

# THE “UNDERSTANDING” BETWEEN THE EUROPEAN UNION AND THE UNITED STATES OVER INVESTMENTS IN CUBA<sup>1</sup>

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The history of relations between revolutionary Cuba and what was called Western Europe during the Cold War provides some clues for the lack of agreement between the U.S. and European states in the 1990s over the Helms-Burton Act and investments in Cuba. During this period, most of the European countries, in response to their own political and commercial needs, maintained diplomatic and economic links with Cuba despite U.S. pressures and admonitions. Today, more than half of all joint ventures established in Cuba involve European investments.

The European perceptions and reactions to the development of the Helms-Burton bill and its approval by the U.S. Congress can be divided into two categories. First, the moves by the more influential individual countries. Second, the collective measures taken under the umbrella of the institutions of the European Union. Individually, each European state showed different approaches due to their varied degrees of commercial and political links with Cuba and their specific relations with the United States. Nonetheless, as far as attitudes are concerned, European countries showed a remarkable consensus of opposition to the Helms-Burton law. “Special relation-

ships” (such as in the case of the UK) with the United States seemed not to be an obstacle for the creation of mechanisms of protection against the effects of the Torricelli and Helms-Burton laws.

The main European Union institutions have issued declarations and approved resolutions extremely critical of the policies of the United States, before and leading to the *finale* of the Helms-Burton law. Concurrently, the EU has systematically denounced violations of human rights in Cuba.<sup>2</sup> This two-pronged approach has been consistent over the years: opposing U.S. unilateral measures and at the same time conditioning the improvement of the treatment that Cuba has received through the EU mechanisms of humanitarian aid delivery, commercial preferences, and comprehensive cooperation agreements. In this specific terrain, Cuba has been and still is the exception in the Western Hemisphere. The political and human rights profile of the Cuban regime is the main obstacle to the implementation by the EU of a global package, which failed in March of 1996. However, the European institutions held the hope that by applying a simultaneous dual-track approach (trade and investment with