government, with a legislature that is more hawkish than the executive, the US would have great difficulty in successfully completing international agreements. Milner concludes that policy outcomes depend on *both* the structure of domestic preferences and the institutional balance of power between the executive and his legislature. (Ibid: 242-244)

Milner's 'divided government' was the political reality in 1990s Washington, forcing President Clinton to grapple with a Republican Congress with opposing domestic preferences after the elections of November 1994. Clinton's unhappy situation was exacerbated by the institutional balance of power weighing heavily against him. Furthermore, Milner predicts little chance of cooperation if the empowered institution is also the more hawkish body. Jesse Helms became the Chairman of the powerful Senate Foreign Relations Committee in 1995, with embargo-tightening legislation against Cuba a top priority. Helms resolutely refused to moderate his hard-line position against Cuba, despite the conclusion of the US-EU Understanding in May 1998, and the threat of a resumption of a WTO Panel if the undertakings in that agreement were not implemented.

Faced with an intransigent legislature, Clinton actively encouraged the growth of business pressure groups like USA*Engage to help him widen domestic support for his win-set. But Clinton's attempts to seek a more conciliatory win-set were not successful enough to empower the executive. As Milner predicted, a hawkish Congress in a divided government prevented the US-EU agreement being ratified.

The American foreign policy establishment is somewhat schizophrenic, with the agenda setting commander-in-chief at the White House, but the purse strings controlled by the House and the Senate wielding final authority in the approval of ambassadors and foreign treaties. The executive generally adheres to a more cosmopolitan view of world affairs, for it is he who must engage with world leaders, while the legislature is often swayed by more parochial concerns that directly affect their constituents. "The national focus of the executive and the more local concerns of legislators help explain why, although they may have the same interests, legislators and executives may have distinct policy preferences." (Ibid: 36)

Bill Clinton and Jesse Helms were not only from opposing parties; Clinton was a centrist Democrat and Helms a staunchly right-wing Republican. They exemplify Mo's description of a divergence of win-sets between the executive and the domestic constituency, as represented by the congressional leadership, on both ideological and political grounds, and perhaps also on personal grounds.⁸⁵ Clinton's agenda, as his rocky eight-year presidency drew to a close, was to deflect attention from his shabby personal life and secure a favourable legacy for his presidency. Clinton sought a foreign policy coup, but Congress refused to co-operate, as the divergence between executive and legislative preferences widened. This could perhaps partly explain Congress' refusal to grant Clinton 'fast-track' authority in further trade liberalisation talks in 1997, the Senate's rejection of the treaty on nuclear non-proliferation in 1999, and Congress' refusal to amend Libertad.

⁸⁵ Clinton's 1999 impeachment trial left him with many personal enemies.

6.6 Conclusion

The last two chapters established the influence of domestic interest groups in the shaping of Washington's Cuba policy. The Cuban American National Foundation promoted its hard-line agenda through targeting politicians with substantial campaign contributions, and through their perceived ability to command bloc votes in the key swing states of Florida and New Jersey. They "established the domestic game as the major factor shaping U.S. policy toward Cuba" (LeoGrande 1998: 75) due to the fact that there was no organised countervailing entity to effectively argue against them, and no perceived political benefits of doing so.

The emergence of an increasingly effective Cuba Lobby provided a counterpoint to CANF and encouraged an easing of the Cuban embargo; it gained momentum after the passage of *Libertad*, led by corporate America and abetted by President Clinton. Their argument, while supported by religious and humanitarian groups, was essentially a commercial one, cleverly couched in emotive patriotic terms of extending the freedoms Americans take for granted to unfortunate people struggling under dictatorship.

Clinton showed a remarkable ability to 'sit on the fence', seemingly upholding Helms-Burton and catering to the Cuban-American hard-liners and their sponsors in the legislature, whilst at the same time seeking to dilute their political clout, particularly as the international furore over *Libertad* forced consideration of Level I sensibilities. Although Clinton negotiated a Level I 'Understanding' with the EU, the executive was doubly hampered: the paralysis of a divided government that reduced presidential authority, and a more institutionally powerful and more hawkish Congress that did not share the executive's win-set. The consequence of the diverse preferences at play coupled with a sclerotic, weak-willed administration unable to mobilise a comprehensive win-set encompassing a majority of the domestic constituency, fulfilled game theory prediction of American defection.

Chapter 7

Level II Tensions in the European Union: Leading to the WTO

"It is difficult to overstate the virtual unanimous scorn and disrespect that the Helms-Burton economic sanctions elicit abroad." (Preeg 1997)

Henry Kissinger famously asked, "When I want to speak to Europe, whom do I call?"

"If Europeans obey the Helms-Burton law, [the] EU would find a great deal more of its foreign and trade policies being written in Washington."⁸⁶

7.1 Introduction

The United States and the European Union have enjoyed close relations since the early days of the movement to foster European integration, which many American statesmen interpreted as a logical extension of the Marshall Plan. The US encouraged Europe's early steps at integration in the late 1950s, although an increasingly effective customs union would impose costs on American farmers and manufacturers. This decision was a strategic Cold War manoeuvre by Washington, for the US considered a democratic, stable, and prosperous Europe essential in the fight against communism. Cynics might reason that the Americans preferred to fight communism in Europe rather than closer to its own shores, even if the trade-off was lost export markets. However, the menacing strength of the communist parties in post-war Greece, Italy, and France underlined the importance of rapidly improving living standards to undercut their growing support. Stuart Eizenstat believes that Brussels has encouraged the "democratic impulse" in Europe, contributing decisively to the transformation of countries such as Spain and Portugal from military dictatorships to vibrant democracies. Indeed, the US and the EU are close partners precisely because they espouse similar liberal, democratic values. (Eizenstat 1996a: 23-25)

⁸⁶ Anthony M. Solis, "The Long Arm of U.S. Law: The Helms-Burton Act." Loyola of Los Angeles International and Comparative Law Journal 19:3, p. 729. Quoted in Roy 2000a: 82.

Washington and Brussels have nurtured their close relations, co-operating in institution building, such as the enlargement of NATO, and the creation of the WTO to find mutually acceptable norms for protecting intellectual property rights and trade in services. At the Madrid Summit in December 1995, US and EU leaders⁸⁷ reinforced their partnership by signing the New Transatlantic Agenda (NTA), supplementing the 1990 Transatlantic Declaration. The NTA reaffirmed their joint "conviction that the ties which bind our people are as strong today as they have been for the past half century," (Commission 1995d) and sought "to translate common political and economic objectives into practical measures centred around four priorities." (Commission 1995e) These four areas, to be monitored by twice-yearly presidential summits, were to promote peace, stability and democracy; to respond to global challenges such as crime, drug trafficking and protecting the environment; to strengthen the multilateral trading system and further reduce barriers to transatlantic trade; and to build bridges across the Atlantic through commercial, intellectual and cultural exchanges.

Transatlantic trade amounted to more than \$200bn annually by the mid-1990s, with over forty percent of US investment abroad in the EU, and over fifty percent of EU investment in the US. (Eizenstat 1996a: 24) Notwithstanding several US-EU clashes, such as the banana war and disagreements over genetically modified foods, officials on both sides of the Atlantic agree that media hype obscured their close economic ties. The furore over Libertad was another example of a dispute between two friends who remained committed to nurturing a deeper alliance. EU Commissioner Sir Leon Brittan (SLB) declared in the summer of 1996, as the Helms-Burton controversy was intensifying, "Those relations are too deep, too long-standing and too important. We have not sought confrontation and don't do so. We are merely defending ourselves."⁸⁸

This chapter introduces the EU's Level II preferences with regard to Cuba. It analyses the EU's competence in articulating and pursuing foreign policy objectives, and examines the tensions inherent in EU foreign policy decision-making between the

⁸⁷ US President Bill Clinton; Felipe González, Spanish Prime Minister and President of the European Council; Jacques Santer, President of the Commission.

⁸⁸ "EU Vows Retaliation if US Doesn't Waive Cuba Sanctions," *International Herald Tribune*, 16th July 1996.

supranational Commission and the member states in the Council. Finally, it describes how Level II tensions were resolved as Brussels debated its response to Libertad.

7.2 EU-Cuba Relations: Constructive Engagement

The European Union never supported the American sanctions against Cuba, unlike Latin American countries in the Organisation of American States, who effectively made the embargo multilateral until 1975. Despite the best efforts of Washington officials, Europeans maintained normal diplomatic and commercial relations with Cuba; the levels of trade were not great, as Cuba enjoyed preferential treatment with the Soviet bloc, but significant nonetheless for the policy statement they proclaimed. When the loss of Soviet support compelled Cuba to actively seek foreign investment, Cuban government figures claimed that there were 212 joint ventures by the end of 1995, the bulk undertaken by Europeans. Whereas only 7 percent of Cuba's trade was with Western Europe in the 1980s, by the late 1990s, Europe was responsible for roughly a third of Cuba's international trade. Much of this trade was from tourism, with Italy, Spain, and Germany (along with Canada) accounting for the greatest number of tourists. (Roy 1999: 31-33) Foreign investment was fuelled by expectations of American loosening of the embargo, perhaps after the 1996 presidential elections; Europeans would then be well placed to benefit. (Falk 1996: 16-17)

Europe's motivation in nurturing trade contacts with Cuba was not solely mercantile. The EU has long espoused 'constructive engagement' - by which they hoped to promote civil society and democratic reforms in Cuba through cultural and economic links with Havana. Perhaps the best articulation of European objectives was the Commission's communiqué of 28th June 1995, noting the economic reforms Castro had instituted, and concluding:

"In the Commission's view, a peaceful and successful transition to a market economy and political pluralism will depend on Cuba's ability to forge new international and regional bonds and that, by virtue of its very size, the European Union is probably best placed to play a supportive role vis-à-vis reforms likely to draw in other major partners. The first step is to initiate a dialogue based on regular consultations and which will also provide a forum for an exchange of views on current reforms, the development of a civil society and measures to extend private initiative and personal freedom in Cuba." (Commission 1995b)

Commissioner SLB confirmed the 1995 EU decision to open a dialogue and co-operate with Cuba "to underpin the process of democratic reform, encourage human rights, broaden private enterprise and develop a civil society." (Brittan 1996b)

Washington agreed that economic and diplomatic isolation was not conducive to fostering change in a country, and that "principled, purposive engagement is generally preferable to isolation...Nevertheless, engagement is useless with unreconstructed dictatorial regimes whose actions are completely outside the norms of responsible international behavior." (Eizenstat 1999a) This view was validated by Human Rights Watch, which concluded in late 1996 that the EU's policy had had no effect on promoting civil liberties in Cuba. (López 2000: 348, fn 14)

The debate over Cuba is part of a wider debate between diverging Level II preferences concerning the appropriate use of foreign policy instruments. The US has followed containment and asphyxiation policies since the Cold War; the EU has preferred the use of integration, dialogue and trade to influence others. With regard to Cuba, the US has employed isolation, whilst offering limited carrots, such as Track II of the CDA. More controversially, the US has imposed secondary sanctions on its allies to coerce them into supporting its position. The EU has valued carrots over sticks, offering conditional inducements to encourage reform. Many scholars believe in the efficacy of positive over negative sanctions in dealing with an adversary, due to the lower levels of dependence and the lower baseline of expectations inherent in an adversarial relationship. This is tempered, however, by the moral hazard associated with supporting a dictatorial regime, and the limited ability of totalitarian states to respond to positive overtures.

7.2.1 Spanish Initiative

With common historic, cultural and linguistic ties, Spain has maintained a close bilateral relationship with its former colony, Cuba, beyond those cultivated by Brussels. Madrid advised Cuba on economic reforms, and, through the promotion of dialogue within Cuba, was responsible for the release of many political prisoners in the early 1990s. (Lisio 1996: 709) As Spain's socialist government under Felipe González prepared to assume

the presidency of the EU in July 1995, Spain embarked, in early 1995, on a new programme to establish closer economic ties with Cuba with an eye to encouraging a democratic transition, using the French-Spanish-Italian troika. This Spanish initiative resulted in a flurry of activity throughout 1995. Following the Commission's recommendation (Commission 1995b),⁸⁹ the Council opened a dialogue in October, to determine a framework for EU-Cuba relations that would serve to hasten process of reform (Commission 1995c: 1.4.108), and the troika held exploratory talks in Havana in November. The Madrid European Council in December 1995 asked the Commission to "draft negotiating directives for a trade and economic cooperation agreement, which will be examined by the Council in the light of developments in the political and economic situation in Cuba" (Commission 1995d)

Manuel Marín, Vice President of the European Commission, and the (Spanish) Commissioner primarily responsible for this initiative, personally presented the plan to Castro in early 1996. Castro flatly rejected any commitment to a programme of political and economic reform in return for aid in a contentious eleven-hour meeting with Marín, then cancelled Marín's planned meeting with Cuban dissidents by arresting them. The Cuban shootdown of the Cuban-Americans followed days later, effectively shelving the cooperation. (Roy 1999: 35-37; Nuccio 1999: 14) *The Times* expressed Europe's disillusionment at Castro's brutality, understanding why Washington viewed Cuba as a "pariah."⁹⁰

Marín's abortive trip was the culmination of a remarkable secret transgovernmental initiative in US-EU cooperation that took place between January 1995 and February 1996. This plan put aside the embargo, on which there was no agreement between Washington and Brussels, and concentrated on advancing those values on which there was substantial agreement: encouraging the growth of civil society, protecting human rights and promoting a peaceful transition by nurturing democratic reforms in Cuba. Rather than seeking to marshal support against the aforementioned Spanish initiative, the State Department, astonishingly, chose to work quietly throughout 1995 with Spain and

⁸⁹ The European Parliament supported this in January 1996. See Commission 1996a: 1.5.150

⁹⁰ "Big Brother Fidel," *The Times* Editorial, 28th February 1996.

the EU, challenging Europe to put 'serious conditionality' for the promotion of reform in the agreement.

The year's diplomatic activity climaxed on 7th February 1996, as Commissioner Marín met in Brussels with Stuart Eizenstat, US ambassador to the EU and Richard Nuccio, Clinton's Cuba advisor, just before travelling to Cuba. The degree of confluence between the American and European positions was startling; without time to consult Washington, the American delegation gave an undertaking to Commissioner Marín that if his mission succeeded, they would prevail upon President Clinton to respond in a positive and significant manner. In response to this researcher's question of what the President would have done, Nuccio confessed that he did not know for certain. However, he surmised that the White House would bring into play the quid-pro-quo policy "to reduce the sanctions in carefully calibrated ways in response to positive developments in Cuba" as stated in the CDA. Nuccio probably referred to the ongoing secret initiative when he used the identical CDA expression of the Administration responding "in carefully calibrated ways" to positive change in Cuba in a September 1995 speech. (Nuccio 1995; Nuccio 1999: 13-16).

The Cuban shootdown of the aeroplanes effectively aborted the European cooperation formula, and Clinton's nascent softening of Cuba policy was overwhelmed by the enormous political constraints of a re-election year. In attempting to explain Castro's appalling behaviour, perhaps the Track II people-to-people contacts of the Torricelli Bill, coupled with Marín's EU initiative menaced Castro by promoting the growth of a civil society that threatened to de-stabilise Cuba's strict totalitarian regime. Castro's response guaranteed continued American animosity. (Nuccio 1999: 16; Rieff 1996: 73; Haass and O'Sullivan 2000: 184) A Whitehall official's interpretation was that Castro could not accept Marín's proposal, and therefore, knowing he had nothing to lose, deliberately shot down the American aeroplanes, thus handing momentum to the Cuban-American hardliners in an election year. (research interview) Professor Joaquín Roy argues, based on evidence from Cuban officials, that Castro benefits politically from the embargo, and that the shootdown was a deliberate provocation. (Roy interview) It is a validation of Jorge Domínguez's argument that "hardliners in each country have been each other's best

allies, each remaining an obstacle to changing the quality of US-Cuban relations." (J. Domínguez 1997: 70).

The May 1996 election of José María Aznar, the first conservative government in Spain for fourteen years, heralded a radical about-turn: a hard-line Spanish policy toward Cuba through the direct linkage of bilateral cooperation agreements with political reform, much to Castro's displeasure.⁹¹ The new Spanish policy was announced on 25th May at a joint press conference at the end of an official visit by American Vice-President Al Gore, and was predictably praised by Gore. Moreover, Aznar was responsible for initiating a similar hardening of the EU's Cuba policy, as Madrid presented a draft resolution to the EU Foreign Ministers on 14th November 1996, making European cooperation with Cuba proportional to its democratic reforms. (Arenal 2004) *El País* reported that Aznar's proposal "*se alinea estrechamente a la actual política norteamericanana.*" (Vidal-Folch 1996) Spain's conditional initiative was adopted as the Common Position after heated debate, discussed later in this chapter.

To summarise, the degree of division between the United States and the European Union on Cuba policy was less than perceived. The overlapping win-sets led to covert cooperation between Washington and Brussels to promote a peaceful transition to democracy in Cuba immediately before the passage of *Libertad*. There seems to have been a particularly close working relationship between Clinton and Madrid's Aznar, who may or may not have been a recipient of a side payment from the Americans - adopt a tough line and speak out against abuses in Cuba and win immunity from prosecution under *Libertad*. (Kiger 1997: 66)

7.3 EU Foreign Policy Decision-Making: Level II

The Cuban Democracy Act (CDA) of 1992 had extraterritorial implications for it extended the Cuban embargo to American subsidiaries operating in foreign countries.

⁹¹ Tensions mounted between Madrid and Havana as Aznar's repeated criticism of Castro's totalitarian system culminated in Havana refusing to approve the new Spanish ambassador. See Roy 1997: 90-91; Patrick Chalmers, "Tougher EU Cuba Stance Adds to Madrid-Havana Row," *Reuters* 28th November 1996.

The Europeans threatened to contest the CDA, but nothing materialised as they realised the potential benefits that could accrue to their own firms. The response to Helms-Burton was entirely different, with Eizenstat characterising the EU's reaction as "unadulterated, undiluted anger." (Kaplowitz 1998: 184) The different European reaction astonished Washington. But in 1992, Europeans believed that the Clinton Administration would either emphasise Track II or significantly moderate Washington's harsh Cuba policy soon. (Purcell 1998: 47-49) A Whitehall official conceded that, in view of Libertad, the EU had erred gravely in not forcefully defending itself against the extraterritorial aspects of the CDA. (research interview) The toothless European bark was not lost on supporters of Libertad. In 1995 Congressional testimony, the president of the Cuban American National Foundation recalled that the EU's vigorous protests against the CDA were not substantiated, implying that European threats were hollow. (Hernández 1995: 93)

What accounted for the varied reactions? In protesting against Helms-Burton, perhaps Brussels was more concerned with the Iran Libya Sanctions Act (ILSA) that was making its way through Congress in the summer of 1996, which sought to impose sanctions on any country that aided Libya or Iran in developing their oil or natural gas fields. Middle East oil was a far more important issue than Cuba to Europe, for both consumers and producers (France's Total was involved in a consortium negotiating to develop oil fields in Iran). It was easier to object to an existing law, rather than to pending legislation, and the American defence of national security could be much more easily challenged in the case of Cuba than in a case involving 'rogue' states. (Purcell 1998: 47-49) Indeed, Sir Leon referred to the ILSA bill as the EU was considering options for defending itself against Libertad, arguing that it was "imperative to send a clear message" that the EU would not tolerate extraterritorial legislation. (Brittan 1996a)

What was perhaps most extraordinary about the EU's reaction to Helms-Burton was the remarkable degree of unity that it fostered. The EU not only mounted an effective defence against what it perceived as an onerous law with serious extraterritorial implications, Brussels also successfully orchestrated a compromise with the US that averted a potentially damaging WTO hearing. (Roy 1999: 33) In announcing the May

1998 Understanding, Commission President Jacques Santer crowed, "It's a deal that is good for the EU, which has shown that it can act together, united in important foreign policy issues." (Santer 1998) Fieldwork confirmed that there was remarkable unity on the over-arching substantive issue of contesting Libertad's extraterritoriality; nevertheless, there were conflicting national preferences over tactics that required resolution.

How competent a foreign policy did the EU have in the 1990s? Christopher Hill and William Wallace argue that an effective foreign policy is based on a shared sense of national identity, which the EU can never have. While the EU has achieved a 'collective presence' internationally and the ability to articulate objectives, it has not achieved 'actorness,' which demands the practical ability to effect policy in relations with other actors in the international arena. National governments, therefore, downplay the extent of compromise they have to make to national priorities in order to reach consensus with their fellow member states. EU foreign policy decisions are taken in almost total secrecy; member states take great pains to disguise the integration of foreign policy, to avoid domestic scrutiny and democratic accountability in their common foreign policy. Hill and Wallace conclude that the sticky issue of a comprehensive foreign policy remained unresolved by the EU in the 1990s. (Hill and Wallace 1996: 6-13)

But Andrew Moravcsik argues that EU institutions strengthen the power of member states in two ways. Firstly, they increase efficiency in interstate bargaining by pooling sovereignty. Secondly, they create a two-level game, which enhances the autonomy of national leaders with regard to domestic interest groups. The fact that intergovernmental discussions are held in secret affords national leaders the freedom to bargain with relatively little domestic constraint. Domestic polities cannot amend or revise agreements, only accept or reject. Indeed, in facilitating agreement on common interests, the 'democratic deficit' may be an important source of the success of the EU. (Moravcsik 1993b: 507-517)

7.3.1 Instruments of Foreign Policy: Three Pillars

The intergovernmentalist approach won over the community approach at Maastricht, establishing the three pillar structure upon which the Treaty on European Union (TEU) is based. Commission President Jacques Delors warned at the time that the arrangement was "a recipe for confusion" (Cameron 1999: 24), while Helen Wallace has characterised the TEU as having "grand policy ambitions and muddled institutional results." (H. Wallace 1996: 55) Karen Smith is concerned that the pillar system raises issues of consistency: ensuring that decisions made in one pillar do not conflict with those of another. This has improved as the pillars increasingly overlap and demarcation between the pillars became less distinct. (K. Smith 2003: 65-66)

Pillar I incorporated the former European Communities (EC), retaining most of the policy responsibilities it previously had under the 1957 Treaty establishing the European Community (TEC). The TEU allowed the EC to act only within specified parameters, granting the EC exclusive competence over the 'low politics' of trade. Where the Community did not have exclusive competence, "the Community shall take action, in accordance with the principle of subsidiarity..." (Article 5, ex Article 3b of the TEC) a rather vague indication that policy should be decided at national or local level.

The 'high politics' of Common Foreign and Security Policy (CFSP) was reserved to the Council's Pillar II under a weaker institutional regime that demanded intergovernmental cooperation (as was Justice and Home Affairs, Pillar III). CFSP provided the Council with two important tools in the pursuit of a common foreign and security policy, both of which have been sparingly used. Significantly, both instruments were applied during the escalating crisis over Helms-Burton.

- On the basis of unanimity, the Council could define 'common positions' on any matter of foreign or security policy that was of general interest to the member states. (Article J.2 of the TEU)
 - Based on general guidelines from the European Council, the Council could decide to take a 'joint action,' determined by QMV. (Article J.3 of the TEU)
- Member states would be committed to ensuring that their national policies conformed to the common position/joint action.

British and French insistence at Maastricht kept joint actions in foreign policy under national control, limiting the role of the European Parliament to an advisory one, and the role of the Commission to an "advisory but not a policy-initiating role." (Hill and Wallace 1996: 12)⁹² The Commission is nevertheless 'fully associated' with the Council's CFSP work. This means that, while the Commission plays a secondary role, its contribution to CFSP can be significant, especially when EC instruments such as trade are involved. (Nugent 1999: 139-140)

7.3.2 Pillar I Ambiguity

Trade policy broadly falls under Pillar I. From its inception, the member states have delegated supranational competence on trade issues to the Community, allowing the Community to speak with one voice in international trade negotiations. But the Community has exclusive competence only in trade in goods; investment policy, intellectual property and trade in services are areas of shared competence between the Community and the member states. (Woolcock 2000: 375; K. Smith interview) Meunier and Nicolaidis argue that the 1990s debate over trade was a reflection of the larger ideological controversy over deeper European integration. In 1994, the European Court of Justice decided competence for non-goods trade should be shared. At the Amsterdam IGC, important member states (France and UK among them) were reluctant to transfer more sovereignty to the Community; therefore, Article 133 allowed for the extension of exclusive community competence to the new trade sectors on a case-by-case basis after a unanimous Council vote. (Meunier and Nicolaidis 1999: 478-496)

The main difference between exclusive and shared competence is at the ratification stage. For exclusive competence, the Council ratifies by qualified majority voting (QMV), but shared competence requires unanimity in Council in addition to parliamentary ratification in each member state. Shared competence seems to grant member states veto rights, both in Council and in their national parliaments. In practice, powerful member states exercise an informal veto even under QMV. The real difference

⁹² The 1997 Amsterdam Treaty extended and streamlined CFSP by giving it three new instruments, among them the definition of CFSP principles and the adoption of common strategies, all of which required majority voting. The previous CFSP tools of joint action and common position were to be taken under QMV. See Nugent 1999: 85.

lies in the fact that "the expression of dissent is dampened, the incentives for seeking compromise increased and the role of the Commission enhanced in areas of exclusive competence." (Ibid: 482) Indeed, Meunier argues that most policies are decided by consensus rather than by formal vote, with only 14 percent of issues in Council decided by vote in 1994. (Meunier 2000: 108)

A complicating factor has been the increasing overlap between the political and the economic resulting in a blurring of boundaries between pillars and competencies. These ambiguities have presented difficulties not only for the member states, as competence determines decision-making processes, but also for non-member countries with whom they interact. (Van den Bossche 1997: 29) Helms-Burton presented one of a growing number of 'mixed agreements' that straddled the interface between trade and foreign policy, raising troublesome questions over competence.

Ambiguity over competence is reflected in the fact that both the EU and the member states retain WTO membership. (Ibid: 26) When signing the Marrakesh Final Act at the conclusion of the Uruguay Round in April 1994, the member states rejected the Commission's suggestion that the European Community and its member states sign collectively, similar to the manner in which they were already listed at GATT. The member states signed in alphabetical order, with the United Kingdom following the United Arab Emirates. Moreover, the French industry minister held a meeting with the USTR Mickey Kantor before Sir Leon did, defending his entitlement to act in areas that were not exclusive Community competence. (Ibid: 75-77)

LSE trade expert Stephen Woolcock argues that the continuing ambiguity spills over to who represents the EU at a WTO dispute settlement hearing when the dispute concerns the grey area of mixed competence. (Woolcock 2000: 388) The EU has adopted a pragmatic approach insofar as the Commission speaks for the EU before the WTO, "even when disputes touch on issues of mixed competence...and of operating by a kind of common-sense consensus-building." (Ibid: 395) Illustrating this pragmatism, the European Council empowered the Commission to speak on behalf of the Community and the member states in March 1985, before the Uruguay Round talks began at Punta del

Este that September. However, despite the sensible nature of the accommodation that has evolved within the EU, the arrangement remains fraught with confusion and controversy. (Van den Bossche 1997: 53-54; 102)

As the most supranational of the EU's institutions, the Commission often holds policy preferences divergent from those of the member states. Helen Wallace argues that, because the Commission is insulated from national politics, it frequently develops innovative, idealistic proposals, which the Council finds impossible to translate into practical policy due to member states' reservations. (H. Wallace 1996: 58-59)

Tensions are exacerbated by delicate balance of power considerations between the Council and the Commission in trade talks, as the Council seeks to maintain control, and the more liberal Commission seeks greater manoeuvrability in order to obtain an agreement.⁹³ A flexible Council mandate, reflecting the lowest common denominator of consensus in the Council, allows the Commission freedom to interpret the mandate according to its preferences and negotiate a fairly liberalising trade agreement. Some argue that this inevitably leads to friction at the ratification stage (Meunier and Nicolaidis 1999: 482), a common constraint at Level II. However, the Commission may deliberately exploit the fact that the Council may be reluctant to censure it, thereby committing the EC to an agreement whilst uncertain of internal support, but confident that the international costs of reneging are high enough to ensure that reluctant member states approve. (Deutsch 1999: 103)

Competence delegated to the Commission is therefore often tightly drawn, and the Commission frequently consults with the Council with regard to new compromises that may have been tabled during talks. Woolcock observes that critics of the EU accuse the Commission of being unwilling to negotiate without a mandate, but unable to negotiate with one, as mandates may be so tightly constructed. (Woolcock 2000: 381) While a rigid mandate may create problems for Level I negotiators, the Commission may use this

⁹³ On the heels of the Blair House Agreement breaking the six-year US-EC deadlock over agriculture in the Uruguay Round, tensions flared as French Prime Minister Juppe famously told Commissioner Brittan that he did not trust him. (Meunier and Nicolaidis 1999: 483)

constraint to its advantage (as Putnam predicts) by responding to an unacceptable proposal that the Council will never agree to that, much as the US has been wont to do.

Competence remains zealously guarded. For example, when the Council decided in October 1995 to open a dialogue with Cuba to determine the level of EU commercial relations appropriate to promoting reform in Cuba, it warned "that step may be taken only on the basis of prior directives from the Council." (Commission 1995c: 1.4.108)

7.3.3 Resolution of Tensions

How does the EU resolve tensions between its supranational and intergovernmental institutions? Woolcock argues that continuous consultation between the Commission and the Council is essential to the decision-making process and the successful conclusion of international trade negotiations. The Council and the Commission share many points of contact, with dossiers moving vertically up and down working groups and committees but also horizontally across to each other. (Woolcock 2000: 382-384) Indeed, a dry, legalistic view of EU institutions conceals a "dynamic, multi-layered and politicized system of decision-making." (Collinson 1999: 208) Failure to consult may scupper agreement, as nearly happened in this case study. Collinson and Woolcock cite the example of the failure of EC diplomacy in the 1990s GATT talks due to the inordinate degree of power exercised by the agriculture ministers that undermined the credibility of the Commission to negotiate. (Woolcock 2000: 383) This leads to what has been labelled 'a perpetual boundary problem' in the EU's external policy, as distinctions between domestic and external, and political, economic and security issues become more difficult to ascertain. (Collinson 1999: 208-211)

Integral to the conduct of trade negotiations is the Article 133 Committee, which deals with common commercial policy and is composed of trade experts from the member states and Commission representatives.⁹⁴ Article 133 sets out the procedure for conducting trade negotiations, whereby the principal (Council) delegates authority to its

⁹⁴ Article 113 of the 1957 Treaty establishing the European Community (TEC) dealt with commercial policy. The Amsterdam Treaty (1997) amended and consolidated the TEC, resulting in the change to Article 133.

agent (Commission). The policy process begins with the Commission submitting a proposal to the Council. Key policy discussions take place in the Article 133 Committee, which amends the Commission proposals before sending them to the Committee of Permanent Representatives (COREPER), and finally to the Council. The Council determines the negotiating mandate by qualified majority voting (QMV), then delegates power to the Commission, who conducts the trade negotiations within the parameters set by the Council's mandate. The Commission may initial an agreement but the Council remains the final arbiter in deciding ratification. (Article 133; Meunier 2000: 107; Nugent 443-445) Throughout, the Commission plays an integral role in mediating compromises between reluctant states, as it attends COREPER meetings and recognises member states' constraints. (K. Smith interview)

Continuous dialogue enables the Commission to have its mandate adjusted by the Article 133 Committee. If the negotiations were particularly sensitive, the Commission may consult COREPER ministers, or the General Affairs Council (GAC), as SLB increasingly did when the Uruguay Round negotiations neared their end. Tim Abraham, former 133 Committee official, allowed that the 133 Committee advises and monitors the Commission, amending or refining the mandate as needed, but that member states have little interest in re-negotiating the mandate completely. To facilitate agreement, the Commission may declare, "We are going to take our own responsibilities," which means that the member states are 'shut out' of negotiations; a general understanding exists that the Commission must be allowed to proceed with its remit. If member states are very displeased, or feel the Commission is acting beyond its brief, they complain to the 133 Committee or the GAC, who tackle the Commission on their behalf. (Abraham interview) In this case study COREPER, keen to see a peaceful resolution with the US, granted the Commission this independence. (research interview) However, as the talks neared conclusion, SLB consulted COREPER ambassadors with possible texts for their consideration, and received support from EU foreign ministers to press for an agreement. (Croft 1998b)

7.3.4 Competence: Pillar I or Pillar II?

Was the EU's defence over Libertad undertaken as a trade matter under Pillar I with Community competence, or as a foreign policy issue under Pillar II, with the intergovernmental Council responsible? As late as September 1996, the *FT* reported that the Commission was experiencing difficulties in enacting its blocking statute, as legal opinion in Brussels was unsure whether to act under Community competence, Pillar I, or under intergovernmental competence, Pillar II. (de Jonquieres and Barber 1996) This thesis argues that both Pillars were involved; the EU's foreign policy vis-à-vis Cuba was essentially Pillar II, but the WTO challenge was mounted under Pillar I.

- The EU's Cuba policy is a foreign policy issue, dealt with by the member states in Council under Pillar II. As the Helms-Burton dispute escalated, the Council initiated two responses under CFSP:
 - a Joint Action to protect European businessmen with interests in Cuba from the effects of Helms-Burton,⁹⁵ and
 - a Common Position outlining EU-Cuba relations.
- The dispute over the extraterritorial aspects of Helms-Burton involved investment principles, a Pillar I area of shared competence between the Community and the member states, who co-ordinated an effective defence.
 - The Council Regulation was a Pillar I instrument, drafted by the Commission, blocking the effects of Libertad.
 - The Commission, acting under a Council mandate, mounted the WTO litigation, and conducted the bilateral negotiations with the US. The agreement required unanimous support of the member states in the Council in addition to ratification in each capital, as mandated by Article 133 for cases of mixed competence.

The narrative, fieldwork, and a close reading of EU documents will support this thesis' contention that the separation of Cuba (foreign) policy from trade policy is legitimate and sound. The EU clearly regarded the Helms-Burton's extraterritorial attempt to dictate its commercial relations with Cuba as a (Pillar I) trade matter; indeed, this

⁹⁵ The Joint Action cited TEU Articles referring to both Pillar II and III.

interpretation was bitterly contested by the US, who insisted that Helms-Burton was a foreign policy matter that did not belong before the WTO.

LSE lecturer Karen Smith argues that EU foreign policy has increasingly been fashioned across pillars, especially as there has been a blurring of distinctions between pillars. With regard to transatlantic disputes in particular, the EU has been markedly reluctant to use the 'high politics' of CFSP for it is too provocative, signalling too much displeasure. Brussels prefers to use the more technical aspects of trade under Pillar I, particularly in view of the fact that the volume of transatlantic trade is so large. (K. Smith interview) Tim Abraham concurs that the EU often employs cross-pillar strategies, surmising that Pillar I would have been employed first, but, due to an element of political foreign policy as well, Pillar II was utilised as well. (Abraham interview)

In this case study, Brussels consistently based its arguments on the fine technical point of extraterritoriality under Pillar I. Both the Commission and the Council presidency signed the letter requesting a WTO panel, reflecting their shared competence under Pillar I. Furthermore, there was close cross-pillar cooperation, as the Council Regulation (Pillar I) and the Joint Action (Pillar II) were approved the same day.

Sir Leon Brittan served as one of two vice-presidents of the Santer Commission, and DGI Commissioner in charge of External Relations (with North America), and relations with the WTO in the late 1990s. SLB had also been the chief EU negotiator during the protracted Uruguay Round talks. He claimed that his Commission brief included external political and economic relations with the US, and that he clearly had competence to represent the EU in a trade dispute with the US before the WTO. (Brittan interview) Per Haugaard, who worked at the US Desk in DGI, concurred that SLB was the natural choice as the lead negotiator given his position as head of DGI. (Haugaard interview)

7.3.5 Seeking Consensus

Interviews with EU officials consistently painted a picture of the deep irritation Brussels felt at Washington's extraterritorial legislation. The usual 'North-South divide', pitting

northern liberal states (UK, Germany) against the 'Club Med' states (Spain, Italy) did not exist. In this case study, the French were quite determined, while the British, Dutch, Germans and Italians were more wary "not to provoke a full scale transatlantic row," cognisant of Clinton's domestic constraints. (research interview) Lord Brittan emphasised the harmony in Brussels, characterising the WTO action, once initiated, as a "seamless process." (Brittan interview) Speaking just after the July Council decision to prepare a concrete response to Libertad, SLB said he was aware of how strongly ministers felt, but "I was frankly surprised at the unanimity of their conclusions, the rapidity of their deliberations, the strength of their condemnation and the determination of their action." (Brittan 1996a)

A fundamental characteristic of the EU decision-making process has been the continuing ambiguity surrounding voting rules in the Council, both for deciding the mandate to be given to the Commission, and for the ratification of agreements. The Council often adopts a mandate through unanimity, despite the clause in the 1957 Treaty of Rome ending unanimity voting in trade negotiations by 1966. (Meunier 2000: 107)

These deliberations are essentially academic, as the Council has developed a *de facto* 'culture of consensus,' ensuring that it hardly ever acts under QMV, even when permissible under the Treaty. (Hix 1999: 73) The Council goes to great lengths to resolve the misgivings of member states so as to achieve a consensus. Indeed, much of EU decision-making, particularly in the Council, is based on a search for agreement between competing interests that is somewhat more than the 'lowest common denominator.' (Nugent 1999: 140) Resolution between competing national interests takes place primarily in COREPER, with a former ambassador observing that COREPER was "the last point of negotiation before [policy proceeds] to politicians for decision." (S. Wall 1999) In this case study, the Council devoted substantial resources to building consensus at Level II, overcoming national objections both in deciding negotiating strategy and in adopting the agreement; this thesis argues that the UK Presidency was particularly crucial in securing ratification of the final agreement.

Woolcock argues that the lack of formal voting by the Council at the adoption stage of negotiations reverberates back on the trade negotiations themselves. If QMV were the

norm, the Commission would only have to ensure that it had the requisite backing for its agreement. As consensus is the norm, the Commission operates under considerable constraints, for a member state may effectively veto a proposed accord in the Council. However, it is generally only in areas that affect "vital national interests" that a member state will "dig in its heels"; otherwise, members of the minority will usually be persuaded to join the majority. (Woolcock 2000: 385)

Sir Leon confided that a formal vote was never taken over the Helms-Burton WTO action. SLB reported to COREPER, and when there was disagreement, reservations were accommodated, and the issue resolved by consensus. The question of a formal vote was not discussed; indeed, the Council never votes unless someone *specifically* requests a vote. SLB also highlighted the absurdity of holding a vote under rules of unanimity after a member had voiced disagreement. (Brittan interview) A former COREPER official concurred that it was not unusual for a vote not to be sought when a "politically neuralgic" issue was being discussed and two large member states - France and Spain - were very unhappy. (research interview)

7.4 Three-Level Game

Negotiating with the European Union in reality opens a third level in the game: Level I is the international negotiation, Level II is the negotiation at the Union level and Level III is the compromise at the domestic level in each member state. Level II is the new level, forming the interface between governments in the Council of Ministers and other EU committees and institutions, where member nations pursue domestic goals and co-operative integration at the same time. Level III can be quite a complex grouping, including the domestic constituencies of the member states, but also transnational interest groups who operate community-wide. The EU's win-set is actually a double one, for it is determined by preferences, institutions and the COGs (or chief of government, Moravcsik 1993a: 23) at national and Community level. Furthermore, there is a two-step process of ratification as both Council and member states must approve agreements, although national approval may sometimes be informal. Such a game is far more complex, as bargaining (and the possibility of side payments) at the domestic, Community, and international levels reverberate on each other.

Two-level and three-level games can differ widely. In the two-level game, the COG is active in the international negotiations, and thereafter in the domestic ratification process. In a three-level game, however, the actors are different; it is the Commission that negotiates at Level I and reports to Level II but national ministers in the Council take charge in Level II and in Level III. Moreover, in analysing the relative agency of actors, Level II in the EU's structure is far more active and more directly involved in the negotiating process than Level II in Putnam's model, for the Council determines the Commission's negotiating mandate, in addition to ratifying the agreement. (Collinson 1999: 217-219; Patterson 1997: 141)

The Council splits loyalties as ministers juggle domestic interests against integrationist tendencies and policies promoting the welfare of the Union, accommodating member states' domestic constraints through consensual agreement. In this case study, the Council struggled mightily to resolve Level II tensions and reach consensus, particularly at the eleventh hour, when the Council Presidency over-ruled minor objections of a recalcitrant member state as the final agreement was announced.

7.5 Early Defence

Brussels adopted a cross-pillar strategy vis-à-vis Cuba in 1995, pursuing constructive engagement with Castro, with the tacit support of the White House, under CFSP Pillar II, and objecting strenuously to the extraterritorial provisions of Libertad as it was debated in Congress under Pillar I. The implicit threat of a WTO lawsuit was mentioned quite early in the communiqués.

- On 5th April 1995, the Council presidency expressed its "serious concern regarding the possible adoption by Congress" of the Helms-Burton Act, pointing out "that it is opposed to the adoption of any measure having extraterritorial application and in breach of WTO rules." (Commission 1995a)
- The passage of Helms-Burton by the House of Representatives in September prompted a response from the Council president on 11th October 1995, re-iterating Brussels'

opposition to this extraterritorial legislation "which is in conflict with the rules of international organisations, including those of the WTO." (Commission 1995c: 1.4.5).

- More explicitly, in a communiqué printed in the *Congressional Record*, the Commission expressed concern over whether Libertad was compatible with WTO rules, warning that it intended to defend its "legitimate interests in the appropriate international fora." (Commission 1996b)

The Council meeting of 26th February 1996 heartily condemned the shootdown of the two American civilian aircraft by Cuba, but concluded with a veiled warning, "Irrespective of the circumstances of the incident, there can be no excuse for not respecting international law and human rights norms." (Commission 1996a: 1.4.7).

The next chapter takes up the narrative of the WTO action; this chapter continues with an analysis of three remarkable cross-pillar documents that were adopted in rapid succession by the Council:

- the Council Regulation, (or blocking action) taken under Pillar I, and
- the Joint Action, and the Common Position, both enacted under CFSP, Pillar II.

7.5.1 Blocking Action

The Council meeting on 22nd April 1996 expressed grave concern over the extraterritorial aspects of Helms-Burton and pondered how to protect EU companies and their American investments. The Council asked "the relevant experts to draw up all WTO and other options" along with "the possibility of countermeasures" in its defence. (Commission 1996c)

- On 15th July 1996, the Council, noting "widespread international objections to this legislation," requested that President Clinton waive Title III (due to take place the next day), and expressed disquiet about the implementation of Title IV. The Council proposed several countermeasures, including requesting a WTO Dispute Settlement Panel, legislation neutralising the effects of Helms-Burton, a watch list of American companies filing Title III suits, and changes in the law governing admission of American businessmen to the EU. Finally, the Council, hinting at cooperation between pillars,

issued instructions to COREPER to lay the necessary groundwork for "urgent Community and coordinated national action." (Commission 1996d: 1.4.116).

Following the Council's request, the Commission approved the following two proposals on 24th July, (Commission 1996d: 1.4.117), formally adopting them a week later:

- On 30th July, the Commission invited European companies to compile a 'watch list' of US firms and citizens that file suits against them.⁹⁶ (Commission 1996d: 1.4.119)
- On 31st July, the Commission adopted a proposal for a Council Regulation aimed at neutralising the extraterritorial effects of Libertad, to be binding on all member states (Pillar I). Hinting at the Iran Libya Sanctions Act being debated on Capitol Hill, the Commission proposed that the Council be able "to extend these measures to any other extraterritorial laws adopted in the future." (Commission 1996d: 1.4.118)

Level II Tensions

The Council negotiations over the blocking action provided evidence of how this intergovernmental institution patiently sought consensus and resolved Level II tensions.

Commissioner Brittan drafted the Council Regulation modelled on Britain's 1980 Protection of Trading Interests Act, which forbade British firms from co-operating with American extraterritorial actions (during the pipeline sanctions), and authorised them to file counter claims in Britain to 'claw back' any penalties levied by American courts. Sir Malcolm Rifkind, who was Minister of State at the Foreign Office in 1980, and British Foreign Secretary in 1996, recalled that both the dispute over the pipeline and Helms-Burton were centred on the principle of extraterritoriality. The 1980 Act provided protection to British companies threatened by the pipeline sanctions, such as the UK engineering firm John Brown, by allowing them to respond to Washington that British law prohibited them from co-operating. (Rifkind interview)

⁹⁶ The Commission later called on any EU entity that had been adversely affected by Helms-Burton to inform it so that it could measure the effects of the legislation. See Bulletin EU 10-1996: 1.4.85

Britain's Rifkind objected to the proposed 1996 Council Regulation, on the general grounds that member states would be ceding too much sovereignty to Brussels. Rifkind preferred that each member state enact its own version of the legislation, similar to the UK's existing legislation, rather than a Community-wide proposal. Rifkind's objections surprised the member states, as the UK had appeared to support the broad agreement reached by EU member states on a package of retaliatory measures ten days earlier. Moreover, although frequently in the minority in the EU, Britain's leadership in campaigning for a tough united European response to Helms-Burton sent a particularly sharp signal to Washington. The Commission postponed its decision on a draft statute for another week, to allow time to ease British concerns. (Bates and Palmer 1996; Bremner 1996; Helm 1996) Sir Malcolm recalled that his government sought to avoid a domestic row over deeper European integration (Rifkind interview), indicative of the paralysis suffered by the Major Government as 'wets' and Euro-sceptics collided.

The Council also had to overcome Danish hesitancy. Denmark faced a court challenge by a group claiming that Danish signature of the Maastricht Treaty was unconstitutional in abrogating too much sovereignty to the EU. (Southey and Barnes 1996) Lawyers laboured for a week to find a compromise that resolved these Danish fears. (Bates and Palmer 1996)

British and Danish doubts over how to proceed at Union level were prompted by domestic constraints, illustrating the Level II dynamic in EU decision-making. Both episodes portray the extent to which the Council was prepared to accommodate member states' legitimate concerns in its search for consensus. On the other hand, Spain threatened to take unilateral action if a European-wide commitment to substantively challenge Helms-Burton were not reached. (Martínez 1997: 290)

7.5.2 Council Regulation: Pillar I

On 22nd November 1996, the Council of the European Union unanimously adopted a blocking action, Council Regulation EC No 2271/96, based on Articles 73c, 113 and 235

of the (1957) TEC,⁹⁷ clearly Pillar I. Referring to the Community's objectives, the preamble noted that extraterritorial laws are likely to "have adverse effects on the interests of the Community," necessitating Community action to protect the "established legal order." The Regulation contained protective measures that explicitly forbade adherence to Libertad:

- "This Regulation provides protection against and counteracts the effects of the extra-territorial application of the laws specified in the Annex of this Regulation,"⁹⁸ (Article 1) and binds any interests so affected to inform the Commission within 30 days. (Article 2)
- "No judgement of a court or a tribunal" outside the EU giving effect to these laws will be recognised as valid or enforceable. (Article 4)
- "No person...shall comply, whether directly or through a subsidiary...with any requirement or prohibition, including requests of foreign courts, based on or resulting, directly or indirectly, from the laws specified in the Annex..."⁹⁹ (Article 5)
- Any person so affected has the right to recover (claw back) all damages, including legal fees, caused by these laws. (Article 6) (Union 1996a)

It is significant that the Council chose to take action in the form of a 'Regulation,' for this is the strongest type of Community legislation, meaning it was immediately binding on all member states, "without the need for national measures to implement them." (Communities 1999: 11)

7.5.3 Joint Action: Pillar II and III

The Council of the European Union adopted Joint Action 96/668/CFSP on the very same day as the Council Regulation. Whereas the Regulation referred to the 'Community,' the Joint Action addressed the 'Member States,' for it was based on Articles J.3 (CFSP - Pillar II) and K.2 (Justice and Home Affairs - Pillar III) of the TEU. The Joint Action referred to the Council Regulation as protecting "the interests of the Community" from

⁹⁷ They became Articles 57, 133, and 308 in the consolidated version. Article 57 granted the Council, acting on a Commission proposal, the right to legislate on the movement of capital.

⁹⁸ Cuban Democracy Act of 1992, Cuban Liberty and Democratic Solidarity Act (Helms-Burton) of 1996, Iran and Libya Sanctions Act of 1996. The Council reserved the right to add to these laws. (Article 1)

⁹⁹ Article 5 allows individuals to comply if non-compliance would "seriously damage their interests or those of the Community."

extraterritorial legislation, and instructed the Member States to take all measures necessary to provide protection "insofar as such protection is not provided under Regulation (EC) No 2271/96." (Union 1996b)

The Joint Action concluded by declaring that it, together with Regulation (EC) No 2271/96, "constitute together an integrated system involving the Community and the Member States each in accordance with its own powers." (Ibid) In adopting the Council Regulation and the Joint Action, the Council utilised foreign policy instruments across all three pillars to pursue a consistent strategy.

The same agents may act under different pillars. (K. Smith interview) The Council Regulation was affirmed by the GAC under Pillar I, while the Joint Action, taken later that same day, was approved by the Council of Foreign Ministers under CFSP Pillar II. Both Councils were composed of the foreign ministers of the member states, working together under different competences.¹⁰⁰

7.5.4 Common Position: Pillar II

To formally confirm its well-established policy towards Cuba, the Council approved the Common Position 96/697CFSP on 2nd December 1996, based on Article J.2 of the TEU, strongly conditioning EU economic cooperation with Cuba on democratic reforms. Its purpose was "to encourage a process of transition to pluralist democracy and respect for human rights and fundamental freedoms." The EU pledged that it would "intensify the present dialogue" with Cuba and Cuban civil society to encourage reforms whilst continuing to provide humanitarian aid. "As the Cuban authorities make progress towards democracy, the European Union will lend its support to that process" through more intensive dialogue and closer economic cooperation. The Council pledged to evaluate this position in six months time. (Union 1996c)

As one of the first experiments in CFSP, (Roy 1997: 79) the Common Position was substantially based upon the Spanish initiative hardening the EU stance against Cuba the

¹⁰⁰ These Councils are now collectively called the General Affairs and External Relations Council (GAERC).

previous May. The document resolved diverging Level II preferences. Spain's proposal that every member state appoint an official in its Havana embassy responsible for contacts with human rights protection agencies was rejected, but Madrid "congratulated itself" nonetheless on the adoption of the document.¹⁰¹ Many ministers, France and Italy foremost among them, objected to the very extreme conditionality of aid which they saw as representing a "180 [degree] turn from European policy to Cuba, bringing it close to the American line."¹⁰² But the Common Position stated very clearly that it was "not European Union policy to try to bring about change by coercive measures with the effect of increasing the economic hardship of the Cuban people." (Union 1996c)

The Common Position was understandably not well received by Cuba (Roy 1999: 39-40), heartily welcomed by Washington, and the subject of a mixed reception in Europe. A British journalist icily characterised the document as "interference, lecturing and conditionality." He urged the new governments in Britain, France and Italy to forsake the Common Position and develop relations with Cuba without conditions. (Steele 1998)

Spain, France and the UK were among the leading hawks in defending the EU against Libertad. Given Spain's historical and cultural ties with Cuba, and France's deep socio/psychological issues with the US (and Total was threatened under ILSA), their position was readily understandable. But it was unusual for the UK to be so actively involved, as Britain generally preferred a more Atlanticist role. Indeed, Joseph Nye has underlined the important role that Britain plays in the reinforcement of US-EU relations by looking simultaneously across the Atlantic and across the Channel. (Nye 2000: 55) Sir Malcolm Rifkind felt that Britain's input was important *precisely* because it represented a departure, for the US tended to take greater notice when the UK objected. (Rifkind interview)

7.6 Vertical Consistency

¹⁰¹ "EU/Cuba: EU States Show More Willingness to Step Up Dialogue," European Report, 30th November 1996; "Opinión," El País, 5th December 1996, p.14.

¹⁰² "EU/Cuba – Spanish Plan for Making Aid and Cooperation with Cuba Strictly Tied..." Agence Europe, 20th November 1996

Karen Smith argues for vertical consistency between national and EU policy to ensure that member states do not undermine EU policy. (K. Smith 2003: 65) The evidence suggests that the EU has not achieved consistency in its Cuba policy. With regard to the Common Position, CFSP Pillar II, Professor Joaquín Roy argues that the EU's institutional framework contrasts sharply with national conduct, rendering the Common Position "neither common, nor a policy" as member states trade with Cuba with impunity.¹⁰³ (Roy 2005)

Regarding the implementation of Council Regulation No 2271/96 under Pillar I, two curious anomalies arose. Firstly, the Council Regulation mandated that any European firm investigated by Washington under Helms-Burton Act was to report this to the Commission within thirty days (Article 2). *Reuters* reported in February 1997 that the Commission was "very, very disappointed" with the fact that no company had come forward; the Commission was therefore launching its own quiet investigation into the suspected dozens of companies that had been targeted by Libertad. (Fox 1997b) Commission officials and Spanish government sources confirmed that the US had requested information from some twenty EU companies regarding their investments in Cuba. The Spanish list included the banking group Banco Bilbao Vizcaya, the oil group Repsol, the tobacco group Tabacalera and the hotel operator Sol Meliá.¹⁰⁴

Secondly, the Italian telecommunications company STET, cited under Libertad's Title IV in May 1996, paid compensation to ITT in July 1997. This is difficult to reconcile with Article 5 of the Council Regulation that specifically prohibited compliance with the American authorities over Libertad. The *Financial Times* (FT) reported that the Commission would "scrutinise" whether STET had breached EU law (Buckley 1997), but this researcher found no record of any further action being taken. Professor Roy felt that it was "very damaging" that the EU took no action against STET's flagrant transgression of the blocking action, (Roy interview) making a mockery of EU legislation.

¹⁰²Roy credits the research of Suzanne Gratius, "Cuba and the European Union: A Fragile Relationship," *Transitions-Critème*, Université Libre de Bruxelles, for quoting this widely used expression in Brussels.

¹⁰⁴"US Government Asks for Information over Cuban Investments," *Gaceta de los Negocios*, 22nd February 1997.

But an EU official felt that that the Commission made a conscious decision not to prosecute STET. He observed that the Council Regulation was misunderstood, for it was a political defence primarily designed to help companies caught between two jurisdictions, not a tool with which to beat European firms. (research interview) The DTI's John Foggo concurred with this assessment: the Council Regulation was meant to support EU companies, and the Commission took the view that it would interpret the legislation "as a rather grey area," not get too irate over the STET deal, and concentrate on solving the larger political problem with Washington. (Foggo interview) Furthermore, another DTI official argued that the Council Regulation was drafted so hastily that it was "full of holes" particularly compared to Britain's Protection of Trading Interests Act upon which it was modelled. Its many ambiguities included lack of clarity over what point in the trade process one is in breach of the EU law, whom to report to, and what the penalties entailed were.¹⁰⁵ (Woodger interview)

7.7 Conclusion

The Europeans were pleased with the unusual degree of unity fostered by Helms-Burton (Roy 1999: 33). But Washington felt frustrated by European sluggishness and red tape, for it was burdened with four Commissioners who oversaw foreign policy coupled with fifteen member states who must agree on policy decisions. The EU's dual-executive necessarily means there is comprehensive negotiation and compromise before decisions are taken, but it may result in sclerotic government with little discernible movement. (Hix 1999: 55) Henry Kissinger's famous question was addressed somewhat in the Amsterdam Treaty, where the post of High Representative for the Common Foreign and Security Policy (Pillar II) was created. Furthermore, the Prodi Commission re-organised the geographically-based portfolios, separating External Relations from Trade.¹⁰⁶

Brussels never supported the American embargo against Cuba, preferring engagement to asphyxiation. Although there was broad general agreement that the extraterritorial

¹⁰⁵ Article 9 stipulated that each Member State determine its own sanctions.

¹⁰⁶ EU Commissioner for Trade Pascal Lamy said, "I think we have fixed the famous Kissinger problem. The EU has essentially restored a single telephone number on trade issues." See Lamy speech at the American Enterprise Institute, Washington, 18th December 2000, www.europa.int/comm/trade/speeches_articles/spla43_en.htm

aspects of Libertad were unlawful, divergent national preferences of the member states meant the EU struggled to find a consensus that was somewhat more than the 'lowest common denominator.' This chapter has documented how the EU overcame internal constraints, formulating a comprehensive cross-pillar strategy that protected its commercial interests through the simultaneous passage of the Joint Action under Pillar II and the Council Regulation under Pillar I. This was followed by the formalisation of its relations with Cuba in the Common Position under CFSP, Pillar II. The EU's most instrumental and forceful response to Libertad's extraterritoriality was the initiation of a WTO dispute settlement hearing, the subject of the next chapter.

Chapter 8

Level I of the Two-Level Game US-EU Negotiations and Agreements

"Consult before you legislate; negotiate before you litigate; compensate before you retaliate; and comply – at any rate." (Pascal Lamy)¹⁰⁷

8.1 Introduction

This thesis argues that the EU's WTO challenge was essential in defusing the transatlantic dispute over Helms-Burton. The US was trapped in a Catch-22 situation. Washington threatened to ignore the WTO procedure as it did not have sufficient confidence in its case, but it was loath to impair the prestige of the fledgling WTO, whose trade-liberalising principles it supported. Bilateral negotiations offered the only elegant escape. Washington and Brussels negotiated intermittently in 1996 in an attempt to settle their dispute, but the appointment of a Dispute Settlement Panel in early 1997 ushered in earnest bilateral consultations. This chapter analyses the bargaining strategies employed in the Level I talks which resulted in an interim understanding of April 1997 and the final understanding of May 1998. It probes the Level II constraints on both sides of the Atlantic, seeking to understand how the EU overcame diverging national interests to ratify the accords whereas the US did not.

Analysing international level negotiations is problematic as talks are held behind closed doors, with transcripts rarely available publicly. Important sources of information exist in the public domain, such as official documents, media reports based on periodic statements released to the press by aides, and statements by major actors. Fieldwork in the form of elite interviews was essential in discovering how negotiations evolved, but fraught with tight-lipped functionaries on both sides of the Atlantic who were reluctant to discuss a "live" issue containing "policy-sensitive" material that "continues to be the topic of active diplomatic discussion." (State Department emails 2001) Therefore, many

¹⁰⁷ Speech at US Chamber of Commerce at Brussels, 7th March 2001.

interviews were granted on the understanding that the information would be background only, and not for attribution.

8.2 The WTO Challenge

Brussels' penultimate defence was to 'seek consultations' with the US under the dispute settlement procedure of the WTO on 30th April 1996¹⁰⁸ (Paemen 1996). Significantly, the letter informing Washington of Brussels' decision was signed jointly by the Commission and the Council, representing the European Community and the Member States acting together on a Pillar I issue in which they shared competence.¹⁰⁹ This letter referred to extraterritorial aspects of both the Cuban Democracy Act and Helms-Burton which were inconsistent with US obligations under WTO, citing the provisions¹¹⁰ these two laws violated. (Baldocci and Leng, 1996; WTO 1996a) Washington's May citation of several European businessmen for violating Libertad's Title IV provoked calls for stronger measures, leading Brussels to initiate the 60-day formal consultations on 4th June 1996.¹¹¹

President Bill Clinton sought re-election in the summer of 1996. Putnam argues that Level I negotiators may collude, for each has an interest in enhancing the authority of his counterpart, as this widens both win-sets. (Putnam 451-452) Knopf notes the opportunity for transboundary links in the two-level game, such as cross-level alliances, whereby Level I leaders establish contacts with the Level II of the opposition. (Knopf 1993: 606-608) The EU supported Clinton's re-election, for they appreciated his ambivalent position vis-à-vis Libertad. Brussels also hoped to see the Democrats regain control of Capitol Hill, replacing a divided government that imposed severe constraints on its executive, and toppling Helms from his perch as Chairman of the Senate Foreign Relations Committee. A Democratic Congress would widen Clinton's win-set, thus promoting a peaceful conclusion to the Helms-Burton dispute. In view of these cross-level considerations, the GAC took a strategic decision at Tralee in September 1996 to

¹⁰⁸ The European Parliament supported this decision on 24th May. (*Bulletin EU 5-1996*: 1.4.76)

¹⁰⁹ All subsequent communications followed a similar format; for example, on 3rd October, "The European Communities, acting on its own behalf and on behalf of its Member States..." (WTO 1996b)

¹¹⁰ Articles I, III, V, XI, and XIII of GATT 1994 and Articles I, III, VI, XVI, and XVII of GATS.

¹¹¹ "EU/US/Cuba: Helms-Burton Law Grows Its First Tooth," *European Report*, 1st June 1996.

delay its Council Regulation and WTO challenge until after the US elections in early November. (Barber and Blitz 1996)¹¹²

Brussels inexplicably reversed itself on the WTO action in early October. SLB argued that the presidential elections did not justify delaying the EU's case;¹¹³ after three failed bilateral consultations,¹¹⁴ Brussels requested the establishment of a Dispute Settlement Body (DSB) Panel on 3rd October. (WTO 1996b) Nevertheless, Rifkind declared that the panel would not meet until after the American elections. (Casert 1996)

8.2.1 The Arguments

In his first meeting with Stuart Eizenstat in September 1996, Sir Leon Brittan presented what was to consistently remain the EU's main argument, "firm opposition to any law with extra-territorial effects." (Commission 1996e) In requesting a DSB Panel on 3rd October, Brussels protested against the extraterritorial applications of Libertad, which "restricts trade between the EC and Cuba or between the EC and the US", detailing the objectionable titles of Helms-Burton and citing the WTO Articles they violated. Specifically, Brussels sought consultations under Article XXIII(1/b) which deals with "non-violation nullification or impairment," and states that although an action may not be a direct infringement of the WTO rules, it may nevertheless impair the 'reasonable expectations' of another party. Under this argument, the EU would not have to prove that the extraterritorial application of Libertad directly violated WTO regulations. It would suffice to argue that US actions impaired the 'reasonable expectations' of the EU with regard to trade with the US and/or Cuba. (WTO 1996b; Reinisch 1996: 560-561)

At the DSB meeting on 16th October, the EC allowed that the three rounds of consultations had "clarified the facts" but had failed to solve the problem. Brussels was concerned that Title III was only temporarily suspended, and that Title IV had been invoked against Community citizens (two Sherritt executives). Washington expressed surprise "to find its tactical and foreign policy differences over Cuba raised before a

¹¹² See also "EU/US: EU Prepares to Delay Counter-Sanctions Until After US Elections," European Report, 11th September 1996.

¹¹³ "EU to Take United States to WTO over Cuba," Agence France Presse, 2nd October 1996.

¹¹⁴ 4th June, 2nd July and 23rd September.

multilateral trade forum", arguing that the President had suspended Title III, reflecting American willingness to work with its European partners to promote democracy in Cuba. Moreover, Title IV had not been applied to any European firms. Washington concluded that the dispute over Libertad was not a trade matter, and asked Brussels to reconsider before pressing ahead with its case, reasoning that bringing a matter regarding foreign and security policy before the WTO pushed the institution "into unexplored territory. For that reason, the United States would not join a consensus to establish a panel at the present meeting." The EC nevertheless demanded that the Panel request be on the agenda of the next DSB meeting on 20th November. (WTO 1996c) Under WTO rules, a country may block the creation of a Panel only once; if a second request is made, a Panel must be established. (Lubetkin 1996)

The Americans sought to persuade Brussels that the WTO was not a suitable venue to discuss Libertad. Washington exerted tremendous pressure on Brussels to abandon its case, but with no clear quid pro quo, the EU perceived that the US sought merely to maintain the status quo. It was not until Brussels was granted the establishment of a DSB Panel on 20th November¹¹⁵ that Washington began arguing the national security exemption, Article XXI, permissible under WTO rules. (Morley 1997) Booth Gardner, US Ambassador to the WTO, expressed regret at Brussels' persistence, warned of the possible damage to the fledgling WTO and implied the US would use Article XXI. (Shapiro 1997: 97-108; Gardner 1996)

Dave Marchick, Eizenstat's deputy, recalled that the US was very reluctant to use Article XXI, fearing that it would set an inappropriate and damaging trend. After fierce debate, and in the face of EU implacability, the National Security Council resolved to use the national security exemption threat if the EU persisted with its request for a Panel. Washington's second line of defence evolved using further linkage, threatening that if it were forced to use Article XXI it would not recognise the legitimacy of the WTO Panel, and would not appear before it. (Marchick interview)

¹¹⁵The deadline for their report was nine months, 20th August; as the panel has six months to reach a decision, it had to be appointed by 20th February. See "EU/United States/Cuba: Sir Leon Brittan Agrees to Prolong Deadline..." Agence Europe 13th February 1997.

Washington was increasingly irritated with each phase in the WTO process and tried mightily to thwart it. Eizenstat characterised the WTO action as a "lose-lose proposition," arguing that pursuing the disagreement in the WTO would support anti-WTO forces in the United States, increasing protectionist pressures. (Eizenstat 1996b).¹¹⁶ SLB countered that the WTO was a robust institution, and that the US should underline its commitment to it rather than predicting negative fallout if it lost. (Brittan 1997a) When Brittan pressed on with the appointment of the DSB Panel in early 1997, American reaction was "furious", with Eizenstat and Gingrich speaking "scathingly of the EU position and the succour it gave to Castro." Some diplomats intimated that the US fury was also personal, directed at Sir Leon who was an unpopular figure in Washington. (R. Evans 1997a)

With the disputants unable to agree on a panel, and repeated blocking attempts by Washington, Brussels asked WTO Director-General Renato Ruggiero to appoint the three panellists himself on 13th February, in accordance with Article 8 of the Dispute Settlement Understanding. (Fox 1997a; WTO 1997a) Ruggiero duly appointed a prestigious Dispute Settlement Panel (DSP)¹¹⁷ on 20th February. Eizenstat invoked the second line of defence, threatening Washington would not co-operate with a "misguided" complaint that the WTO had no competence to handle and that "we would not show up" if called upon to testify.¹¹⁸ Curiously, the *FT* applauded Washington for allowing appointment of the Panel, after months of stalling tactics. (de Jonquieres and Dunne 1997)

The full motion of a DSP hearing injected a note of urgency and led to the conclusion of an 'Understanding' between Washington and Brussels on 11th April. COREPER accepted the agreement on 14th April, hours before the EU was to present its first brief to the DSP,

¹¹⁶ Cuban-American Congresswoman Ileana Ros-Lehtinen warned the EU on a visit to Brussels, "Congress voted for the Helms-Burton law to be passed by a majority of over 400. Congress voted to join the WTO by less than 150. Work it out". See "EU/US: EU Ministers Emphasise Friendly Solution to US-Cuba Row," *European Report*, 26th February 1997.

¹¹⁷ Arthur Dunkel, the Swiss former head of the GATT, Tommy Koh, Singapore's Ambassador-at-large, and Edward Woodfield, experienced trade negotiator from New Zealand. Canada, Japan, Malaysia, Mexico and Thailand "reserved their third party rights in this dispute." See WTO 1997a; WTO 1997b.

¹¹⁸ "EU/US: US Says It Will Not Help WTO Inquiry on Anti-Cuba Law," *European Report*, 22nd February 1997

formally approving it two days later.¹¹⁹ The EU agreed to suspend the WTO hearing for six months in return for an American undertaking to continue to suspend Title III and to seek presidential waiver authority for Title IV. It was implicit that the United States would not apply Helms-Burton against any European entity during this six-month hiatus from the WTO. Brussels requested a suspension in the Panel proceedings on 21st April 1997; the authority for establishment of the Panel lapsed on 22nd April 1998. (WTO 1997c; WTO 1998)

8.2.2 Article XXI: The National Security Exemption

The World Trade Organisation (WTO) is a rules-based trading system which encourages its members to reciprocally open markets to trade and investment, providing a much more cohesive order than the General Agreement on Tariffs and Trade (GATT) that it replaced. The core principles of GATT, first laid down in 1947, were incorporated into the WTO, while the deficiencies in the GATT dispute adjudicatory system were corrected with the establishment of a formal dispute settlement system. The national security exemption that Washington claimed relates to Article XXI, which states:

- (a) No party is required to provide information that it considers "contrary to its essential security interests"
- (b) No party is prevented from taking "any action which it considers necessary for the protection of its essential security interests" whether (iii) "in time of war or other emergency in international relations." (GATT 1947)

Washington appears to have anticipated defending Libertad on the basis of national security, for the legislation contains specific references to national security. Findings §2(28) states that the "Cuban Government...continues to pose a national security threat to the United States." Purpose §3(3) seeks to maintain the "national security of the United States in the face of continuing threats from the Castro government of terrorism and theft..." (PL104-114; Reinisch 1996: 561)

¹¹⁹ "EU/US: European and American Officials Clinch Deal to End Cuba Row," European Report, 16th April 1997.

The historical context of Article XXI - the anxious early days of the Cold War - provided the rationale for the adoption of an exception to an otherwise liberalising trade agreement. During the entire 47 years of GATT, Article XXI was invoked only seven times, but proved sufficient to obtain a favourable ruling. The US drew the implication that any nation might unilaterally invoke the national security exemption, regardless of the quite stringent rules governing its use; many European diplomats such as Ambassador Hugo Paemen, Head of the European Commission's Washington Delegation, supported Washington's interpretation. (Shapiro 1997: 101-112)

But many questioned whether the US retained the unilateral GATT right to stop examination of its trade policies under the more rules-based WTO. One trade lawyer condemned the American position that Article XXI offers a blanket escape clause that does not require justification, arguing that the phrase "war or other emergency" was quite specific in disallowing simple strained political relations. (Kuilwijk 1997: 51-56) American trade expert Ernest Preeg dismissed the notion that Castro presented a national security threat to the US, unreservedly condemning this tactic, and arguing that Washington's threatened boycott of the DSP "constitutes a mockery of the rules and commitments-based trading system" the US had promoted for fifty years. (Preeg 1997) Sir Leon argued that no country had sole discretion, for the WTO was the ultimate arbiter in deciding if the protection afforded by the national security exemption was reasonable.¹²⁰

8.3 Moderation

This thesis argues that the rhetoric over the escalating Helms-Burton dispute masked an underlying discourse of moderation and restraint, as both the United States and the European Union preferred a negotiated settlement. Though prolonged and often tedious, the negotiations were conducted courteously between friendly allies rather than adversaries. Although each sought to gain concessions, there was respect for the other's constraints. Never did negotiations break down, and even when little substantive progress had been achieved, the press releases were upbeat and positive. Ambassador

¹²⁰ Op. cit. footnote 115.

Hugo Paemen confided that there was a deliberate shared strategy to "go for time" in order to "*depassionner*" or take the heat out of the dispute to promote a peaceful resolution. (Paemen interview)¹²¹

At the US-EU summit in June 1996, Commission President Jacques Santer remarked that "the highly visible disagreements we have had in recent months over Cuba, Iran, Libya...represent a fraction of our overall relationship ... there is much more that binds us together than pulls us apart." (Santer 1996a) British Foreign Secretary Malcolm Rifkind labelled the dispute just a "rift." (McCabe 1996)

Stuart Eizenstat was appointed Clinton's special presidential envoy for Cuba in August 1996, and immediately embarked on a world tour to mitigate the effects of Helms-Burton. Attempting to downplay the profile of the dispute, Eizenstat argued that Libertad was not a blanket extension of the American embargo against Cuba, for it was "targeted and limited" only to companies that were 'trafficking' in American assets. (Eizenstat 1996b). The EU's request for a one-week delay in appointing the Panel in early 1997 in order to pursue further negotiations received Eizenstat's appreciation.¹²²

Even as the Panel was appointed in early 1997, both the US and the EU affirmed that they preferred a bilateral agreement to a Panel solution. Eizenstat expressed American desire "to provide every opportunity" to settle the dispute. Sir Leon characterised the DSP as "purely procedural," re-iterating that the EU's aim was to achieve a "negotiated settlement, and ...the panel procedure can be halted or suspended at any time if the parties reach agreement."¹²³ The Commission received important backing from the member states as the GAC urged a negotiated bilateral settlement over Libertad.¹²⁴

¹²¹ Indeed, Professor Joaquín Roy claims that US Mission officers in Brussels welcomed help in opposing Helms-Burton.

¹²² "A Stay in EU-US Trade Spat: Brussels Seeks to Settle Crisis over 2 Sanctions Laws," *International Herald Tribune*, 13th February 1997, p12.

¹²³ *Op. cit.* footnote 118.

¹²⁴ *Op. cit.* footnote 116.

8.3.1 Substantive Threat

Why was the rhetoric so mild in the midst of a serious transatlantic trade dispute with potentially damaging repercussions? Washington's threat to boycott the DSP prompted transatlantic concerns for the WTO's prestige, which would leave the WTO, in SLB's words, "immeasurably damaged."¹²⁵ Some scholars worried about the loss of public support in the United States for the WTO as a result of its continual maligning from supporters of Libertad. (Preeg 1998) Finally, the *FT* expressed concern that an EU triumph would be a Pyrrhic victory, as weak American support for the WTO would be further sapped. (C. Wall 1996)

American and European reluctance to confront each other at the WTO was due to their overlapping win-sets in two key areas: a high regard for the institution of the WTO, and a belief that it was not worth falling out over Cuba. (Roy 1997: 91) These rational considerations resulted in a mutual preference for a negotiated settlement over a legal confrontation.

Furthermore, the prevailing consensus among many trade experts was that the EU would win its case before the DSP. (Lockwood 1998)¹²⁶ *Reuters* reported that almost all WTO member states supported the EU contention that Helms-Burton violated WTO principles. (R. Evans 1997b) This presented Washington with Hobson's choice of continuing on a course that would almost certainly damage the prestige of the WTO, or seeking a negotiated compromise solution. In choosing the latter, the US acknowledged both the weakness of its case and its high regard for the multilateral trade principles promoted by the WTO. This thesis argues that the impending Dispute Settlement Panel was essential in forcing Washington into serious bilateral negotiations with the EU. The US would not have negotiated with the same conviction were it not for this tactical and substantive threat hanging over it like the 'Sword of Damocles'. "Amidst this tension between

¹²⁵ *Op. cit.* footnote 115.

¹²⁶ See also "US to Make New Offer to EU in Row Over Cuba, Iran Ties," *Agence France Presse*, 14th October 1997.

Brussels and Washington, a limit has been set: avoiding irreparable damage to the WTO." (Roy 1999: 41)

8.4 Reaching Agreement

Washington and Brussels held bilateral negotiations from late 1996 until May 1998, concluding two accords:

- an "Understanding" on 11th April 1997, a short, hastily written document spurred by the appointment of a DSP in February and the impending presentation of the first EU brief on 14th April, and
- an "Understanding" on 18th May 1998, confirming the first Understanding and incorporating it into a more comprehensive agreement, announced at the US-EU Summit in London by President Bill Clinton and Prime Minister Tony Blair, in his role as EU President.

The first agreement suspended the DSB Panel in exchange for an American pledge to attempt to neutralise the damaging effects of Helms-Burton and stipulated that the antagonists would develop principles to regularise international investments by 15th October 1997. It also covered ILSA, pertaining to oil and gas investments in Iran and Libya. Despite provocation from France's Total,¹²⁷ and Paris' calls for an end to negotiations, (Buckley 1997) the October deadline passed with mild statements about the 'common ground' shared by Washington and Brussels and the commitment to continue negotiations. (Swardson 1997) The April truce remained in force: the WTO action remained dormant and the US did not sanction any European countries.

The second agreement encompassed the former in a comprehensive arrangement encouraging cooperation and multilateral dialogue. Again, there was pressure to reach an accord as WTO rules mandate that a suspended panel lapses after a year and the April 1998 deadline loomed. Although the EU allowed the panel to expire (WTO 1998), as reactivating it would have been seen as escalating the dispute, it characterised the lapse

¹²⁷ Total announced investment plans in Iran that September, precipitating fears of a strong American reaction. Washington's response was muted, stressing the necessity of a lengthy prior investigation. See "A Look Behind the News - Truce Declared," *Reuters*, 31st October 1997.

as a 'technicality' as the EU could request a new panel if Washington took action against their interests. (Croft 1998a) The May Understanding was agreed under the time constraint of presenting it at the US-EU Summit in London that month. This chapter will analyse each in turn.

8.4.1 Understanding of April 11, 1997

The Understanding confirmed both parties' commitment to the promotion of democracy in Cuba, with the US undertaking to continue to suspend Title III as long as the EU continued to press for democratic reforms in Cuba, a well-established quid-pro-quo. Dave Marchick, Eizenstat's deputy, disclosed that the negotiating teams agonised over the specific language of the agreement, balancing every nuance in the agreement.

- The US and the EU agreed to develop "disciplines and principles for the strengthening of investment protection" which "should inhibit and deter the future acquisition of investments from any State which has expropriated or nationalised such investments in contravention of international law" before 15th October 1997, and to introduce those proposals into the MAI negotiations.
- At the same time as the bilateral investment consultations commence, the US Administration "will begin to consult with Congress with a view to obtaining an amendment" granting waiver power over Title IV. Marchick argued that this did not constitute a firm commitment, only that the Administration would *begin* the consultation process with Congress. A former US official corroborated this interpretation, claiming this language was so "loose" that the US agreed to nothing. (research interview)
- The Title IV waiver authority would come into force "once the bilateral consultations are completed and the EU has adhered to the agreed disciplines..." to protect property from confiscation. Marchick felt these were two very high hurdles for the Europeans.

The wording was intended to create a parallel process, a mutual conditionality whereby both parties had specific obligations to fulfil simultaneously. (Marchick interview)

- The agreement noted President Clinton's continuing obligation to enforce Title IV, but hinted strongly that this process could be intentionally slowed down through the application of "rigorous standards...a thorough, deliberate process...and careful implementation."
- The EU agreed to suspend the WTO panel, but insisted upon a protection clause overcoming WTO rules prohibiting a renewal of proceedings by reserving "all rights to resume the panel procedure, or begin new proceedings, if action is taken against EU companies or individuals under Title III or Title IV."¹²⁸ (Understanding 1997)

8.4.2 Level II Reactions

The EU negotiating team was exceedingly pleased at securing a reasonable compromise with the US. The EU had sought Libertad's repeal, but, failing that, Brussels successfully mitigated the American threat against EU businesses through two interim objectives of a continued suspension of Title III and a commitment to seek amendment of Title IV to allow presidential discretion in return for suspending the WTO panel. While reaction in many European capitals ranged from mild resignation to sharp disappointment that the EU had acceded to American pressure in suspending its WTO action, Sir Leon felt the Clinton Administration could not have conceded more due to Level II constraints. SLB struck a deliberately positive tone, arguing that Brussels was "fully protected by this arrangement," for it provided recourse to the WTO if Washington cited any European entities.¹²⁹

France, Spain and Italy objected to the conditional nature of the American commitments and to the lack of explicit European condemnation of the principle of extraterritoriality.¹³⁰ But a majority of COREPER supported the agreement and felt that the Commission did the best it could. Britain and Germany were among the leading supporters of the agreement, with Germany granting the White House credit for having made "strong efforts."¹³¹ The Understanding was approved by the Council of Ministers

¹²⁸ "or if waivers under ILSA...are not granted or are withdrawn."

¹²⁹ "EU/United States – Helms-Burton Act," Agence Europe, 15th April 1997.

¹³⁰ Ibid.

¹³¹ "Bitterness Over US-EU Trade Deal Proves It a Truce, Not a Settlement," International Herald Tribune, 15th April 199, p6.

on 18th April, and the WTO procedure was suspended. But "if action is taken against EU companies or individuals under [Libertad or ILSA], or waivers as described in the Understanding are not granted or are withdrawn, the Commission will request the WTO to restart, or re-establish, the panel." The declaration ended with a re-iteration of the Council's opposition to all extraterritorial legislation. (Union 1997) France, who agreed reluctantly, attached a statement asking the Commission to be vigilant in defending EU interests and ensuring the US fulfils its pledges. (Gaunt 1997)

Libertad supporters were predictable in their condemnations. Senator Helms quickly dashed hopes of cooperation, declaring that "Congress is giving up absolutely nothing in exchange for these talks."¹³² The Cuban-American representatives from Florida denounced the agreement as a "surrender." (Roy 2000a: 128) Congressman Benjamin Gilman showed little inclination to trade the "concrete tool" of Title IV "for vague assurances from the EU," warning that, Title IV would not be changed unless the EU stopped 'trafficking'. (Gilman 1997)

8.5 Continuing Bilateral Talks

Luxembourg held the Council Presidency in late 1997; with the immediate pressure relieved after the April agreement, the exhausted negotiating teams did not resume serious meetings until September 1997 recalled Simon Fraser, SLB's Deputy Head of Cabinet. Media reports of the talks were deliberately upbeat as the 15th October deadline passed, and both sides agreed to continue bilateral talks, but little progress ensued. Fraser felt that the forthcoming UK Presidency in January 1998 could spur the talks forward as London enjoyed a special affinity with Washington, leading to what Fraser termed US 'confidence' in Britain's Presidency. Indeed, many felt that if the UK Presidency could not produce an agreement, the chances for a resolution were very bleak. Both the Commission and the UK Permanent Representation (UK Rep) engaged in forward-planning, to ensure conclusion of an accord at the US-EU Summit in London in May 1998. (Fraser interview; research interview)

¹³² *Op. cit.* footnote 119.

A UK Rep official sought to move the process forward without the continual interference of the fifteen member states that had stalled the Luxembourg Presidency. His solution was to invite the Commission to report to COREPER once a month, thus keeping Ambassadors informed of the progress of the talks, and enabling them to contribute constructively, without impeding progress in the negotiations. (research interview)

A Commission official disclosed that COREPER's French Ambassador, Pierre de Boissieu, abruptly suggested that the 15 member states withdraw from the negotiations, and allow the Commission to "take its responsibility," or proceed with the talks. The official was puzzled; Total's investment in Iran meant the French should be very interested in the progress of the talks. But it was a ploy "to ensure that the format of negotiations was changed... by giving a free hand to the Commission to negotiate, whilst simply informing the Presidency of progress... The people of Total came and thanked me profusely afterwards." (research interview)

This initiative granted the Commission independence to proceed unimpeded with the negotiations, without unduly worrying about the more sovereign-minded member states. In easing inter-institutional EU tensions, the strategy contributed to the successful conclusion of the talks.

The Commission made further concrete plans to maximise the potential benefits of the opportune British Presidency. Simon Fraser wrote a confidential paper entitled "Anatomy of a Deal on Helms-Burton and ILSA" in autumn 1997, which was the genesis of the structure of the agreement, although the real architect, concedes Fraser, was the "creative" Stuart Eizenstat. Part of Fraser's paper was entitled the "Transatlantic Partnership on Political Cooperation" (Fraser interview), an integral part of the final agreement package.

This thesis argues that the confluence of two leading European roles being played by Britain was significant, given the trust that characterised the Anglo-American relationship. Sir Leon and much of his senior staff were British, and Britain assumed the Council Presidency in January 1998. The UK Rep helped ease the deadlock in the

Level I dispute, and managed the intergovernmental bargaining to ensure Level II ratification.

8.5.1 Understanding of May 1998

The May 1998 Understanding was a much more substantive and comprehensive document than the April 1997 Understanding. It incorporated much of the previous agreement's key propositions, such as: (Understanding 1998)

- The disciplines would "inhibit and deter the future acquisition of investments" in illegally expropriated assets. There was no outright ban, and §Ic/1 specifically mandated that the disciplines would not apply to questionable investments acquired before 18th May 1998. However, §Ib/4 mandated that investments in assets illegally expropriated after May 1998 would be banned.
- The US agreed to "continue intensive consultations with Congress with a view to obtaining" a Title IV waiver authority. The investment disciplines and the exercise of the waiver "will be simultaneous." (§II.4)
- Linking EU efforts to promote democracy in Cuba, the US agreed to "take soundings of Congressional opinion and consult Congress with a view to obtaining" a Title III waiver provision without time limit. The language regarding both Title III and IV did not constitute a binding commitment.

The agreement documented in detail the disciplines governing the protection of property under international law, the aim to establish a Registry of claims of illegally expropriated property, and the plan to inhibit investment in dubious ventures through diplomatic efforts and the denial of government assistance. (§I/a-b) Furthermore, the parties reiterated their intention to jointly submit the investment protocols to the Multilateral Agreement on Investment (MAI), thus making this political agreement binding under international law. (§II/2)

Comprehensive Agreement

In addition to the Understanding on Investments, the comprehensive agreement included:

- the Transatlantic Partnership on Political Cooperation (TPPC)
- the confidential US Non-Paper
- a letter from SLB to Madeleine Albright and an Understanding on Conflicting Requirements. (Annex D of the Understanding)

Fraser's TPPC referred to the 1995 New Transatlantic Agenda, in which the US and the EU had pledged greater cooperation in a number of areas; the TPPC particularly urged the US and the EU to consult and respond multilaterally on the issue of economic sanctions. In the event of disagreement, the TPPC pledged they "will not seek or propose, and will resist, the passage of new economic sanctions legislation based on foreign policy grounds which is designed to make economic operators of the other behave in a manner similar to that required of its own economic operators." Per Haugaard characterised this passage, with its oblique reference to both Helms-Burton and ILSA, as the crux of the TPPC.¹³³ The "Understanding on Conflicting Requirements" (Annex D), contained similar language, pledging "cooperation as an alternative to unilateral action."

Non-Paper

ILSA authorises conditional presidential waiver of sanctions. In the Non-Paper, the US pledged that it would grant a waiver to Total, the French petroleum company exploring for oil and gas in Iran, as this was "important to the national interest."¹³⁴ Washington insisted on keeping the Non-Paper secret, and refused to accept the document as a fully binding part of the agreement. But the Commission needed a written guarantee of a waiver for Total. This was particularly important to France, who had taken Fraser to task over the 1997 Understanding, where ILSA was included in the final paragraph but the language was so weak that France was concerned that it would be prosecuted. The compromise was this "Non-Paper". (Fraser interview) *El Mundo* reported that Spain had similar concerns, for the Spanish oil company Repsol was extracting 5,000 barrels of oil daily in Libya. (Segovia 1998a/b) Spanish concerns were alleviated by the Non-

¹³³ Krenzler and Wiegand (1999: 167) make the same argument.

¹³⁴ The US further pledged to grant waivers to other EU companies under ILSA if "the US and the EU continue the enhanced level of cooperation on non-proliferation, counterterrorism ..." (Non-Paper)

Paper, in which the US pledged to "engage with the EU in a sustained process on Libya for consideration of waivers...." (Non-Paper)

Madeleine Albright announced the ILSA waiver in London on the same day the Understanding, after the US received an EU commitment to monitor the export of material that may aid Iran in the development of weapons of mass destruction or the support of terrorist groups. (Balz 1998) Albright insisted that granting the waiver should not be construed as support for the investment. She argued that, as the sanctions would not have blocked the investment regardless, it was unproductive to unnecessarily sour relations with the EU. Eizenstat, losing no opportunity to promote his agenda for presidential flexibility in sanctions policy, argued that exercising the ILSA waiver accomplished the basic purposes of the act. (Lippman 1998b)

The EU posted the entire text of the agreement package on its website, including the TPPC and the confidential US Non-Paper, but was forced to withdraw them in the face of American anger. (Haugaard interview)

Annex D

Sir Leon's letter (Annex D) to Secretary of State Madeleine Albright highlighted Level I sensitivities. SLB wrote that the Commission had investigated a number of the 5911 certified claims and had established that "it appears that the expropriations were contrary to international law," and that therefore, in accordance with the agreed disciplines, §1b/2 (urging diplomatic representation to the expropriating state, and denying all forms of government support in such investments) would apply. Furthermore, if these investigated cases were typical of all the 5911 claims, it was "reasonable to assume" that the same restrictions would be enforced upon them. The letter was meant to meet US concerns that European investment support agencies exercise extreme caution before granting investment support in countries such as Cuba where there *appears* to be expropriated properties. (Richardson 1998: 12)

Roger Noriega, Helms' senior staffer, was livid; his interpretation of the letter was that the EU questioned the legitimacy of all the 5911 claims that had been certified by the US

Foreign Claims Settlement Commission. (Noreiga interview) In fact, the EU accepted only 8 out of 10 claims it reviewed; extrapolating from this, one congressional staffer concluded that the EU would likely reject 20 percent of the certified claims from protection by the disciplines. (Rademaker 1998: 16) But Albright argued that it was only for lack of time that the EU had not endorsed all 5911 certified claims, and that SLB's letter signalled EU acceptance of the legitimacy of those claims. (Albright 1998c)

Sir Leon's letter also provoked European Level II sensibilities. He began his letter saying "We have taken note..." But, at the insistence of the COREPER Ambassadors at a late night meeting before the Understanding was announced, "We" was changed to "I". Spain's Foreign Minister Abel Matutes was among those who refused to admit in writing that Castro had illegally expropriated American assets in Cuba. (Segovia 1998a) Brittan confided that he didn't think the member states objected substantively to "We", but changing it eased their domestic constraints. (Brittan interview) Given the time constraints, there was no time to consult with the Americans, and Stuart Eizenstat was extremely cross at the change. (Fraser interview)

Unilateral Statement

The EU issued a sharply worded "Unilateral Statement" in conjunction with the announcement of the Understanding on 18th May. It welcomed the agreement, but confirmed the EU's continued strong opposition in law and in principle to secondary sanctions and extraterritorial legislation. It further proclaimed

- that it considers all the day's decisions and statements, including the US Non-Paper, form a "single package" and
- the Understanding and the TPPC are important political commitments and are of *equal weight and status*." (emphasis Haugaard interview)

The Unilateral Statement pledged to implement the disciplines and not seek a WTO panel if there continued to be a waiver of Title III, if waiver authority had been granted for Title IV, and if waivers were granted to EU companies under ILSA. The EU concluded that its commitment would not apply if one of these conditions was not fulfilled, or if "by the time of the expiry of the President's term of office, no waiver

without specific time limit in respect of Title III has been granted, as envisaged in II.5 of the same Understanding." (Commission 1998b)

This thesis interprets the Unilateral Statement as mandating that the EU's commitments would lapse if an open-ended Title III waiver had not been granted by the end of the Clinton presidency. Lord Brittan corroborated that the agreement was meant to be implemented before the end of the Clinton Administration. (Brittan interview)

8.5.2 EU Level II Constraints

The Commission had to balance the Level I negotiations with the Level II constraint of the fifteen member states. Fraser recalled that the 1997 agreement was negotiated in secret, and the text agreed on Friday, 11th April, by phone via Brussels-Washington. Fraser briefed the press, who were eagerly awaiting an announcement, before the member states had time to consider it, and before Eizenstat had consulted Congressional leaders. In retrospect, Fraser admitted that he should have advised member states earlier. They were understandably incensed when the *FT* carried the story on its front page on Saturday, the 12th of April.¹³⁵ (Barber and de Jonquieres 1997) Fraser cited two reasons for this secrecy: Eizenstat's constraints with Capitol Hill, and seeking to avoid giving the member states time to "unpick" the agreement. (Fraser interview)

This secrecy had immediate repercussions. One diplomat warned that "the Commission presented the member states with a *fait accompli*," but endorsement in EU capitals would not be automatic. Furthermore, due to enormous dissatisfaction on the part of many member states, among them France, Italy, Spain, Belgium and Portugal, the agreement was accompanied by a sharp statement that extraterritorial legislation is "unacceptable both in law and in principle," and a warning that the EU would automatically re-instate its WTO challenge if Washington cited any EU entities under Helms-Burton. (Gaunt 1997)

¹³⁵ Indeed, France urged the member states not to talk to the press until the conclusion of their deliberations on 16th April. See "EU Struggles over Helms-Burton Peace Plan," *Reuters* 16th April 1997.

The secrecy also had more long-term consequences, as SLB lost the trust of the member states, which made the continuing negotiations much more difficult. (Fraser interview) Woolcock predicts that "member governments will have confidence that the Commission is reflecting their interests only if it keeps them fully informed of developments." (Woolcock 2000: 382)

Moreover, some key states were adverse to an accord; there was some difficulty with Germany at the beginning, but the main opposition emanated from France and Spain, both of whom had substantive concerns regarding ILSA. Indeed, as late as 14th May, *El País* pessimistically reported that the member states considered the American offers insufficient to reach agreement. With Spain, France and Portugal leading the hard-line position, many Europeans feared that the American Congress would not grant Europe the unconditional protection they sought from Helms-Burton and ILSA. (Oppenheimer 1998)

There was a frenzy of activity in May, with diplomatic teams working feverishly on the fringes of the G8 Summit in Birmingham through the weekend of 15th-16th May to secure an agreement. The weekend talks produced a "balanced package," incorporating investment disciplines, waivers on Helms-Burton and ILSA, and the TPPC's proposal for multilateral cooperation, which was particularly crucial in securing COREPER's approval. The meetings continued on Sunday¹³⁶ in London in anticipation of the US-EU Summit the next morning. At nearly midnight on Sunday, the UK Presidency presented the final text of the agreement to the exhausted COREPER meeting, and recommended passage. The UK had support for the accord from the Dutch, who maintained "it was the only way to go." Six points were raised,¹³⁷ and, in an adroit manoeuvre, the member states were given Tony Blair's phone number if they had any further objections to raise. A consensus approved the agreement, and it was passed with minor changes that night. France still resisted, but, Tony Blair, when he had not heard from President Chirac by eight o'clock on Monday morning, decided to proceed regardless. (research interviews)

¹³⁶ It was unusual in the extreme to hold meetings over the weekend. See Adrian Croft, "US, EU Hold Last-Minute Helms-Burton Talks," *Reuters*, 17th May 1998.

¹³⁷ Among them, the change in Sir Leon's letter previously referred to.

The Spanish press reported that, with the constraint of the 24-hour deadline looming, practically all the improvements in the text that were sought by the Europeans were realised. For example, the Spanish obtained a less ambiguous text relating to (Repsol's) investments in Libya, and the French gained greater clarity in relation to unilateral sanctions with regard to third parties. (Gómez and Vidal-Folch 1998)

Although the French Ambassador had suggested that the Commission "take its responsibility," the French were recalcitrant throughout the negotiations; at the midnight hour, they were unhappy about the "poorly written text," and objected to several minor points. French objections contributed to delays at the Monday morning meeting, and bad temper from the frustrated American delegation. American National Security Advisor Sandy Berger was so irritated by the protracted negotiations necessitated by French resistance that he warned, "We will not be treated like that another time." The US-EU Summit scheduled for that day was delayed by 90 minutes, which was unusual in the extreme. (research interview)

The Council Presidency decides when an agreement has been reached in COREPER. The accord then proceeds to the GAC as one of three options: "A" Point, which means no discussion as everything has already been agreed; "B" Point, which means challenge is permitted¹³⁸; False "B" Point, where no one seriously challenges the agreement. This Understanding passed to the Council as a "B" Point, as the UK Presidency understood outstanding objections remained that needed to be addressed. (research interview)

There was considerable apprehension that the French may cause the entire accord to unravel as the press reported on 18th May that French officials at a WTO meeting in Geneva opposed the accord because it did not specifically condemn extraterritoriality. But France's finance minister, Dominique Strauss-Kahn, distanced himself from those reports on 19th May; calling the accord a "step forward," he indicated that while France was not entirely happy with the deal, it would not oppose it in the Council of Ministers later that week. (Buckley 1998)

¹³⁸ Ten to fifteen percent of agreements are "B" Point. See Hix 1999: 68.

The UK Rep orchestrated this extraordinary coup on the advice of his French counterpart, Pierre de Boissieu, who was worried that troublesome politicians at home might scupper the agreement. De Boissieu suggested that a British reporter specifically ask Strauss-Kahn about the Helms-Burton agreement so as to secure public French support for the pact. Once the French were publicly on record as supporting the agreement, they could hardly undermine it in Council. This tactic succeeded in guaranteeing French cooperation. (research interview)

This thesis argues that great credit is due to the UK Presidency for the way that it managed the fifteen member nations and secured a consensus. The astonishing cooperation offered by the pragmatic de Boissieu, when the French were publicly so recalcitrant, was essential. France opposed the agreement partly due to the ideological issues France always encounters in dealing with the US,¹³⁹ and partly because of ILSA's threat to Total. (research interview) But France's fractious behaviour appeared quite irrational once Total was no longer threatened.

The EU negotiating team greeted the accords with something close to celebration. They felt tremendous satisfaction in having successfully challenged the US, and in having negotiated a political solution that achieved EU objectives on waivers and arrested the WTO action.

The jubilation was not shared throughout Europe. A Whitehall official felt there was a degree of self-deception on the part of the EU, voicing particular concern that Brussels had ceded the principle of extraterritoriality. He also expressed doubt over the credibility of the EU's WTO threat, questioning why the EU backed down, instead of proceeding with what many analysts considered was a fairly airtight case against the US. (research interview) Although aware of American constraints, the Belgian Foreign Minister, Erik Derycke, was disappointed, arguing that the EU had accepted precise investment codes in exchange for vague promises from Washington to grant waivers to EU companies. (Croft 1998e) Critics voiced legal concerns that the Understanding violated Article 73c of the Maastricht Treaty that prohibits limitations on investments, and that SLB had

¹³⁹"When President de Gaulle demanded that American troops be removed from French soil, Lyndon Johnson asked whether that included those who were buried beneath it." (Humphreys 2002)

exceeded his competence in signing an agreement with foreign policy implications, a policy area reserved to the member states. (Roy 2000b: 93-94)

Despite continuing consternation amongst member states such as Spain, France and Belgium, the GAC accepted the text that COREPER had drafted on 25th May. (Commission 1998c) SLB wrote that in "welcoming" the accords, the Council broadcast "a clear political signal" of the EU's "willingness to implement the terms of the Understanding, if the US does likewise." (Brittan 1999)

8.6 Investment Protocols

The 1998 Understanding had potentially far-reaching effects, in providing protection for US investments worldwide, in addition to resolving the immediate US-EU dispute over investments in Cuba. Indeed, President Clinton declared that the measures the EU had agreed to would protect American property more effectively than unilateral American legislation. (Mikkelsen 1998) Theory supports this fortuitous outcome of additional, unanticipated gains resulting from international bargaining. Instead of conceptualising bargaining as dividing up a limited pie, so that one actor's gain is another actor's loss, the pie itself can be expanded, with potential greater benefits to both protagonists that neither would have enjoyed were it not for the negotiations. John Odell applies the economic concept of a production possibility frontier to international bargaining; he argues that this Pareto efficient frontier can be reached by actors asking themselves during the talks whether more gains could be achieved, and if so, how much? (Odell 2000: 29-31)

The inherent potential of the investment disciplines that offered worldwide protection was widely recognised; Americans and Europeans broadly agreed with DGI's statement characterising the protocols as "a valuable step forward in investment protection policy, which goes far beyond addressing the issue of possible illegal expropriations in Cuba." (Commission 1998d) John Richardson, Deputy Head of the Commission's Washington delegation, declared, "By effectively banning investment in future expropriations, the 'Understanding' will have a significant future deterrent effect. This provision has been largely overlooked in the narrower debate over Cuba – but represents a real breakthrough

on a thorny issue which has long remained unresolved – and should not be dismissed lightly." (Richardson 1998: 11) Attorney Brice Clagett concurred, saying the investment protocols presented a "sea-change" in focusing on the serious problem of 'trafficking' in confiscated property. (Clagett 1996-7: 314) Peter Bass, who served as Chief of Staff to Stuart Eizenstat at the State Department in 1997-1998, felt that Eizenstat achieved something of lasting value in the agreement. Bass charged the EU with underestimating the significance of agreement, particularly accusing the French of effectively killing the protocols at the MAI, and mused that the EU may regret this action. (Bass interview)

Stephen Rademaker, Chief Counsel to the House Committee on International Relations, was more cynical. Rademaker argued that Washington recognised that political considerations prevented the EU from further isolating Castro, so "we all agreed to pretend to change the subject. The negotiations ostensibly were about the broader issue of how to discourage investment in expropriated property around the world. But there was never any doubt that Congress's test of any agreement would be how it applied to Cuba..."(Rademaker 1998: 14)

8.6.1 Contentious Issue: Order of Implementation

Was the US obligated to amend Title IV of Helms-Burton first, whereupon the EU would institute its investment principles, or was it vice-versa? The 1998 Understanding clearly stated that "Application of the disciplines and exercise of such waiver authority [Title IV] will be simultaneous." (§II.4) But the EU was resolute that it was not obliged to implement investment disciplines until Congress modified Title IV. This was substantiated by Joaquín Roy, stating "the implementation of the Understanding was void until evidence of a waiver on Title IV was in hand." (Roy 2000b: 93)

- A DGI report in October 1998 noted that the Understanding "contains a clear commitment on the part of the US Administration that it will seek from Congress the authority to grant a waiver from Title IV...without delay. It is important to note that the *EU will not apply the agreed disciplines until this waiver authority is exercised.*"

(emphasis mine) The document later reiterated "But the EU...can only fulfil the European side of the deal once the presidential waiver authority under Title IV of the Helms-Burton Act has been adopted and exercised." (Commission 1998d)

- In a New York speech, SLB proclaimed the EU's readiness to implement the investment disciplines "when Congress authorises the President to grant a waiver to the European Union under Title IV of the Helms-Burton Act, and when that waiver is granted." (Brittan 1998b)
- External Affairs Commissioner Chris Patten¹⁴⁰ had a long and "courteous" meeting with Senator Jesse Helms and urged him to accept a waiver of Title IV so that the EU could proceed with a programme of disciplines on illegally expropriated property. "I don't think it is for us at the moment necessarily to do any more.... I think it is now for the Senate and the Congress to show some greater understanding of our position." (Patten 1999)
- The Commission's John Richardson claimed that the Understanding clearly mandated that the EU must apply the disciplines only after Congress amended Title IV, and the waiver authority was exercised. Therefore, the EU's implementation of their commitments hinged on the US fulfilling its obligations first. (Richardson 1998: 8)

European documents would be expected to support the position that the burden was on the US to grant the amendment of Title IV first. But there is considerable supporting evidence from Washington:

- Eizenstat conceded that, "Implementation of this Understanding is contingent on our obtaining waiver authority from the Congress under Title Four of Helms-Burton." (Eizenstat 1999d)
- In advance of the 1998 Understanding, the White House pledged to "move aggressively to implement the arrangement," by seeking presidential waiver authority, as the EU "has agreed to implement the agreement upon receipt of a waiver from the provisions of Title IV of the Libertad Act." (White House 1998)
- Assistant Secretary of State Alan Larson conceded that the implementation of the

¹⁴⁰ The Commission underwent fundamental restructuring in 1999; the External Relations (Chris Patten) and Trade (Pascal Lamy) portfolios were separated.

investment protocols depended on Congress granting waiver authority for Title IV, and would be concurrent with the exercise of that waiver. (Larson 1998: 6)

Per Haugaard reconciled the conflicting views. The disciplines and the waiver were meant to be simultaneous. However, in view of the fact that it would take some time for Congress to amend Title IV, the EU would not implement the investment disciplines until the waiver authority had been approved by Congress and implemented by the President. (Haugaard interview) In conclusion, both American and European documents support the contention that Congress was obligated to first amend Title IV of Helms-Burton, so that the *implementation* of Title IV by Washington and the investment disciplines by Brussels would be simultaneous.

8.7 American Level II Constraints

In contrast to the European satisfaction in having negotiated an agreement, the Clinton Administration was ambivalent over the accord. The pervading sentiment was that this was regrettably the best they could do under the circumstances, with one journalist admitting he did not expect Eizenstat to "turn a sow's ear into a silk purse." (Armstrong phone interview)

The *FT* predicted that the Clinton administration would find it difficult to convince Capitol Hill and the American public that the agreement was not a "climbdown by Washington." (Baker and Fidler 1998) Benjamin Gilman regretted that the Understanding has "a number of serious deficiencies" and does not "represent a viable substitute" for US sanctions laws. (Dunphy 1998) Lincoln Díaz-Balart warned Clinton "should not assume this has the support of Congress." (Balz 1998)

Little wonder that the Clinton Administration strove mightily to downplay the concessions it had granted to Europe. Alan Larson declared that, "This is not the abolition of Helms-Burton; it is the internationalization of Helms-Burton." (Larson 1999) Eizenstat testified on Capitol Hill in early June, claiming that the agreement would "effectively chill investment in confiscated property" (Fletcher 1998)

Secretary Albright's press release of 18th May 1998 is a particularly enlightening exercise in damage limitation, stressing the positive, massaging sensitive egos, and saving the bad news for the very last sentence of a 500-word statement. Albright expressed her pleasure that the agreement advanced the protection of property rights, a goal that the Clinton Administration shared with many Congressmen, including Senator Helms. She said the Understanding "advances in a most significant way the goals of the supporters of the Helms-Burton Act," mentioning all the lawmakers by name. "The Understanding will also ensure that Castro is not able to put illegally expropriated U.S. property on a fire sale in a desperate effort to undo the results of 38 years of political repression and economic mismanagement." At the very end, Albright mentioned that the Clinton Administration would "seek legislation authorizing the President to waive Title IV of the Helms Burton Act with respect to countries implementing the disciplines set out in this Understanding." (Albright 1998b)

8.7.1 Senator Helms' Reaction

Whether to apply the investment disciplines to existing investments or only to future ones was a particularly contentious issue in the negotiations. The 1997 Understanding called for disciplines that would "inhibit and deter the *future* (emphasis mine) acquisition of investments." SLB agreed that the EU would seek to restrain investment in expropriated property in the future but rejected similar disciplines over *existing* EU investments in Cuba. The US sought to apply principles to existing investments as well; otherwise, it meant Washington was effectively ceding its rights over 'grandfathered' ¹⁴¹ American assets. But the 1998 Understanding specifically excluded investments entered into before 18th May (§Ic/1).

In an exceedingly frank speech, Alan Larson admitted, "It was evident from the beginning of our negotiations that the EU would not support disinvestment...they would not agree to any stringent disciplines if those disciplines extended without qualification to properties in which European firms had already invested." (Larson 1999) Albright

¹⁴¹ Investments that pre-dated the May 1998 accord.

acknowledged the same, while pointing out that there were safeguards against, for example, expanding existing investment schemes. (Albright 1998c)

Senator Jesse Helms was predictably critical, vowing to oppose an agreement that allowed European companies to continue operations in Cuba as long as "new investments do not receive government support. For me, to accept this agreement offered by the European Union, would be to condone thievery and dishonesty...It will be a cold day in you-know-where before the EU convinces me to trade the binding restrictions in Helms-Burton for an agreement that legitimizes their theft of American property in Cuba." (Helms 1998a)

This reaction from Senator Helms, though not unexpected, was puzzling, as the media had reported that senior Administration officials had liaised closely with Congressional leaders, and found a degree of sympathy and understanding for their position vis-à-vis the Europeans.¹⁴² Stephen Rademaker confirmed that the Clinton Administration had consulted closely with Congress throughout the talks, particularly after the April 1997 understanding (Rademaker 1998: 14) and that Capitol Hill held "innumerable consultations with Alan Larson." (Rademaker interview) Stuart Eizenstat felt he had the full backing of Helms and the Cuban-American community during the negotiations, as he was not seeking to undermine the impact of Libertad. (Eizenstat interview) A Clinton official claimed that Senator Helms was briefed as the progress of the talks, and, while not giving a "specific commitment of support," had said, "Keep negotiating. I'm interested." Lastly, the American Ambassador to Brussels, Vernon Weaver, warned that a general agreement encompassing both Libertad and ILSA would not pass Congress, which was much more "fiercely pro-sanctions" than the Administration. However, Weaver said that the White House had proposed "a solution concerning Title IV" that had received "good vibrations" from Congress.¹⁴³ Even Helms claimed he was "puzzled" by reports that he was prepared to accept an agreement that "lets the EU off the hook." (Helms 1998a)

¹⁴² "Clinton Faces Trouble Over His Pledge to EU on Helms-Burton Pact," *Lloyd's List*, 20th May 1998.

¹⁴³ "EU/United States: Extra-territorial Aspects of Law," *Agence Europe*, 3rd February 1998

What was the source of this misunderstanding? Helms' spokesman Marc Thiessen declared Senator Helms had given his "blessing" to the EU negotiations only because "he hoped by some miracle the president would be able to convince the EU to support an enforceable ban on investments in stolen properties....What the EU has offered doesn't even pique interest here on Capitol Hill." (Ulbrich 1998)

Helms and Gilman wrote to Albright on 17th June 1998, complaining that the Understanding would allow a company "currently trafficking in stolen American property [to] continue to do so without liability," and that it mandated exceedingly weak sanctions on new investments. The letter ended that "we are disgusted" that the EU needs a permanent Title III waiver as an incentive to increase their promotion of democracy in Cuba; "Title III is not on the table," and they cannot agree to "swap" Title IV for the Understanding. (Helms and Gilman 1998b) Albright valiantly defended the Understanding, pointing out that it was the first time the EU recognised that American property had been illegally expropriated in Cuba, which was an "extraordinary vindication" of Libertad's underlying principles. She acknowledged Congress' "strong resistance" to modifying Title III, which she had reported to the EU, and assured Congress of her determination to enforce Libertad if the EU defaulted. (Albright 1998c)

Significantly, Senator Helms postured and issued damning statements, but did little else. Marchick argued convincingly that the mere fact that Helms did not undercut the Understanding was tantamount to his acquiescence! (Marchick interview) Eizenstat felt that Helms was prepared to accept the ban on investments, but Roger Noriega, his hawkish chief of staff, was very distrustful of the EU for political reasons. (Eizenstat interview)

8.7.2 Amendment of Title IV

Senator Helms' staffers Marc Thiessen and Roger Noriega and Congressman Gilman's staffer Caleb McCarry visited Cuba during the Papal trip in January 1998. They saw no evidence of increased EU support for human rights in Cuba, on the basis of which Clinton had repeatedly waived Title III, and considered that the president's suspensions

"make a mockery of US law." They accused the EU of a cynical "business as usual" attitude, claiming that there was "no good faith" on which to proceed in further negotiations on Cuba between the US and the EU. They queried why Title IV was being so "sluggishly" enforced by the Clinton Administration, leading them to conclude that the Executive was "pulling its punches...to placate European governments whose companies have engaged in joint ventures with the Castro regime." (Noriega et al 1998)

Noriega's report highlighted the Level II constraints under which the Clinton Administration was operating. Nevertheless, administration officials attempted to fulfil their obligations with the EU by broaching the subject of a Title IV waiver with Congress; Larson declared the Administration was "working closely with Congress to seek legislation" that would amend Title IV. (Larson 1999) But Caleb McCarry adamantly declared there was "never a commitment to revise the statute." (McCarry interview)

Stuart Eizenstat tried valiantly to persuade Congress. He claimed that the EU had acknowledged in writing for the first time that Castro's expropriation of property from American citizens "appears to be contrary to international law," arguing that this admission was made possible only by the US offer of a Title IV waiver (Eizenstat Testimony 1998) In later testimony, Eizenstat argued that presidential flexibility over Title III resulted in the EU's Common Position, and that the proposed waiver authority for Title IV could guarantee Americans protection internationally for illegal investments in expropriated properties. "We have in mind an amendment that would authorize waiver of Title IV for countries that are implementing the Understanding but that would require revocation of the waiver if implementation is inadequate." (Eizenstat Testimony 1999c) But a formal bill was never introduced and Washington has defaulted on the accords.

There were numerous communications between Capitol Hill, the State Department and the European Commission over the interpretation of the Understanding. Benjamin Gilman wrote a very cordial letter to SLB on 8th January 1999, welcoming SLB's offer to clarify the proposed waiver authority. Gilman apologised for the detailed nature of the questions, of which there were 22, but explained that they were necessary because the

Congress was seriously studying the Understanding, and was "committed to carefully reviewing all issues" relating to the waiver authority of Title IV. (Gilman 1999) SLB answered half a year later, after consulting the member states. He refused to provide information on existing European investments in Cuba, and reminded Gilman that the EU was not obligated to apply the investment protocols until a Title IV waiver was granted. (Brittan 1999)

8.8 Conclusion

This chapter has analysed the Level I bargaining strategies and the two Understandings concluded between Washington and Brussels in April 1997 and May 1998, arguing that the strategic EU decision to seek a WTO Panel was critical in pressuring the US to negotiate bilaterally. It has credited the 1998 UK Presidency with the remarkable achievement of shepherding the agreement through to Council ratification, successfully overcoming diverging Level II national preferences in the process.

Finally, it has documented the Clinton Administration's futile attempts to fulfil their undertaking to amend Title IV, resulting in American default. Helen Milner suggests that the Realist school, who is the most pessimistic about the degree of international cooperation, may actually have overestimated states' capacity to cooperate. "Domestic politics reduces the possibility of cooperation, even below the level that Realists expect." (Milner 1997: 98)

Paradoxically, the WTO was the essential midwife in resolving the dispute over Libertad, despite never having convened its Dispute Settlement Panel. The impending threat that this international institution posed, particularly after the appointment of the Panel, was sufficient to promote intense bilateral negotiations that produced the compromise.

The *FT* predicted in 1997 that any agreement would be "largely cosmetic." (de Jonquieres and Tucker 1997) Despite the European contention that the Understanding gave the Americans language that was "loose enough" to be able to go to Congress (research interview), the Clinton Administration never formally introduced legislation to

modify Title IV. The agreement therefore remains, in Eizenstat's words, "inchoate" (Eizenstat interview). European negotiators were nevertheless pleased that, although the agreement was a political one rather than a binding legal contract, the pact proved effective in protecting EU companies. (Haugaard interview; research interview)

Jesse Helms remained resolutely opposed to the accords; in correspondence with External Relations Commissioner Chris Patten, Helms declared that the fact that the EU had not "clarified" the Understanding, and Washington had not enforced Libertad properly combined to "undermine any confidence that the requested 'waiver authority' would not be abused." He reiterated his continuing opposition to trading "concrete provisions" of American law for "vague assurances." (Helms 2000a)

Notwithstanding the grumbling over the details, both sides expressed satisfaction at having reached a resolution, and looked forward to increased cooperation through the Transatlantic Economic Partnership (TEP) pledging further bilateral trade liberalisation, announced at that same US-EU Summit in London in May 1998. Peter Bass felt that "Stuart Eizenstat made a commitment in good faith," thinking he could persuade Helms to accept the conditions. In Bass' estimation, Eizenstat probably could not have gained more for the US; reaching an agreement was better than no agreement at all, even if there was only a 10 percent chance of it being endorsed at Level II. (Bass interview) Commission President Jacques Santer warmly welcomed the agreement, for the protection it afforded European businessmen, praising the EU's ability to "act together, united in important foreign policy issues." (Commission 1998c)

Two DGI insiders label the successful US-EU negotiations on Helms-Burton an example of "creative conflict management." While they acknowledge that the accords did not satisfy everyone, they nevertheless reconciled very different positions in a constructive manner. Most impressive was the TPPC, in which the US and the EU pledged not to enact sanctions legislation with extraterritorial applications. "Though fragile, the package remains an important, pragmatic and far-reaching political compromise, which is legally non-binding but shields EC companies effectively from the impact of the Helms-Burton legislation, and also contributes to the ongoing review in the USA on sanctions policy in general." (Krenzler and Wiegand 1999: 167-169)

Chapter 9

Two-Level Game Analysis

*"...to sense what others really need to stay at the table and enter the end game."
(Eizenstat 1999d)*

9.1 Introduction

Robert Putnam divides the negotiation process into two stages: the Level I international bargaining round where diplomats bargain and initial a tentative international agreement, and the Level II ratification procedure, where the domestic polity decides whether or not to accept the agreement, in a straight up-or-down vote. This sequence is not rigid as there will certainly have been extensive consultations with the domestic constituency prior to Level I meetings to ascertain what is acceptable to them. Indeed, consultation with Level II often occurs during the Level I negotiations, as SLB consulted with the Council in the frantic last days before the May Understanding, and Eizenstat's deputy, Alan Larson, consulted with lawmakers on Capitol Hill.

The win-set of the domestic polity is uppermost in the minds of the chief negotiators during the international bargaining sessions, with diplomats constantly asking themselves what would be ratified back home. "What will not be accepted at the domestic level cannot be usefully accepted at the international level." (Collinson 1999: 216) Central to Putnam's analytical framework is the size of the win-set, which fundamentally determines the parameters of the negotiating contract. Putnam hypothesises that the larger the win-sets, the more likely they will overlap and enable a successful agreement at Level I, but the *relative* size of the respective win-sets will determine the distribution of joint gains from the bargaining round. The size of win-sets depends on Level II preferences, interests and coalitions, Level II political institutions, and the strategies of the COG at Level I. (Putnam 438-450)

This chapter applies Putnam's two-level game to the international bargaining strategies. It probes the COG's constraints, and the negotiating tactics, and skills he brings to the bargaining table, including an assessment of the proficiency of SLB and Eizenstat as negotiators. It considers opportunities for transgovernmental and synergistic linkages at Level I, and the role of side payments in facilitating agreement. Finally, it discusses domestic constraints, the effect of uncertainty, and the cost of no-agreement in attempting to understand the causes of American defection.

9.2 The COGs

It is difficult to overestimate the importance of a strategically adept and autonomous COG. Putnam states, "The political complexities for the players in this two-level game are staggering. Any key player at the international table who is dissatisfied with the outcome may upset the game board; and conversely, any leader who fails to satisfy his fellow players at the domestic table risks being evicted from his seat." (Putnam 437)

The COG may negotiate as an agent representing his polity, or he may have his own set of preferences that diverge somewhat from his domestic constituency. If he is a 'dove,' his preferences lie partially outside the polity's win-set and closer to that of his opponent and he has greater manoeuvrability in negotiations; if he is a 'hawk,' his preferences are further removed from the opposing win-set than is the domestic win-set, and his flexibility is more limited. Two-level game theory allows the COG to hold his own set of preferences and to act autonomously, whilst still within the confines of his negotiating mandate or win-set. The COG effectively has veto power over the Level I negotiations, and may reject proposals that conflict with his personal preferences, even if those proposals are within his constituency's win-set. The domestic constituency's power is constrained to a straight up-or-down ratification; the COG is rarely constrained to a single outcome, and he may successfully manipulate the terms of the agreement towards his preferred outcome. A proficient COG may manage to re-shape the domestic win-set, or achieve passage of another preferred measure by linking it to an international agreement, something Putnam labels "synergistic issue linkage." (Putnam; Mo)

The credibility of the COG is important in guaranteeing ratification. Putnam, Moravcsik and Evans recognise 'COG collusion,' whereby each chief negotiator seeks to bolster the prestige of his opponent in his domestic constituency, since each has a vested interest in helping his counterpart to attain ratification at Level II. Such collusion happens more often with COGs who are 'dovish' rather than 'hawkish' relative to their polity. SLB and Stuart Eizenstat frequently commended each other after a round of meetings as an illustration of this phenomenon.

This thesis argues that, not only were the bilateral talks held between friendly allies, the two chief negotiators were congenial, and this fortuitous combination contributed significantly to the positive outcome of the negotiations. Upon concluding the April 1997 understanding, each complimented the other; SLB stated, "I would also like to pay tribute to Stuart Eizenstat...whose skill and dedication has helped bring this agreement to fruition." (Brittan 1997b) Eizenstat's statement also recognised SLB and his negotiating team "for taking a constructive and creative approach...and preventing unnecessary tensions." (Eizenstat 1997b) The press reported that European and American officials enjoyed an easy relationship, with Sir Leon and Stuart Eizenstat particularly close.¹⁴⁴ After a November 1997 meeting in Washington which realised little progress, Eizenstat nevertheless commented, "Anytime you meet with Sir Leon you're likely to have some positive steps."¹⁴⁵

9.2.1 Stuart Eizenstat

Stuart Eizenstat served as US Ambassador to the EU from 1993 to 1996, where he gained invaluable understanding of the EU and became a strong supporter of an integrated Europe. As an advocate of free trade and closer transatlantic relations, he worked assiduously to obtain concessions on both sides for the Uruguay Round and actively supported the New Transatlantic Agenda to promote closer ties between Washington and Brussels. Eizenstat was appointed Undersecretary of Commerce for International Trade upon his return to Washington; one year later, he became Undersecretary of State for Economic, Business and Agricultural affairs, advising

¹⁴⁴ "A Global Odd Couple at the Table," *International Herald Tribune*, 13th October 1997, p 1.

¹⁴⁵ "US, EU Negotiators Meet in Washington on Cuba Law," *Reuters*, 21st November 1997.

Madeleine Albright. He was promoted to Deputy Secretary of the Treasury in May 1999, where he served until the end of the Clinton presidency. His appointment as Clinton's special Cuba envoy in August 1996 was nothing short of brilliant; he was described as "Undersecretary of State for all things extraordinarily complicated." (Crowley 1998) He spent months in shuttle transatlantic diplomacy, trying to achieve "an elegant face-saving solution." (Roy 1999: 37) Having failed to dissuade the Europeans from seeking a WTO action in February 1997, he served as the chief American negotiator in the bilateral talks, where he earned the title "master of diplomatic gymnastics." (Wolffe and Dunne 1999)

Eizenstat was extremely well respected by the bipartisan community on Capitol Hill. A Republican congressman stated, "I consider you one of the finest public servants of the century." (Ibid) Senator Helms saved particular praise for Stuart Eizenstat as "an able advocate for the freedom of the Cuban people," upon conclusion of the 1997 agreement, (Lippman and Blustein 1997) prompting the *FT* to report that Eizenstat's success in getting Helms to "consider amending" *Libertad* was "particularly impressive." (de Jonquieres 1997) In rejecting the 1998 agreement, Helms nevertheless complimented Eizenstat, saying he "has done his very best to reason with the Europeans." (Helms 1998a) The *FT* wrote that Eizenstat knew how to talk to "old cold war warriors" like Jesse Helms by arguing that Castro would be "delighted" if the compromise brokered by Washington and Brussels failed. (Wolffe and Dunne 1999)

Foreign diplomats who have encountered Eizenstat on the other side of the table, laud him for his "sensitivity to the political pressures which shape other governments' positions and the difficulties which limit their room for manoeuvre. However, he is also ruthless about not letting the quest for consensus thwart his determination to achieve results." A European ambassador described him as "a totally driven man" who "will do anything to remove obstacles." (de Jonquieres 1997) Hugo Paemen, EU Ambassador to Washington, characterised Eizenstat's formidable qualities as a negotiator with the analogy to a hedgehog: "relentlessly sniffing at the edges of the cases he had to deal with, looking where the right entry can be found. At the slightest danger, however, he

curls up and becomes intangible. Then he unrolls and starts again." (Wolffe and Dunne 1999)

SLB praised Eizenstat, saying: "His talent, dedication and tireless efforts in the different posts he has occupied have been indispensable in all that we have done." Brittan 1997c) Simon Fraser found Eizenstat "creative," and a former EU official characterised Eizenstat as a "class act." (research interview)

Eizenstat's negotiating strategy called for "letting all involved have their say and respecting genuine differences among them. Living within constraints is what government is all about. We don't live in a perfect world, where we can just do whatever we want." (de Jonquieres 1997) An experienced and polished diplomat, Eizenstat enumerated the essential qualities required of a good negotiator: "patience, persistence, creativity, a command of the facts, the ability to argue persuasively, to know when to speak and when to be silent, to respect the position of the other side and while understanding your own country's bottom line needs, to sense what others really need to stay at the table and enter the end game." (Eizenstat 1999d)

9.2.2 Sir Leon Brittan

Sir Leon Brittan was first elected an MP for the Conservative Party in 1974, rising to serve in various ministerial positions in the Thatcher government. A committed Europhile and free trader, SLB was appointed Commissioner of Competition and Financial Services in the EU in 1989, moving to Commissioner for External Economic Affairs in 1993, and representing the EU as chief negotiator in the Uruguay Round. SLB developed a reputation as a powerful and independent commissioner, involved in matching intergovernmental agreements with national policy reforms, and managing win-sets of member states, transnational constituencies and third countries simultaneously during the Uruguay Round talks. (Deutsch 1999: 102-104) There was speculation that, had he not been British, he might have been chosen as President of the Commission in February 1995. Instead, he was appointed one of two vice-presidents,

serving under President Jacques Santer as External Relations Commissioner until 1999. SLB was made a life peer in the New Year's Honours List in January 2000.

SLB was a strong advocate of further liberalisation of markets. Having succeeded in negotiating the New Transatlantic Agenda in late 1995, he worked tirelessly, despite the Helms-Burton row (and others), to deepen and widen US-EU economic cooperation and further open trade, especially in services. The Commission approved his boldest initiative, called the New Transatlantic Marketplace (NTM) in March 1998. It called for wide-ranging liberalisation of trade between the US and the EU, through the removal of all industrial tariffs by 2010, the creation of a free trade area in services, and further liberalisation of investment and intellectual property rights. (Commission 1998a)

France, concerned about trade in agricultural products and the protection of its domestic film industry, rejected the NTM in Council. The US-EU Summit in May 1998 saw the launch of the far less ambitious Transatlantic Economic Partnership (TEP), to promote trade liberalisation bilaterally across the Atlantic, but with no mention of services, in what the French Finance Minister labelled "a more pragmatic and gradual" approach than the vetoed NTM. (Commission 2000)¹⁴⁶ Jacques Chirac dismissed the NTM as Brittan's personal project that sought to enhance the Commission's powers over trade policy. The bitter legacy of the NTM sowed such suspicion that it was only through the strenuous efforts of the UK Presidency that the TEP was accepted.

As the EU is the world's largest trading bloc, SLB argued that it was in Brussels' interest to support trade liberalisation; the EU has consequently been a strong supporter of the WTO since its inception in 1995. SLB led the Commission in persuading the Council to undertake needed reforms when the EU has lost a WTO case instead of challenging the WTO's ruling, arguing "If the EU does not abide by the WTO rules, there will be little incentive for the United States to do the same." (Hix 1999: 338)

Whilst undoubtedly an experienced and valuable negotiator, SLB never enjoyed the widespread admiration accorded to Eizenstat. Indeed, SLB was an "unpopular figure" in

¹⁴⁶ See also "France Accepts EU-US Trade Deal: Strauss-Kahn," *Reuters*, 19th May 1998.

Washington. (R. Evans 1997a) The *FT's* Guy de Jonquieres reported that SLB's "confrontational style irked US officials," contrasting his abrasiveness with the more "emollient" new Trade Commissioner, Pascal Lamy. (de Jonquieres 1999) Eizenstat's Chief of Staff, Peter Bass, confided that "Any conversation with Sir Leon is tortured," and that he found him "pompous" and "insufferable." (Bass interview) Nevertheless, SLB and Eizenstat enjoyed cordial relations; this congeniality, in addition to their professional negotiating skills and their determination to see a bilateral solution helped promote the accords.

9.3 The Waiver and the Common Position: Transgovernmental Collusion?

President Clinton suspended Title III with predictable regularity every July and January, always crediting Helms-Burton with having raised international awareness of human rights abuses in Cuba. Announcing the first waiver in July 1996, that pre-dated the Common Position of December 1996, Clinton called upon allies to help "accelerate change" in Cuba, promising that he would decide whether to end the suspension "based upon whether others have joined us in promoting democracy in Cuba." (Clinton 1996c) At the next suspension in January 1997, Clinton referred explicitly to the EU Common Position enacted the previous month declaring, "I would expect to continue suspending the right to file suit so long as America's friends and allies continue their stepped-up efforts to promote a transition to democracy in Cuba." (Clinton 1997)

Administration spokesmen continued this linkage. Eizenstat remarked that the US was "acting alone" to promote democracy in Cuba before the "multilateral pro-democracy initiative" of 1996, but now the world is not quiet about Cuban abuses." (Eizenstat 1999b) And, "The possibility of a waiver under Title III of Helms-Burton...helped get the European Union to link future improvements in its economic and political relationship with Cuba to changes in the Castro regime's human rights record." (Eizenstat 1999a)

Brussels was greatly irritated by the American presumption that it alone, through Helms-Burton, was responsible for raising international awareness over human rights abuses in Cuba. SLB argued Europe cared greatly about promoting democracy in Cuba, and had

frozen plans for mutual cooperation with Cuba because Castro had not instituted the mandated reforms. But he declared that Europe's Cuba policy had been "arrived at independently and [would be] pursue independently..." (Brittan 1996b) Europeans remained adamant that there was no linkage between waiver and Common Position. During the Dutch tenure of the Council Presidency in early 1997, a member of the Dutch foreign ministry declared at a conference in Washington, "Ambassador Eizenstat would have us believe the European common position was in response to Helms-Burton, but this was absolutely not the case." (van Voorst 1997)

Stuart Eizenstat once conceded this point in a press briefing in January 1997, saying, "I want to say that the actions taken by Europe were taken independently...in furtherance of their own...attitude toward democracy. (Eizenstat 1997a)

When asked to clarify this apparent contradiction, Eizenstat explained that his brief vis-à-vis Europe was two-pronged: to publicly impress the EU that Libertad was highly targeted, affecting only limited European investment in Cuba, and to privately urge the Europeans to take a firmer position on human rights abuses in Cuba. Elevating the international "decibel level" on human rights violations in Cuba would enable Clinton to waive Title III. Thus there was an implicit understanding between Washington and Brussels that linked the continuing waiver of Title III with the continuing extension of the EU's Common Position every six months.¹⁴⁷ (Eizenstat interview)

Ambassador Paemen resolved the apparent inconsistency when he disclosed that, in trying to "de-politicise" the situation, the Common Position was prepared "in close contact with some members of the US administration (State Department with EU Presidency and Commission)." (Paemen 2001) This was an astonishing and significant admission, corroborated by the Spanish, who were responsible for initiating the Common Position. Celestino del Arenal wrote that the Spanish proposal to the Council of Ministers on 14th November 1996 "was largely in line with US policy on the island. It incorporated all the requests put forward in September by the special US envoy [Eizenstat] during a tour of European capitals." (Arenal 2004, fn 13)

¹⁴⁷ The EU considered developments in Cuba bi-annually, and reconfirmed the Common Position. See, for example, Bulletin EU 6-1998: 1.4.139 and Bulletin EU 12-1998:1.3.130.

This thesis argues that this quid-pro-quo was essential in providing Clinton with a basis upon which to waive Title III. Libertad granted the president narrow authority to suspend Title III, but the Common Position made it possible by widening Clinton's domestic win-set.¹⁴⁸ In a near-perfect solution, the Europeans were temporarily protected from prosecution as Clinton consistently deferred Title III. This agreement represented an extraordinary transgovernmental link whereby EU and US Level I officials colluded to empower Clinton to prevail over his divided domestic constituency.

In promoting this linkage, the Clinton Administration ignored a problem inherent in the conceptual basis of the waiver. Open commitments by governments to promote democracy in Cuba justify the Title III waiver, even as it undermines those same efforts to succeed in Cuba. Cuba had to be faced with a choice of responses: the European 'good cop' promoting engagement, or the American 'bad cop' promoting isolation. Institutionalising European efforts within Libertad were self-defeating, as it linked perceived friends with the Yankee enemy. (Nuccio 1999: 20)

9.4 Reaching Agreement

There are two troublesome but interrelated questions regarding American strategy in the Helms-Burton negotiations. First, why did the United States conclude an agreement with the European Union that enjoyed dubious Level II support? Second, was American defection voluntary or involuntary? The thesis will propose several possible explanations to the first before considering the latter.

The 'cost of no-agreement' analyses whether the status quo remains unchanged or deteriorates if no agreement is attained at Level I. Putnam predicts that when the cost of no-agreement is high, the win-sets will tend to be larger, and vice versa. *Ceteris paribus*, perceived high costs of no-agreement should positively advance the conclusion of a Level I agreement, whereas a 'take it or leave it' (TILI) attitude will likely result in failed negotiations. (Putnam 443; Collinson 1999: 216) This thesis argues that the cost of no-

¹⁴⁸ *El País* recognised the potential benefit of the Common Position in providing "*el principal exito*" to Clinton. *Op Cit.* footnote 101.

agreement was very high indeed; Washington and Brussels shared overlapping win-sets to reach a peaceful conclusion and avoid a WTO confrontation.

Furthermore, the Helms-Burton negotiations were an example of coercive bargaining, as they were undertaken under threat of a WTO hearing. Moravcsik argues that, by raising the cost of no-agreement, threats widen the win-set of the target state, thus promoting agreement. (Moravcsik 1993a: 29) However, Odell (1993) argues that the target will not comply with the threat if the internal political cost of compliance is greater than the cost of no-agreement. Both scholars also emphasise the importance of the credibility of the sender.

Meunier argues that if the EU is closer to the status quo than its negotiating opponent, "bargaining theory predicts that the outcome of the negotiations will be equated with the EU's position." (Meunier 2000: 115-6) Milner makes a similar argument; the player with the power to set the reversion level (what happens if the negotiations fail) exercises enormous control over the agreement. (Milner 1997: 73-76) If the Level I negotiations failed, the status quo, or the reversion level, was a resumption of the WTO Panel, which was closer to the EU position than that of the Americans, making the EU the stronger player in the talks.

The negotiation literature employs the term 'BATNA, best alternative to negotiated agreement', to analyse outcomes. BATNA "is the only standard which can protect you both from accepting terms that are too unfavourable and from rejecting terms it would be in your interest to accept." The relative negotiating power of the participants depends on how each views the option of not reaching an agreement. If the proposed agreement is better than the BATNA, accept it; if the agreement is not better than the BATNA, re-negotiate, or withdraw from the talks. BATNA is the measure of the balance of power in a negotiation; the better the BATNA, the stronger the negotiating position. (Fisher and Ury 1999: 104-111) The EU had the better BATNA, and was therefore negotiating from a position of strength.

Synthesising all the above arguments, this thesis argues that the high cost of no-agreement was intensified by the WTO threat, and that the EU was master of the

reversion level and had a better BATNA. Putnam endorses the Schelling conjecture, which contends that the player with the greater constraints is in a position to win greater distributional gains. The US, with its divided government and hawkish legislature, had the greater constraints, but this thesis argues that Putnam's hypothesis was not validated in these negotiations. Any advantages in having the greater constraints were

- weakened generally by the perceived high cost of no-agreement, underpinned by a credible threat that outweighed the domestic political cost;
- undermined by the strong bargaining position of the EU who commanded the reversion level; and
- diluted by the EU's BATNA.

To conclude, Washington negotiated a settlement, uncertain as to the Level II support it could expect, because the US perceived the domestic costs of an agreement to be less than the costs associated with no-agreement and a certain WTO confrontation. Washington and Brussels unquestionably preferred an accord that was embedded in law to a tenuous political agreement, but Brussels understood American constraints. Perhaps there was collusion between the two, each agreeing to negotiate an inchoate agreement incorporating a political compromise that settled the dispute, and pragmatically choosing to co-operate informally in not pressing for formal ratification. Indeed, Lord Brittan expressed great satisfaction that the agreement was standing, despite the US defection that he had not anticipated. (Brittan interview)

9.5 Level I Defection

Many scholars dispute the Schelling conjecture. Evans argues that the strategy of deliberately "tying hands" in order to compel the opposing COG to accept terms closer to one's own win-set is not attempted often, nor does it produce the desired results. (P. Evans 1993: 399) Milner argues that the COGs problems mount with increasing division in government. "The more divided the government, the less likely cooperation is, the greater the likelihood of ratification failure is, and the more influence the legislature tends to exert over the terms of the agreement." (Milner 1997: 98) She argues that the degree of divided government is exacerbated by an institutional imbalance in the US that

invests more power in the legislature than in the executive. Cooperation is unlikely when the distribution of power favours the more hawkish player, for policy will reflect that player's preferences. Milner predicts that if there is a hawkish executive, there will be failure to initiate (Ibid: 236). By extension, a hawkish legislature will result in failure to ratify.

Clinton laboured under a divided government from 1994 that strongly constrained his ability to determine policy. He was further constrained by the institutional rigidities that favoured the hawkish legislature and resulted in American defection. Indeed, the Clinton Administration never formally requested the requisite amendments of Helms-Burton. This contrasted starkly with the EU, whose member states overcame their national preferences to ratify the Understanding within a week.

Failure to ratify at Level II may be either voluntary or involuntary. Involuntary defection occurs when the COG negotiates an agreement that he feels is consistent with his polity's win-set, but which nevertheless fails to win Level II ratification. Voluntary defection, however, "refers to reneging by a rational egoist in the absence of enforceable contracts" - a deliberate defection from the agreement initialled at Level I. Both voluntary and involuntary defection are fatal to a contract, and it is often impossible to distinguish between the two due to uncertainty or misrepresentation. (Putnam 440-441)

Capitol Hill's failure to fulfil Eizenstat's pledge to amend Title IV could be due to three possibilities:

- involuntary defection, with Eizenstat making a "commitment in good faith," (Bass interview) reassured by congressional contacts that Senator Helms would consider an amendment
- a cynical settlement concluded by a strategic negotiator seeking to misrepresent voluntary defection as involuntary
- voluntary defection, with Eizenstat negotiating to the best of his considerable ability, but nevertheless doubtful that Congress would ratify.

Why would Eizenstat deliberately negotiate an understanding that he suspected would fail ratification at Level II? The US did not have sufficient confidence in the merits of

its WTO case, and that was the reason behind the posturing, using the national security exemption and threatening not to appear before the Panel. Nevertheless, Washington was loath to undermine the fledgling WTO by not co-operating with the Panel or not adhering to its (adverse) ruling. This thesis argues Washington's BATNA was so weak, and the cost of no-agreement was so much higher than the domestic costs of compliance that Eizenstat could have negotiated an agreement he doubted Congress would accept.

Significantly, Sir Leon did not expect US to default. (Brittan interview) And Peter Bass felt Eizenstat negotiated with great integrity, aware of his constraints, but hoping to secure ratification at Level II. Bass nevertheless justified initialling an agreement, even if there was only a ten-percent chance of having it ratified, arguing that even such adverse odds was preferable to quarrelling. (Bass interview)

Simon Fraser confided that he *personally* felt the US never intended to implement the accords. (Fraser interview) John Foggo of the DTI suggested the EU was willing to accommodate the American negotiators with a political solution over a piece of legislation their Administration didn't support. (Foggo interview) There may have been collusion between the COGs to find a face-saving solution, emphasising the extent to which both protagonists recognised their mutual interest in co-operating to resolve political differences.

Two-level game theorists (Iida, Putnam) consider how uncertainty effects negotiations. They note that ratification at Level II may fail due to unrealistic assumptions of domestic preferences by Level I negotiators; this danger applies both to assessing one's own constituency, and to information regarding the opposition domestic polity, and is particularly hazardous when faced with a divided domestic constituency. As this thesis has just noted, domestic American constraints contributed to uncertainty as to the degree of Level II support for the agreement within both the European and the American negotiating teams. Although the European negotiators were uncertain as to American support at Level II, they were nevertheless willing to enter into an agreement that they felt, at the very least, afforded them the protection they sought. The American negotiators were also uncertain as to the degree of domestic support, despite numerous

consultations with Capitol Hill, but were pleased to accept an elegant escape from implementing legislation they did not support. Both sides clearly preferred a negotiated settlement to a continuing WTO panel, even if it meant accepting the uncertainty of American domestic support. This thesis therefore argues that uncertainty positively enhanced the ability to conclude a Level I agreement, whereas certain knowledge of American defection would have torpedoed it.

Odell and Eichengreen compare US defection from the ITO agreement in 1947-1948 (where the US was its main initiator) with the successful ratification of the WTO in 1994. This was an unusual outcome, as one would have been expected the US to ratify the ITO as part of its Cold War strategy of trade liberalisation, and show more reluctance to co-operate in the 1990s. They argue that these outcomes were due to three factors:

- there was far less institutional 'slack' between the COG and Congress in the 1990s; there was a divided government in 1947, with a Democratic President Truman, and a Republican Congress;
- the BATNA was better in the 1940s than in the 1990s; and
- Clinton invested far more political resources into the ratification of the WTO than had Truman into the ITO. (Odell and Eichengreen 2000: 159-180).

There may be lessons to be drawn from these negotiations for the American defection in the Helms-Burton talks. Congressional and Administration preferences diverged; Clinton, who never mastered the art of 'working the Congress,' did not invest much political capital into cajoling Congress to modify Helms-Burton; and the EU had the better BATNA. These conditions would constitute sufficient cause to explain American defection.

9.6 Side Payments: Amendment of Title IV

Many scholars (Putnam, Moravcsik, Knopf, Martin) recognise the potential for increased cooperation between individuals who have different preferences across issue areas through side payments, whether money, votes, future policy choices, political appointments, etc. Mayer argues that, in a divided constituency, winners can compensate losers and still obtain ratification. Side payments are a powerful tool in the

hands of the executive, who may make an unratifiable agreement palatable by offering inducements to legislators and/or interest groups. Milner cites Clinton's offer to exclude some producers from NAFTA as vital in securing the legislative votes of those districts. Strategic use of side payments can widen win-sets and successfully obtain agreement.

The consideration of offering side payments to Jesse Helms to gain his cooperation on amending *Libertad* raised some fascinating possibilities. Roger Noriega suggested that Helms might have cooperated on a Title IV waiver if the Spanish hotel group, Grupo Sol Meliá, had been cited under Title IV, as a *quid pro quo*. Nick Gutiérrez thought that if Sol Meliá were forced to settle under duress from the State Department, Helms may then have considered a Title IV waiver as a trade-off. (Noriega and Gutiérrez interviews)

Ignacio Sánchez suggested that the US perhaps discriminate in its enforcement of *Libertad* by applying the waiver selectively. For example, the US could grant a Title IV waiver to countries it believed were conforming to *Libertad*, but not to those who did not co-operate, such as Spain due to Sol Meliá. (Sánchez interview) Eizenstat recommended this very plan in Senate testimony, declaring "We have in mind an amendment that would authorize waiver of Title IV for countries that are implementing the Understanding but that would require revocation of the waiver if implementation is inadequate...We want to work with Congress to craft an amendment to Title IV of the *Libertad* Act that will implement the United States commitment under the Understanding in a manner that instils confidence in Congress." (Eizenstat 1999c)

Another strategy, suggested by *FT* journalists, was that the part of Title IV extending the sanctions to families of cited persons was "originally inserted as a bargaining chip" which implied Helms might be flexible on a presidential waiver. (Dunne and Jonquieres 1997) Finally, the EU could have offered a cross-level side payment to Congress: both Eizenstat and Bass argued that the fact that the investment protocols were not retroactive to before 18th May 1998 was a major stumbling block. If they were, perhaps Helms would have considered granting presidential waiver authority of Title IV. (Eizenstat and Bass interviews)

Clinton sought to persuade Washington's trading partners to act as proxies in propelling Castro to move towards democracy, with the side-payment being that Title III was repeatedly waived and Title IV was invoked only against four countries (of whom only one was European, STET, the Italian telecommunications company) despite some 200 companies being accountable under it.

Spain, the major European trading partner of Cuba, was certainly threatened by Helms-Burton but it seems that the Spanish cut a deal. The Spanish Prime Minister, José María Aznar, publicly called for democratic reforms in Cuba, leading a major Spanish newspaper to proclaim that, in return, the US promised that no Spanish firms would be cited under Helms-Burton. The Clinton administration denied the report. (Kiger 1997: 65-66) Spain applauded Clinton's first waiver of Title III in July 1996, with the Aznar government announcing that it would cut \$3 million in aid to Cuba unless Castro began to institute democratic reforms. (Lazaroff 1996) If indeed such a side-payment were offered, it would explain why, with such a large number of Spanish companies operating in Cuba, none was cited under Libertad. Ever suspicious of Clinton, Helms reminded the president that Title IV carried no waiver with it in July 1997, and that "through its failure to enforce this provision, the administration has issued what amounts to an effective, and in fact, an unlawful waiver." (Schweid 1997)

9.7 Distributional Gains

Many felt that Europe capitulated to American interests in agreeing to the truce. The *FT* expressed disappointment that the US conceded less than that sought by SLB, and that the understanding was vague, relying on promised efforts rather than firm action by Clinton. It suggested that Helms might have been flexible on a presidential waiver for Title IV, but, "The belief that the EU has blinked in the confrontation may also encourage him to drive a hard bargain." (Dunne and Jonquieres 1997) A Washington investigative journalist noted that had the EU exerted more pressure on the US, it would have handed Clinton the necessary clout to tackle Helms. The EU surrender was not only astonishing; it made it impossible to move Helms. (Armstrong 1997; Armstrong phone interview) A former US government official argued that the EU was "blowing smoke" and not serious in its WTO action. (research interview)

This thesis disagrees strongly, arguing that the EU won greater distributional gains in the settlement of the dispute. The US and the EU shared overlapping win-sets in seeking to avoid a WTO panel; therefore, the suspension of that panel was a triumph shared equally by both Brussels and Washington. Focusing on the other aspects of the agreement - the investment protocols, the presumption of the continued suspension of Title III, the American undertaking to amend Title IV, and the synergistic inclusion of ILSA - leads this thesis to conclude that the EU won greater gains.

This thesis argues that the US made substantial concessions to the EU on two core investment issues. Firstly, the Americans wanted recourse to legal protection from *existing* European investments in Cuba, but the language clearly specifies that the agreement applies only to *future* investments, not to any questionable investments made prior to May 1998. The only concession to existing investments in confiscated American assets was that investment disciplines would apply if property was re-acquired, renovated or upgraded after May 1998, i.e. the existing investment benefited from new capital injections (§Ic). Secondly, the Americans sought an outright ban on investment in expropriated assets, but settled for substantially less restrictive language. As SLB stated in announcing the Understanding, the agreement aims to "inhibit" future investment on American properties confiscated by Castro without compensation, "and not to prohibit them."¹⁴⁹ The only ban was on investment in properties illegally expropriated *after* May 1998.

Furthermore, this thesis argues that the EU brilliantly overcame exceptional American opposition to synergistically link ILSA with Libertad, on the justification that both conferred extraterritorial powers. The US knew it would be much easier to solve the Helms-Burton dispute if it were not linked to ILSA, which the Americans labelled "the trickier of the two." (Croft 1998c) Despite "fiercely resisting linkage," the Americans had to concede in the face of a determined EU. (Croft 1998d) It is difficult to overstate the significance of this achievement, especially in light of the fact that Brussels' WTO requests cited only Libertad, not ILSA at all. But SLB was adamant that ILSA be

¹⁴⁹ Op. cit. footnotes 129 and 131.

included, for two reasons: Libertad and ILSA were equally objectionable on the principle of extraterritoriality, and some member states were affected more by ILSA than by Libertad. SLB saw no problem including ILSA even though it had not been cited in the WTO briefs; the bilateral settlement did not hinge on the legal case. (Brittan interview)

Dave Marchick allowed that the US erred in permitting the inclusion of ILSA, as ILSA dealt with a far more sensitive issue of national security than did Helms-Burton. Marchick felt that political constraints of appearing weak on rogue states would have prevented the EU from suing over ILSA; synergistic issue linkage with Libertad made such action viable. Marchick recalled that the US resisted linking ILSA for as long as it could, but was apparently worn down by SLB's insistence. Nevertheless, Marchick maintained that the US conceded nothing of substance on ILSA. Indeed, a careful reading of the 1997 Understanding reveals the President's commitment to implement ILSA "in a deliberate and fair manner", whilst taking into account measures taken by the EU that *may* enable EU companies to be granted a waiver. (Marchick interview) But the EU gained the protection it sought when Total was granted an ILSA waiver in the Non-Paper that accompanied the 1998 agreement.

Finally, Lord Brittan argued that the EU had achieved almost all it sought in gaining protection for European companies from the vagaries of Libertad and ILSA, and pragmatically declared there was "no need to row simply to row." SLB had frequently expressed this sentiment during the negotiations; when the WTO Panel was appointed in February 1997, SLB stated that the EU sought to protect European interests from American extraterritoriality, and not to take "our case to the point of a decision by a Panel for its own sake."¹⁵⁰

Despite American defection, the agreement has provided protection to EU entities from both Title III and Title IV. The only regret Brittan voiced was over was the EU failure to gain removal of the two Britons, Patrick Sheehy and Rupert Pennant-Rea from the exclusion list of Title IV. "This issue was raised without success." (Brittan interview and email)

¹⁵⁰ Op. cit., footnote 115.

9.8 Continuing American Level II Constraints

With Title IV still in force, supporters of Helms-Burton have lobbied strongly for the State Department to sanction the Spanish hotel group Grupo Sol Meliá (GSM), one of the leading hotel chains in Cuba. GSM allegedly built hotels on beachfront property formerly owned by the Sánchez family, owners of a 100,000-acre sugar plantation. The family formed an American company, Central Santa Lucia, LC (CSLLC) to represent their unified claims. Their attorney Nick Gutiérrez claims GSM opened two hotels in January 1996, which pre-dated Helms-Burton, but there was new construction after March 1996. GSM therefore received a very mild State Department letter in June 1996, followed by an official advisory letter on 30th July 1999. Finally, GSM received an expanded advisory letter in March 2001, advising them that the five-year management contract on the two hotels that were opened in January 1996 had expired, and warning that renewal would place GSM in breach of Libertad. (Gutiérrez interview)

GSM claimed it was cleared by the State Department for infringement of Libertad in 1996, and did not understand why it was the subject of a further inquiry three years on, especially as they managed, rather than owned, the hotels. Undeterred, GSM was operating fourteen hotels by 1999, with plans for expansion of five more hotels in 2000. (García-Zarza 1999)

Supporters of Libertad felt there was sufficient evidence to sanction GSM under Title IV; but such action risked torpedoing the uneasy US-EU truce. Spain warned that both Spain and the EU would renew their WTO appeal against the US if GSM were sanctioned under Helms-Burton. (Ibid) Gutiérrez confided that he had been urged by the State Department to settle the claims of the Sánchez family against GSM, for this would "get them off the hook." (Gutiérrez interview) Gutiérrez offered GSM a choice of three options: adequate compensation, abandoning the project, or losing the rights of executives to visit the US. (Marquis 1999) A Commission official confirmed that the Clinton Administration had a vested interest in GSM brokering a deal with the Sánchez family, as it offered an elegant escape. (research interview)

GSM held the EU's Blocking Action as a shield against settling compensation with CSLLC. However, Gutiérrez claimed that both the Spanish Embassy in Washington (in mid-2000) and the Commission (in late 2001) declared that a compensation agreement would be acceptable in principle. Gutiérrez characterised a settlement as a "win-win" scenario for all. (Gutiérrez interview) A GSM-CSLLC agreement would follow the precedent set by STET's compensation to ITT in 1997.

As bilateral negotiations commenced between the Sánchez family and GSM, CSLLC demanded \$10 million compensation. GSM's attorney claimed that the disputed property was worth a mere \$3,000 in 1962, and accused the State Department of mounting an extortion game on behalf of the claimants. GSM hoped that mounting EU pressure would deter further US action as the Commission had warned the US that it would vigorously defend GSM. (Alden 2001)

Gutiérrez confided that other European hotel chains had developed beachfront property belonging to CSLLC. LTI (Germany) had received an advisory letter in late 1999, but the two French firms, Club Med and Accor, had not received any State Department communication as of early 2002, as their hotels were still under construction. (Gutiérrez interview) A Commission official confirmed having received complaints about intimidation from US authorities from several European hotel groups including LTI and Club Med. (research interview)¹⁵¹

9.8.1 Capitol Hill Pressure

The Clinton Administration came under unremitting pressure from Capitol Hill to implement Title IV against Grupo Sol Meliá. Senator Helms and Congressman Gilman wrote to Peter Romero, Acting Assistant Secretary of State for Western Hemisphere Affairs in September 1999, regretting the necessity of having to remind him of his responsibility for implementing Title IV against GSM. The sharp letter claimed that it was Romero's "duty" to sanction GSM after having sent them a letter on 30th July. (Helms and Gilman 1999)

¹⁵¹ One wonders whether some firms have "paid under the table" given the low number of targeted firms.

Helms and Gilman were answered in October,¹⁵² with the explanation that the July letter to GSM did not imply that the State Department had "reasonably concluded" that the firm had 'trafficked' in American assets. Sol Meliá had "raised complex issues" that the State Department was reviewing; furthermore, it was the Department's practice to allow a suspected 'trafficker' time to respond to the allegations, or to alter their behaviour so as to be in compliance with Libertad. The letter closed with a reassurance that the State Department intended to enforce Title IV "vigorously". (Larkin 1999)

Helms, Gilman, Burton, Torricelli, and the Cuban-American Congressmen wrote to Secretary of State Albright in June 2000, castigating the State Department (who had briefed Congress concerning 24 suspected 'traffickers' in July 1999) for not having cited any new firms under Title IV for two years. They considered that "this inaction suggests a conscious decision by the Clinton Administration not to apply the law."¹⁵³ CSLLC had worked for over three years with the State Department to "build an air-tight case" against GSM, proving ownership of clearly bounded property since 1857, on which Sol Meliá was managing hotels and constructing new ones. The letter accused GSM of entering disingenuous talks with CSLLC in order to avoid Title IV prosecution. Concluding that a letter of determination was "long overdue," the lawmakers asked the State Department to provide a list of the additional information necessary to support a Title IV 'trafficking' sanction against GSM, and a timetable for taking such steps. (Helms et al 2000b)

9.9 Conclusion

This chapter has argued that the US-EU negotiations over Helms-Burton were held between friendly allies rather than adversaries, and were led by COGs who were congenial and respectful of each other's constraints. Above all, the talks were conducted with a determination to reach an agreement, as Washington and Brussels shared over-

¹⁵² Barbara Larkin, Assistant Secretary for Legislative Affairs, wrote the State Department's answer, explaining that Romero had "recused himself" in July from any further involvement in Title IV determinations, pending confirmation of his State Department position. Romero's nomination was never confirmed by Helms' committee due to his failure to enforce Libertad "vigorously." See Marquis 1999.

¹⁵³ They were surprised at Romero's informal recusal. They expressed disapproval of the resulting gap in the delegation authority, taking it as further indication of the laxity of enforcement of Libertad.

lapping win-sets to avoid a WTO Panel that would undermine support for the fledgling organisation.

The announcement of the accords was greeted with dismay by many Republican lawmakers on Capitol Hill. This thesis argues that the cost of no-agreement was so high that the American negotiators accepted an accord that had dubious support at Level II. The Clinton Administration chose to bear the costs of attempting to persuade a reluctant Congress to make the requisite amendments to *Libertad* to the perceived higher costs of a confrontation at the WTO.

Many Europeans were disappointed that the EU agreed to suspend a WTO case that it was likely to win. But this thesis argues that the EU nevertheless won the greater gains in this dispute with the US, even though Putnam predicts that the more constrained side wins greater distributional gains. The EU won almost every concession they sought, so they pragmatically concluded there was nothing to be gained by pressing on with the WTO Panel. Furthermore, the EU's able negotiator, Sir Leon Brittan, synergistically linked ILSA to the accords, although ILSA was not even cited in the WTO Panel requests, thus succeeding in obtaining an important waiver for France's Total.

It is worthwhile considering the EU's BATNA: could the EU have gained more by pursuing its airtight case at the WTO? There is little indication that Helms, who had voted against implementing the Uruguay Round measures that established the WTO in 1994, would have complied with a WTO ruling to modify *Libertad*; and the WTO's prestige would have been damaged by a bitter confrontation. Based on this analysis, this thesis argues that SLB's decision to compromise was sound.

This chapter has also considered the conundrum of whether Washington's defection was voluntary or involuntary. This thesis concludes that Washington's defection was involuntary, and that Eizenstat negotiated in good faith, based on frequent consultations with Capitol Hill leaders. Although the agreement remains inchoate, there is a fragile but *de facto* truce that is valued by both sides. This has been particularly impressive in view of the unabated pressures from Capitol Hill to implement Title IV.

Negotiations are rarely, if ever, a zero-sum game; there is usually a possibility for mutual gains that adept negotiators can seek out. (Fisher and Ury 1999: 73) Although this thesis argues that the EU won greater gains in the resolution of this dispute, it does not deny significant gains that accrued to the US. The Helms-Burton talks were, in Simon Fraser's words, "an extremely elegant piece of diplomacy" that defused the political row with a viable compromise that represented a 'win-win' situation. Professor Joaquín Roy observed, "Curiously, all the parties involved with Helms-Burton can claim partial or total success." (Roy 1997: 95) After the negotiations, Sir Leon defended the agreement before the European Parliament where he declared, "It is not possible to obtain complete victory over the United States." (Brittan 1998a) Stuart Eizenstat stated, "In the end, both sides must be able to proclaim victory, and neither concedes defeat if negotiations are to succeed." (Eizenstat 1999d).

Chapter 10

Conclusions

"Today, Europe and America threaten each other with economic warfare when negotiations stall. But threats are where the conflict usually stops because everyone is deadly afraid of destroying the global trading system." (Joffe 1997: 25)

10.1 Introduction

The motivation behind this research project was resolving the puzzle of American foreign economic policy that saw the US using unilateral economic sanctions almost as the foreign policy tool of choice in the 1990s. This researcher elected to study the transatlantic dispute provoked by the Helms-Burton Act, a particularly difficult bill which hardened the American embargo against Cuba, and purported to control trade with Cuba extraterritorially. Specifically, this project sought to address two core questions:

- Why did Washington enact Helms-Burton when over forty years of sanctions had not succeeded in removing Castro, thereby deliberately provoking disputes with close allies?
- Was the European Union's strategy of challenging Helms-Burton in the World Trade Organisation successful in achieving its objectives?

This thesis argues that post-Cold War American foreign policy was frequently domestically driven. No longer constrained by national security issues, American foreign policy in the 1990s was often commandeered by powerful interest groups with specific parochial agendas and little regard for multilateral consultation. This thesis agrees with Helen Milner, who forcefully rejects the Realist model that counsels disregarding domestic politics that impede the attainment of goals that are in the nation's best interests. "No political leader can afford to ignore domestic politics – whether at home or abroad – when contemplating foreign policy choices." (Milner 1997: 259-261) Only consideration of domestic politics can offer a motive behind the seemingly

irrational enactment of Helms-Burton. Indeed, this bias led to choosing the two-level game as an analytical framework for this study.

With regard to the second question, this thesis argues that the European Union's defence strategy was extraordinarily successful, awarding the EU more than it had originally sought. The US would have disregarded diplomatic entreaties and enforced sanctions extraterritorially were it not for the WTO threat. Washington agreed to bilateral talks to avoid the WTO litigation.

Robert Putnam's two-level game accounts for the simultaneous interaction of both domestic interests and international factors. This thesis has used the two-level game framework to analyse the Level II domestic preferences that supported and led to the enactment of Libertad in the United States. It has demonstrated how the EU overcame diverging Level II national preferences to plan a credible strategy in requesting a WTO Panel. Finally, it has explored the Level I bilateral negotiations that defused the dispute, and returned to Level II to explain how the EU sought consensus in the face of strong resistance from key member states and successfully ratified the agreement, whereas the US defaulted.

This chapter will summarise the arguments of this thesis before making some concluding observations about the utility of this study in light of the still fragile truce over Libertad.

10.2 Main Arguments

In assessing the Level I negotiations over Helms-Burton, this thesis poses two main concluding arguments, one with regard to strategy, and the second with regard to bargaining outcomes. The first argument is that the EU's strategic decision to request a WTO Dispute Settlement Panel was both substantive and tactical for it was absolutely crucial in forcing the US to the negotiating table. That the US was uncertain of the merits of its case is an understatement; Lord Brittan felt that the US would not have compromised with the EU if Washington were more confident of its WTO case. Equally, although Washington threatened not to co-operate with the Panel, the US was

reluctant to undermine the authority of the fledgling WTO. This sword of Damocles over Washington's head brokered the truce, effectively widening Washington's win-set to the degree that enabled, indeed propelled, the US to seek a compromise. As the US and the EU shared a win-set of seeking to avoid a WTO confrontation, there was enormous good-will and determination with both sides devoting substantial energy and resources to achieving a commonly acceptable accommodation. The mutual recognition of underlying economic interdependence was a significant constraint for both sides in this dispute, driving the two protagonists to seek informal cooperation as a face-saving solution. Furthermore, Cuba was not important enough to justify a full-scale trade war.

The second concluding argument addresses the distribution of gains resulting from the accords. Putnam's paradoxical observation that political constraints and institutions that weaken policy-makers domestically – in this case, the US - may strengthen their position at the Level I bargaining table was not borne out in this case study. This thesis argues that the European Union won the greater gains in these talks for the following reasons:

- The investment disciplines apply only to new investments after 18th May 1998, not existing ones.
- The investment disciplines do not prohibit dubious investments outright; they only inhibit them by proscribing government aid.
- The US must amend Title IV before the EU must implement the investment principles.
- The EU synergistically linked ILSA into the accords, which was particularly impressive as its WTO action had cited only Libertad.

The EU received de facto protection for its businesses from Helms-Burton and ILSA and an undertaking from the US in the TPPC to be more deliberate in the future, and to seek multilateral cooperation over unilateral actions. This thesis argues that the EU negotiated a very advantageous agreement indeed; therefore, agreeing to suspend the WTO action was not an act of weakness but of wisdom. Lord Brittan confided that it was fruitless to continue the dispute when the EU achieved all that it sought in the negotiations (except for the two Britons that remain excluded from the US due to their association with the Canadian company Sherritt International).

10.3 Secondary Arguments

This thesis has made many secondary arguments in the course of the narrative and analysis. This section will summarise these arguments.

Chapter 1 examined the Helms-Burton Act closely, and Chapter 4 narrated the circumstances of its passage into law. They argued that Helms-Burton has failed to achieve its dual aims of promoting democracy in Cuba and internationalising the embargo against Castro, nor has it had an appreciable effect on the level of foreign investment in Cuba. Libertad's main effect has been to undermine meaningful relations with friends and allies. Chapter 4 pointed out the numerous flaws in the bill, and the reasoned opposition from lawmakers and the White House that correctly predicted the international backlash to come. It maintained that Libertad would not have become law were it not for Castro's mobilising incident in shooting down two civilian aircraft. Finally, chapter 4 argued that the Clinton White House showed dreadful negotiating skills in agreeing to the codification of the embargo, and in not seeking presidential waiver authority for Title IV as well as Title III. Despite signing Helms-Burton into law with great fanfare, Clinton implemented Libertad very sparingly, and consistently used the Title III waiver to postpone the entitlement to bring 'trafficking' cases to court.

Chapter 2 examined the economic sanctions literature, particularly as it is relevant to the American trade embargo against Cuba during the Cold War. This chapter argued that, whereas sanctions cannot realise ambitious goals, they can achieve more modest ones. Therefore, although the American sanctions did not topple Castro, the embargo served significant, albeit less ambitious, American national interests during the Cold War, by expressing American resolve to contain communism, by satisfying American public opinion that demanded action against Castro, and, more substantively, by imposing considerable costs on both Cuba and the Soviet Union, and preventing the spread of revolutions elsewhere in Latin America. The Cuban embargo has also performed an important expressive role, in providing a moral barometer of basic civil behaviour

incumbent upon all nations. Arguments regarding the continuing embargo will be considered later in this chapter.

Chapters 5 and 6 explored the American Level II domestic constituency with interests in Helms-Burton. Chapter 5 argued that a confluence of interests between state and non-state actors was responsible for the Cuban Democracy Act and the Helms-Burton Act, both of which tightened the Cuban embargo. The non-state actors were primarily focused hard-line Cuban-American interest groups that brandished substantial campaign contributions and resided in strategically important states. The fact that both these bills were passed in presidential election years was no accident.

Chapter 6 explored the counterweight to the Cuban-Americans, essentially corporate America, who supported general sanctions reform legislation that would restrict Congress' ability to enact sanctions. Although enjoying bi-partisan backing, sanctions reform legislation was not enacted due to lack of vital support from the Clinton Administration. The chapter analysed Clinton's ambivalent implementation of Helms-Burton, attributing his behaviour to his inability to reconcile simultaneous but conflicting domestic and international demands, although he personally supported moderating the embargo. In a astonishingly candid appraisal, Clinton remarked to a *New York Times* reporter that mandated sanctions put "enormous pressure on whoever is in the executive branch to fudge an evaluation of the facts of what is going on...What you want is to leave the President some flexibility, including the ability to impose sanctions, some flexibility with a range of appropriate reactions." (Sciolino 1998)

Chapter 7 presented the European Level II responses to Helms-Burton. Although there was unanimity of purpose in opposing Libertad, the EU overcame significant diverging national preferences to forge a strategic consensus. Assembling foreign policy tools across all three Pillars, the EU based its principle defence on challenging Libertad's extraterritoriality, a Pillar I trade issue of shared competence between the Community and the Member States. The Council Regulation blocking Libertad's effects and drafted by the Commission was a Pillar I instrument; the WTO challenge was undertaken by the Commission under a Council mandate, also under Pillar I. Pillar II (CFSP) and Pillar III

(Justice and Home Affairs) were utilised by the Council in enacting the Joint Action, which re-enforced the protection from Libertad afforded to EU enterprises by the Council Regulation. Finally, under Pillar II CFSP, the EU issued its Common Position conditioning economic cooperation with Cuba to increasing democratic reforms and respect for human rights. Considering the disparate national preferences, the unity Brussels demonstrated in defying American unilateralism was quite remarkable.

Chapter 8 scrutinised the Level I international negotiations that produced the interim 11th April 1997 Understanding and the comprehensive 18th May 1998 Understanding; it then examined the Level II reactions to ratification on both sides of the Atlantic. It argued that Washington and Brussels shared overlapping win-sets in a mutual determination to settle their differences amicably, and, as the negotiations took place between allies, the talks never faltered, although they were long and often tedious. It credited the 1998 UK Presidency with facilitating the Commission's ability to negotiate at Level I, and with brilliantly marshalling a consensus in the Council to ratify the agreement at Level II. In both these endeavours, the UK Rep received unexpected help from the normally fractious French, not surprising considering French interests in Iran.

Chapter 9 analysed the Level I international bargaining in terms of the two-level game. It argued that the cost of no-agreement was higher than the domestic cost of compliance for the US, due to the pending WTO action; this explains why the US negotiated an accord that it knew would be problematic at Level II, and from which it defected. Nevertheless, with numerous consultations with Capitol Hill leaders, Eizenstat hoped he could persuade Congress to make the requisite amendments to Libertad. This thesis notes that there were varying expectations as to American intentions with regard to ratification. But even those who did not expect American defection understood Washington's constraints and were content to collude with the Clinton White House in accepting a political settlement over legislation the Administration did not support.

10.4 Application of Two-Level Games

Putnam argues that, as COGs play at two boards simultaneously, what is rational at one game board may be inappropriate at the other. The key players must resolve conflicting interests of domestic preferences in line with international realities. The two-level game allows that collusion between the antagonists, whereby each helps the other to shift the domestic balance of power and widen the domestic win-set, may facilitate Level I agreement.

This case study has provided several instances of important, and often secretive, transgovernmental links between Washington and Brussels, which sought to reduce tensions between their respective positions.

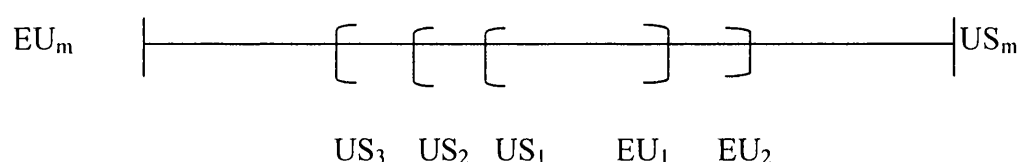
- The US supported the early 1996 secret initiative by EU Commissioner Marín to condition EU economic aid to Cuba on concrete democratic reforms, despite not sharing the EU's philosophy of constructive engagement vis-à-vis Cuba. The understanding was that, if Marín succeeded, the US would respond in a positive fashion. This was quite an extraordinary episode, given the established American hard-line policy against Cuba.
- The COGs colluded in sharing the over-arching win-set of avoiding a WTO hearing. The COGs recognised the high cost of no-agreement, and, although the EU had the better BATNA, both sincerely sought a compromise. The Level I talks were therefore conducted with a determination to succeed.
- The leading COGs, Stuart Eizenstat and Sir Leon Brittan sought to enhance each others standing in their respective domestic communities by mutual compliments and positive spins after each round of negotiations, even when the talks achieved little substantive results. This strategy sought to widen their respective win-sets, thus promoting a compromise solution.
- In sharing the EU's concerns over extraterritoriality, the Clinton Administration in essence shared the EU's win-set. This allowed Clinton to present himself as a reasonable partner to the EU during the negotiations, and to characterise Congress as the real hard-line villain in the dispute. (Roy 2000b: 92) Two-level games recognise the benefits that accrue domestically from international negotiations when a domestic group supports a change in policy being demanded of its country internationally, which the faction could

not have realised without international pressure. Clinton concluded an agreement with Brussels that emasculated Helms-Burton; international pressures helped him realise a policy preference he could not have achieved on his own.

- In the early stages of the Libertad dispute, remarkable secret transgovernmental cooperation between Washington and Brussels (promoted by Spain) linked the EU's Common Position and Clinton's continuing waiver of Title III, effectively widening Clinton's win-set and easing his ability to waive Title III. This was perfect 'win-win' situation, as the EU gained protection and Clinton gained a firm basis upon which to challenge his Level II hard-liners.

To present the above arguments graphically, Figure 3 below summarises a simple zero-sum game between the US and the EU, with US_m and EU_m representing the maximum returns to each, and US_1 and EU_1 representing the minimum agreement that each would ratify. Clearly, the win-sets overlap and an agreement is possible anywhere in the area represented graphically by the distance $US_1 - EU_1$; this indicates shared interest in seeking a compromise solution, and avoiding a WTO confrontation. COG strategies of enhancing each other's reputations would, if mutually successful, widen $US_1 - EU_1$ to $US_2 - EU_2$ and further facilitate agreement. A strategy that was not equally successful would still widen the shared win-set, but would reflect lop-sided gains. If only American efforts were successful, the shared win-set would be $US_1 - EU_2$, reflecting a wider win-set in Washington's favour, and vice versa if only European efforts bore fruit.

Figure 3: Effects of increasing win-set size



Taking $US_2 - EU_2$ as the new shared win-set, the American win-set could have been further widened, both because Clinton shared the EU's win-set to amend Libertad, and through linking the Common Position to the Title III waiver. Furthermore, the Helms-

Burton negotiations were an example of coercive bargaining; the threat of returning to the WTO also widened the American win-set. Graphically, US_2 moved to US_3 , effectively widening the overlapping area from $US_2 - EU_2$ to $US_3 - EU_2$ in the EU's favour.

In addition to transgovernmental links, this case study has demonstrated how intergovernmental collusion within the divided EU Level II polity promotes accord. The remarkable collaboration of the French Ambassador to COREPER enabled the Commission to negotiate the agreement at Level I, and it ensured that difficult ministers in Paris would not undermine the agreement after it was announced, thus guaranteeing Level II ratification.

Putnam argues that side payments can broaden win-sets by eliciting cooperation from an otherwise reluctant supporter. By offering tougher sanctions against Cuba, Clinton secured short-term Cuban-American support for a 1994 immigration policy that sent Cubans rescued at sea to Guantanamo. By allowing the re-location of Radio and TV Martí from Washington to Miami, and agreeing to continue funding in 1996, Clinton secured the muted support of the Cuban-American hard-liners for his second waiver of Title III, and his ambivalent implementation of Title IV. Side payments were used at Level I, as well; Spanish Prime Minister Aznar seems to have gained protection for Spanish companies suspected of 'trafficking' in Cuba by sponsoring the EU initiative conditioning aid to democratic reforms, the Common Position. Spanish involvement continued into the Bush administration, as this chapter will show.

Finally, Putnam argues that two-level games promote issue linkage at Level I that create policy options that were previously beyond domestic control at Level II, known as 'synergistic linkage.' This case study has demonstrated synergistic linkage, whereby the Level I talks created an extraordinary opportunity to challenge another irritating American law, ILSA. It would have been impolitic for Brussels to contest ILSA directly; synergistically linking it with Libertad, on the grounds that both imposed unacceptable extraterritorial demands on legitimate European commercial concerns, made challenging ILSA possible, and resulted in a significant coup for Sir Leon Brittan.

In conclusion, Putnam's two-level game metaphor applies well to the transatlantic dispute triggered by the Helms-Burton Act. The seemingly irrational motives behind the enactment of Helms-Burton can only be understood by looking at Level II American domestic politics. The knowledge that Washington and Brussels shared a win-set of avoiding a WTO confrontation augured well for a successful conclusion. Bargaining outcomes that may appear to be disappointing demand re-evaluation in light of domestic constraints; SLB's appreciation of Eizenstat's constraints helped him negotiate a realistic settlement. Finally, the two-level game offers a plausible motive for American agreement to a compromise from which it ultimately defaulted. This case study thus validates the Putnam model.

10.4.1 Personalities

This case study is populated by a number of skilled personalities that influenced decisions and outcomes. The two-level game notes the important contribution that a creative and proficient COG can make to the outcome of negotiations. Stuart Eizenstat was credited with drafting the agreement, and universally admired for the professionalism he brought to the negotiating table. Sir Leon Brittan was a tenacious negotiator, who was both pragmatic and astute in accepting the compromise. Senator Jesse Helms was probably single-handedly (and delightedly) responsible for American defection. The extraordinary strategic abilities of the British and the French COREPER representatives spurred the talks to a successful conclusion, and ensured that the member states ratified the accords at Level II. Conversely, the loss of a dynamic leader can have negative consequences; the Cuban-American National Foundation has floundered after the death of its charismatic chairman, Jorge Más Canosa.

Furthermore, this thesis has argued that congenial relations between negotiators contribute to positive outcomes, as was the case with Stuart Eizenstat and Sir Leon Brittan. Warm relations between United States Trade Representative (USTR) Robert Zoellick and EU Trade Commissioner Pascal Lamy contributed to the settlement of the bananas dispute in 2001. (Petersmann 2003: 26)

Unfortunately, the reverse holds true as well. *FT* journalist Guy de Jonquieres blames the increasingly frigid relationship between USTR Mickey Kantor and his successor Charlene Barshefsky and Sir Leon Brittan for the deteriorating US-EU relations during the Clinton era. "Because trade is the only substantive external portfolio over which the EU exercises extensive competence, the tone of dealings between Brussels and Washington is critically influenced by personal relations between senior trade officials on either side." Relations between SLB and Barshefsky became so acrimonious that constructive dialogue became virtually impossible; these tensions contributed to the US-EU clashes over Libertad, bananas and beef at the WTO. Eizenstat's appointment marked a turning point, as did the appointment of Lamy, both of whom laboured to lower the fevered rhetoric, demonstrating that "individual personalities played an important role." (de Jonquieres 2001)

10.5 The European Union as an International Actor

LSE lecturer Karen Smith argues that the EU has considerable 'presence' on the world stage, a consequence of the internal development of the EU as an international actor to be recognised. However, the EU's ability to translate its 'presence' into 'actorness' – the actualisation of articulated objectives - remains weak. Member states pursue ever greater integration of common policies, but this conflicts with national preferences to retain control as sovereign states, especially in foreign and security policy. The tension between the national and the collective has shaped the EU's institutions and foreign policy instruments. (K. Smith 2003: 24-26)

Professor Christopher Hill coined the term 'capabilities-expectations gap' (CEG), to conceptualise the discrepancy between the goals the EU sought to achieve as an international actor, and its often limited ability to realise those targets. EU capabilities are based on foreign policy instruments, such as diplomacy, force, positive and negative economic instruments, and cultural influences, along with the EU's fundamental resources of human capital and political stability. Expectations are the ambitions both Brussels and outsiders anticipate it will fulfil, whether in the political, economic, or intellectual field. Hill argues that the CEG narrowed by the late 1990s due to lowered

expectations; the EU's reputation suffered as CFSP has not lived up to the expectations generated by Maastricht. (Hill 1998: 19-37)

The EU has nonetheless developed an international identity that is unique in that it combines "the necessity of cooperation with others in the pursuit of international objectives...and a concentration on non-military means to secure goals." (K. Smith 2003: 14-15) There is broad agreement that Europeans seek peaceful solutions to problems through subtle negotiation and diplomacy rather than through coercion. Europeans emphasise the importance of long-term economic solutions to political problems and are patient when solutions are not apparent. Europeans prefer indirect influences through engagement in cultural, commercial and economic ties, and seek multilateral resolution through international institutions. This philosophy contrasts sharply with the US; Americans prefer coercion to gentle persuasion, using the stick instead of the carrot; they are goal-oriented, interested in finalising solutions; and they are less inclined to seek multilateral approbation in international institutions. (Hill and Wallace 1996: 9; K. Smith 2003: 15; Kagan 2002)

Contrary to predictions that the consolidation of the EU would lead to a multipolar world in the twenty-first century, the US has retained its hegemony in a unipolar world. Robert Kagan argues that EU support of international institutions is a consequence of their weakness whereas American support for international rules of behaviour would significantly constrain Washington's freedom to act. (Kagan 2002) Stephen Walt agrees that Clinton's behaviour is as expected, "relying on international institutions when they suit U.S. purposes but criticizing or ignoring them when they do not." (Walt 2000: 77)

Disparity in power is only part of the story. European values of commercial ties, diplomacy, and multilateralism have evolved as an outcome of their World War II experiences, which left Europeans with a mission to convince the world to reject the balance-of-power principle in favour of moral consciousness and inter-state relations based on the rule of law. (Kagan 2002)

The divergence between American and European philosophies is apparent in this case study. American policy has been confrontational, harassing Castro and adopting unilateral and extraterritorial sanctions to asphyxiate Castro and effect regime change, while the EU has preferred gentle persuasion and cultural and economic engagement to promote democracy and respect for human rights in Cuba. The EU has demonstrated its preference for a peaceful, multilateral solution by requesting a WTO Panel, while the US has demonstrated its disdain for multilateral cooperation by threatening to undermine that international institution. Nevertheless, Karen Smith's observation that the EU has not achieved vertical consistency, in which member states do not undermine EU policy, is particularly apt in this case study.

Washington engages in a measure of self-deception in rationalising its unilateral behavior. "Benign hegemony, however, is in the eye of the hegemon. 'One reads about the world's desire for American leadership only in the United States,' one British diplomat observed. 'Everywhere else one reads about American arrogance and unilateralism.'" (Huntington 1999: 42) Gillian Gunn (Clissold), British-born academic, observes that a degree of naivety and 'innocent arrogance' characterises American policy-makers and liberal academics who cannot understand why the world questions their lead when they are convinced their policies serve the best interest of the democratic West. (Gunn interview)

10.6 The Cuban Embargo

American interests in Cuba are ongoing and strong, due to geographic proximity, the chequered history of bilateral relations, and migration patterns. §403 of the *Restatement* mandates that "a state should defer to the other state if that state's interest is clearly greater," reflecting Washington policy-makers' attitude that Cuba is clearly more important to Washington than it is to Brussels, and therefore Europeans, as friends, should respect Washington's position. (research interviews)

10.6.1 Maintaining the Embargo

The Defense Intelligence Agency (DIA) reported in March 1998 that the Cuban military had "minimal conventional fighting ability", and concluded that Cuba "does not pose a significant military threat to the United States or to other countries in the region." (DIA Report) Faced with anger from Florida's representatives when the report was published by the *Miami Herald*, the document was recalled for review. Re-released in May, the report was essentially unchanged but for a cover letter from Secretary of Defense William Cohen, detailing his ongoing concerns over Cuba's continuing potential threat to its neighbours, and its potential to develop biological agents. (Ratliff and Fontaine 2000: 31-33) The incident illustrated the stranglehold the Cuban-American hard-liners continued to exert over Washington's Cuba policy in the late 1990s.

The continuing embargo is evidence that, on a policy of marginal interest to most Americans, a highly focused group continues to wield political pressure that few politicians have the political courage to contend with in the electoral marketplace.

"In the end, the debate over the embargo and related sanctions may be less about what works but rather about the political clout of those in the United States who care strongly about the issue. This is particularly true in the aftermath of the Cold War, when a U.S. president has a much harder time going against domestic political interests in the name of a larger U.S. security interest. As a result, as long as Cuban Americans remain politically powerful and united in their support of the embargo, it will remain in place." (Purcell 1998: 55)

Supporters claim that Libertad has succeeded to some degree in attaining its objectives, despite its cautious implementation by Clinton. It has isolated Castro, raised awareness of the dictatorial nature of the regime, and increased international pressure for reforms, as demonstrated by the EU's 1996 Common Position. It has also stalled foreign investment; the number of new Cuban joint ventures rose from 11 in 1991, to 33 in 1992, to 60 in 1993, to 74 in 1994, but Libertad debates in Congress contributed to uncertainty and new joint ventures fell to 31 in 1995. (Fisk 2000a: 72-78)¹⁵⁴ A State Department official testified that at least nineteen firms from ten countries ended or curtailed their business activities in Cuba between the enactment of Libertad and May 1998. (Ranneberger 1998) Among the companies that have either withdrawn or reduced their investment plans in Cuba are Red Path (Canadian sugar refiner), Tate & Lyle (British

¹⁵⁴ Joaquín Roy's statistics for joint ventures, based on Cuban government sources, are: 140 by end 1993, 185 by end 1994, and 212 by end 1995, with Spain accounting for the largest share of investment. See Roy 2000a: 12. Roy's statistics broadly tally with Fisk's; adding up the new ventures in each year (Fisk statistics) comes to a total of 178 in 1994 and 209 in 1995.

sugar trader), Amerop (French sugar trader), ING (Dutch bank) and Banque Nationale de France. (Gutiérrez 2001) Spain nevertheless remained Cuba's leading trading partner at the millennium, with a total of 180 Spanish enterprises in Cuba, 70 of them joint ventures; Grupo Sol Meliá was the leading hotelier in Cuba's burgeoning tourist sector, professing unconcern over the continuing Title IV threat.¹⁵⁵ However, Gutiérrez contends that GSM is painfully aware of Libertad, and that GSM shares fell dramatically in late 1999 on rumours of impending Title IV citations. (Gutiérrez 2001)

In maintaining the embargo, Americans policy-makers take the moral high ground in questioning the ethics of doing business with a brutal and repressive government, and disregarding the fact that these earnings consolidate the regime's power. The Cuban-American hard-liners are appalled at European insensitivity in entering into joint ventures with a country that employs 'slave labour.' Foreign investors pay the Cuban government \$100 monthly for each Cuban employee; the state then pays the employees 100 pesos, about 3.8 percent of earnings, while the government pockets the rest. In effect, joint ventures have been bankrolling Castro. (Suchlicki 2002b; Gutiérrez interview)

To conclude, hard-liners argue for continuing the embargo because lifting it without meaningful democratic reforms would "guarantee the perpetuation of the institutions and groups that support the regime." (Suchlicki 2002a) The question of assets is a consideration for some, either to punish Castro for not compensating Americans for their expropriated properties (Suchlicki interview), or because the unilateral lifting of sanctions without fair resolution of "stolen properties...is morally repugnant to basic American principles." (Gutiérrez 2000) Finally, Cuba analysts Falcoff, Fisk and Purcell fear that efforts to strengthen civil society in Cuba may be undermined if resources fall into government, rather than private, hands. They argue that "The balance of power and resources between the state and the civil society that currently exists on the island must be reversed so as to favor the people." (Aronson and Rogers: 35)

¹⁵⁵ "Spanish Hotel Group Says Not Concerned About US Sanctions Threat," BBC Monitoring Service, 31st August 1999.

Mark Falcoff concedes that, although it is highly unlikely that the US would impose an embargo on Cuba today, inertia demands an excuse to lift it, perhaps some tiny movement towards democratisation. Falcoff also urges a more pro-active American diplomacy in countering the "widespread notion that [the embargo] is based on a desire for vengeance and is intended to punish ordinary people there," and in re-capturing the moral high ground that Castro does not deserve. (Falcoff 1998a)

10.6.2 Moderating the Embargo

Cuba scholar Jorge Domínguez has consistently argued the futility of American policy predicated on the imminent demise of Castro. Writing over thirty years ago, he predicted little prospect for change "in a policy which is irrelevant to the end it seeks, is internally incompatible and futile, and continues to cause unnecessary and tragic injury to innocent people." (J. Domínguez 1973: 111-116) Domínguez has decried the recent American policy of the 1990s in which Washington flouted its own aversion to secondary boycotts in pursuing an "illogical" and counter-productive foreign policy. (J. Domínguez 1999: 47-48).

The Cuba Lobby's myriad reasons for supporting moderation of the embargo range from humanitarian concerns to the purely commercial motives of USA*Engage. William Ratliff and Roger Fontaine argue that, aside from the fact that the embargo allows Castro to blame his catastrophic economic position on the Americans, it enables him to play a role on the world stage. Lifting the embargo would humiliate Castro by announcing how irrelevant he is in the 21st century. (Ratliff and Fontaine 2000: 18-19) Gillian Gunn argues that Washington's national interest demands a moderate Cuba policy that promotes respect for civil rights and a peaceful transition to democracy, that stabilises immigration from the island, and that encourages a rapprochement between the Cuban-American exile community and their homeland. (Gunn 1997) Indeed, a 1999 Gallup Poll reported that 51 per cent of Americans oppose the embargo, with 71 per cent favouring re-establishing diplomatic relations with Cuba. (Ratliff and Fontaine 2000: 3)

The prestigious Council on Foreign Relations (CFR) sponsored a four-month independent bi-partisan task force in 1998, to consider American Cuba policy. The report consciously avoided the debate over lifting the embargo, and concentrated on "crafting a range of recommendations that can be implemented within the framework of current legislation." Among its recommendations were raising the ceiling of remittances from \$1200 to \$10,000 per household; allowing Cuban-Americans to retire to Cuba without losing their Social Security pensions; allowing Cuba-Americans to claim relatives in Cuba as dependents; and seeking greater cooperation in controlling narcotics trade in the Caribbean. (Aronson and Rogers 1998)

Kenneth Maxwell, director of the Latin American Program at CFR, castigated the report for accepting Helms-Burton as its baseline, thereby disregarding the central issue that sanctions impeded normalisation of relations while providing Castro with a potent propaganda tool. (Maxwell 2001)

Richard Haass argues that the US should pursue limited rather than ambitious goals of engagement with Cuba; for example, lifting selected elements of the embargo in exchange for the release of political prisoners. Washington would benefit from this approach regardless of Castro's response: if Castro was positive, American policy would be promoting meaningful liberalisation in Cuba; if Castro rejected these overtures, Washington could still ease its hard-line policy, gradually and unconditionally, at its own pace. (Haass and O'Sullivan 2000: 184-185)

This thesis rejects the contention that moderating the embargo necessarily bestows legitimacy or shows solidarity with the Castro government. Moderation could simply be a courageous admission that current American policy has failed to achieve its goals of promoting democracy and/or toppling Castro, is unlikely to do so in the future, and entails negative externalities that are difficult to disregard.

10.7 Outlook

10.7.1 Implementing Helms-Burton

The Helms-Burton agreement remains inchoate, fragile and uncertain. When President George W. Bush acceded to the White House in 2001, there was a degree of apprehension in Washington over whether he would continue his predecessor's practice of suspending Title III so as not to break the uneasy truce with the EU. The anxiety was heightened because as a Republican, Bush would come under greater pressure to enforce Libertad. Furthermore, Bush felt indebted to Florida for its remarkable role in the presidential elections, and to his brother Jeb, Florida's governor. This unease was shared in Europe. A Commission official expressed hope that the US would "maintain and fully implement" the Understanding at the Gothenburg Summit in June 2001. (research interviews) The *FT* urged Bush to bury "this pointless and troublesome law."¹⁵⁶

President Bush pragmatically chose to maintain the ceasefire. On 16th July 2001, he announced the suspension of Title III, following Clinton's well-established precedent of arguing that it "is necessary for the national interest of the United States and will expedite the transition to democracy in Cuba," and specifically linking the continuing American waiver to the continuing European renewal of the Common Position with regard to Cuba. Bush conceded that "real differences remain" between the US and its allies, but argued that this action "will encourage support for the embargo." (Bush 2001)

In continuing Clinton's policy of ten consecutive suspensions of Title III, George W. Bush tactically presented the Cuban-American hardliners with side payments: tightening the embargo by, for example, greater travel restrictions, and nominating right-wing Cuban-American Otto Reich to the position of Assistant Secretary of State for Western Hemisphere Affairs.¹⁵⁷ Bush succeeded in gaining hard-line support; Jesse Helms

¹⁵⁶ "Bush and Cuba," *Financial Times* Editorial, 16th July 2001, p. 16.

¹⁵⁷ Reich's nomination was extremely controversial, given his paid lobbying on behalf of hard-line Cuban-Americans, and his questionable association with the 1980s Iran-Contra Affair, which illicitly sought to gain support for the anti-Sandinista Contras in Nicaragua. The Democratic Senate predictably delayed Reich's confirmation, leading Bush to make a 'recess appointment' during the second session of the 107th Congress (2002). In early 2003, Reich was appointed 'Special Envoy' for Latin America, a post that

declared that those who criticised the suspension should "consider the other salutary initiatives that the president is putting into force." (De Young 2001) President Bush has continued to exercise the global Title III waiver every six months. (Zuniga-Brown interview)

Overall, President Bush has presided over a tightened Cuba policy characterised as "rejection, isolation, and pressure" (Fisk 2004) and has made key appointments of widely recognised hard-liners commensurate with this aim. Following his failure to secure Reich's Senate confirmation, Bush appointed another well-known ideologue, Roger Noriega, who was confirmed in July 2003 and is ably assisted by Deputy Assistant Secretary Daniel Fisk. Caleb McCarry completes the triumvirate of hard-line former congressional staffers with his appointment on 28th July 2005 to the position of Cuba Transition Coordinator; the creation of this post was recommended in May 2004 by Bush's Commission for Assistance to a Free Cuba (CAFC) that "proposed a comprehensive strategy to prepare for a peaceful transition to democracy in Cuba....empowering Cuban civil society ...to deny resources to the Castro regime to break its blockade on information..." (Rice 2005). CAFC endorsed \$59m to promote democracy by, for example, beaming Radio and TV Martí to Cuba by military aircraft to prevent jamming by Cuban authorities. (Mount 2005)

CAFC recommended further tightening Cuba policy by restricting the definition of immediate family members to exclude aunts, uncles and cousins. By June 2004, President Bush had announced that cash remittances could only be sent to immediate family members, and that annual visits to immediate family members would be restricted to once in three years. (Sullivan 2005) Speaking in Miami in October 2004, Fisk estimated that the flow of remittances amounted to \$1.5bn annually, and characterised family visits as having been abused due to lack of effective controls. He claimed that the new restrictions could deny Castro up to \$0.5bn annually, and urged Cuban-Americans to remember "that these are a means to an end: the end of the Castro dictatorship." (Fisk 2004)

needs no confirmation; although the Senate was Republican again, there was strong bipartisan antipathy to Reich on Capitol Hill. See Larry Birns, "Reich Re-surfaces Again – This Time at the NSC," Press Memorandum, Council on Hemispheric Affairs (COHA), 15th January 2003.

With regard to Title IV determinations, the State Department cited a Jamaican hotel, SuperClubs, in April 2004; no sanctions were imposed as SuperClubs divested rapidly. Fisk proudly proclaimed "This was the first determination in five years. The law was implemented; the law worked." (Fisk 2004) In email correspondence in July 2005, Fisk disclosed that there are 26 cases "under active review." The State Department closely monitors the directors of the sanctioned entities (Sherritt International and Grupo BM); sanctions were imposed against four new officers of these two firms, and one officer was removed from the sanctions list. In response to this researcher's question as to which entity endured/merited sanctions, particularly important as two British members of Sherritt's board are involved, Fisk declined to answer on the ground that the information is "confidential, unless the individuals involved want to make their situation public." (Fisk email) Impudently ignoring Helms-Burton, Sherritt International continues to expand its production on the island, oblivious to the continuing Title IV sanctions against its executives. In March 2005 Sherritt announced that its Cuban joint venture plans to spend \$450m to increase production of nickel and cobalt.¹⁵⁸

Nick Gutiérrez is guardedly optimistic that citations will be forthcoming against Grupo Sol Meliá (GSM) with Noriega and Fisk ensconced in the Bureau of Western Hemisphere Affairs, complemented by McCarry in his new role as Cuba Transition Coordinator. Gutiérrez claims GSM is operating three hotels on land belonging to his clients, the Sánchez family: the two neighbouring hotels, since merged into one, which GSM became liable for in January 2001 upon renewal of their management contract; a hotel built in 1999; and a hotel opened in 2002, and billed as a Cuban hotel, rather than as Sol Meliá. Gutiérrez claims that the State Department recently sent GSM a letter of determination, to which a reply should be imminent. Gutiérrez feels that Sol Meliá is somewhat vulnerable now that it is managing a hotel in Miami. Sol Meliá is widely viewed as a test case whose Title IV citation could open the flood gates to many more determinations. (Gutiérrez phone interview)

10.7.2 Continuing Repression

¹⁵⁸ "Sherritt, Cuba to Spend \$450 Mln to Boost Mine Output," Bloomberg 4th March 2005.

Castro continues to rule his beleaguered country with an iron fist. Amnesty International reported a severe deterioration in the human rights situation in Cuba, with a crackdown on dissidents in March 2003, in which 75 activists were arrested and sentenced to prison terms of up to 28 years. Cuban authorities routinely harass, threaten, detain, and imprison human rights advocates, journalists, economists and lawyers. Brussels, who had opened its first diplomatic office days before the arrest of the dissidents, protested vigorously, and announced diplomatic sanctions in June 2003, limiting high-level European visits to Havana, and inviting Cuban dissidents to the EU embassy in Havana. Castro refused further EU development aid, signalling his strong displeasure over the strengthening of the EU's conditionality of aid to improvements in civil rights. (State 2005; Amnesty International 2004)

In what was characterised as a 'conditional opening' by Joaquín Roy, the Council suspended diplomatic sanctions for six months on 31st January 2005; Spain led the EU in re-establishing ties, resulting in 14 of the dissidents being paroled, though not released unconditionally. The Council conclusion, referring to the Common Position of 1996, declared its intention to "maintain a constructive dialogue with the Cuban authorities aiming at tangible results in the political, economic, human rights and cooperation sphere." (ICCAS 2005; San Martin 2005; Union 2005)

This thesis notes that, once again, the EU policy of conditionality vis-à-vis Cuba was initiated by Spain. Karen Smith observes that EU policy with regard to human rights has not been very consistent. Poor, marginal countries often endure suspension of aid, while abuses in countries with a higher profile for the EU (Russia in Chechnya) are virtually overlooked. This inconsistency undermines the EU's lofty principles of promoting civil society, and can be explained by three possibilities: member states block sanctions because the country is commercially important, or strategically important, or there are doubts about the utility of sanctions generally. For example, the EU has been reluctant to sanction Cotonou Convention African countries due to France's protection of former colonies still in its sphere of influence. (K. Smith 2003: 116-118)

As Spain has maintained an intimate bond with Cuba throughout recent history,¹⁵⁹ the Aznar government's break with Cuba (1996-2004) was truly historic, writes Joaquín Roy. This reinforces the contention that Aznar was acting altruistically in conditioning EU aid to reforms in human rights, and was not the recipient of American side payments guaranteeing Spanish immunity from Helms-Burton. The Socialist victory restored traditional Spanish-Cuban closeness and diplomatic sanctions were removed. Prime Minister Zapatero is not as sensitive to the business community's interests as was his predecessor; does this herald the dismantling of the EU's conditionality policy?

The grinding poverty Castro has imposed on his once-prosperous island continues unabated, due primarily to decades of economic mismanagement, despite Castro blaming the American embargo. Bereft of investment, electricity supply is intermittent, and running water is not universally available. Cubans earn an average of \$15 monthly, and government rations provide about a third of the Cuban diet. Castro has reversed much of the liberalisation of the Cuban economy necessitated by the 'Special Period,' limiting private enterprise, and increasingly centralising the tourist industry. In November 2004, Castro banned dollars, of which there is an estimated \$1bn annually in remittances, replacing dollars with 'convertible pesos', for which the government charges a conversion premium of 10 percent. This has led to the paradox of Cubans enduring convertible pesos with no value outside the country and standard pesos with little value inside the country. (McIntosh and Nulle 2005) Even the burgeoning tourist sector, which earned \$1 billion in 1998, does not alleviate Cuban poverty, as most of the inputs of food and fuel are imported, leaving Cuba with only 30 cents in the dollar. (Falcoff 1998b: 566-567)

With continuing uncanny dexterity, Castro welcomed joint ventures from Beijing, who has become his third largest trading partner. Castro also benefits from a close political association with Hugo Chavez of Venezuela, with whom he runs a unique barter system – subsidised oil in return for 15,000 Cuban teachers and medical personnel who work in the Venezuela's urban slums. Castro is currently prospecting for off-shore oil, a venture which has piqued Chinese interest. (McIntosh and Nulle 2005; Frank and Lapper 2005)

¹⁵⁹ This enabled many to leave Cuba for Spain, before settling in the US.

The prospect of a Cuban-Chinese-Venezuelan entente cannot be attractive to Washington.

10.8 Conclusion

Putnam predicts that "America's negotiating partners have reason for concern whenever the American president is domestically weakened." (Putnam 452) Executive power has been checked during the 20th century by "an obstructionist Congress, relentless media criticism, and endless polls." Whereas the nation's big television channels used to carry presidential speeches, the advent of cable TV reduced the length of a presidential candidate's quotations from 43 seconds in 1968 to just 7 seconds in 1996. Practically one in four presidential nominations were put on hold by a recalcitrant Senate, with Helms holding up 15 ambassadorial appointments in 1996 until he succeeded in restructuring the US Agency for International Development. A strong presidency ensures that the US pursues a foreign policy that encompasses a broad national interest, but a weak one finds that difficult to achieve. Clinton signed Libertad, knowing that it would "do disproportionate harm" to US relations with Europe. (Mallaby 2000: 2-8)

The limited opportunities for transatlantic cooperation resulting from a weak executive in the 1990s resulted in a propensity for high-profile trade disputes between increasingly integrated economies. European trade officials identify a 'paradox of maturity' in the transatlantic relationship. The US has promoted a strong and vibrant EU to act as a partner in promoting mutually held international objectives for peace and stability, but the number of transatlantic conflicts tends to be greatest in trade policy, precisely the area where European integration has been most successful. (Krenzler and Wiegand 1999: 178-179) The Helms-Burton negotiations underlined growing European confidence in challenging its transatlantic partner in the area of trade, where the EU enjoys a high level of integration.

Nevertheless, some halting progress has been made in identifying policies that facilitate transatlantic trade and investment ties. The Transatlantic Economic Partnership (TEP) was launched in 1998, at the same summit that announced the Helms-Burton

compromise. The TEP built on the foundation of the New Transatlantic Agenda (NTA) of 1995, which had already established a Senior Level Group of high-level officials to meet between bi-annual summits to resolve problems as they arise. It sought to increase cooperative endeavours by establishing an Action Plan to provide a "forum for bilateral consultation and early warning on any matter of trade and investment relevance, with a view to preventing conflicts and resolving trade frictions," particularly in removing technical barriers to trade (TBTs), liberalising services, improving protection of intellectual property, and increasing regulatory cooperation in areas such as food safety, the environment, and electronic commerce. (Commission 1998e) Harmonising different regulatory regimes that impact on environmental and health protection issues such as beef hormones and genetically modified foods is difficult, linked as they are to domestic politics. Working under the TEP Action Plan, the "Guidelines for Regulatory Cooperation and Transparency" agreed at the Bonn Summit in June 1999 was a promising first step in co-ordinating regulatory regimes to protect consumers and the environment, reflecting mutual concerns to promote transparency and greater cooperation between regulators. (Aaron 2003)

Of particular note, the Transatlantic Partnership on Political Cooperation (TPPC), part of the May 1998 Understanding over Helms-Burton, urged increased multilateral consultation and agreed to resist foreign policy inspired unilateral economic sanctions that impose secondary sanctions extraterritorially. It is noteworthy that, although sanctions reform legislation had not been passed by the millennium, Capitol Hill's propensity for enacting unilateral sanctions had waned significantly. Andrew Semmel claimed credit for this, saying, "We won the war, just not the battle." (Semmel interview) Perhaps the Helms-Burton dispute is partially responsible for this fortuitous turn of events.

What lessons can policy-makers glean from the Helms-Burton negotiations?

- Domestic politics matters in many respects. First, policy-makers must understand their own domestic situation, and remember that consensus at home is important to ensure ratification of international agreements. Second, policy-makers must also understand the domestic politics of their adversary, in order to make rational decisions.

Appreciating the preferences of major actors, the political institutions within which they function and constraints under which they labour will facilitate agreement. (Milner 1997: 259-261)

- The BATNA is important. The EU was arguably the weaker partner at the beginning of the Helms-Burton controversy; Brussels' many representations to the powerful American Congress to amend its legislation fell on deaf ears. But the EU brilliantly changed the BATNA by resolutely mounting a WTO challenge in which Brussels convincingly argued that the US had breached WTO regulations, followed by deliberately broadening the bilateral talks to reach a comprehensive agreement that respected American constraints, while simultaneously planning mutually beneficial investment protection to be incorporated into the MAI. These stages changed the power relationship in the negotiations, invented options for mutual gain, and led to an agreement that was regarded as fair by both parties and allowed the suspension of the WTO panel. (Petersmann 2003: 39-40)
- The international furore over Libertad was a most public display of Washington's continuing obsession with Cuba, and just how isolated that policy had become in the eyes of the world. Paradoxically, the negotiations also revealed how expendable Washington's Cuba-policy had become.

The Helms-Burton negotiations remain a unique episode in 1990s transatlantic relations. The dispute was settled diplomatically after months of delicate deliberations, in a political agreement that remains inchoate. But the agreement satisfied everyone: the Europeans gained the protection they sought, the Americans retained Libertad on the statute books, and a direct confrontation at the WTO was averted. And perhaps the US has learned to tread more sensitively and cautiously in an increasingly constrained and interdependent world.

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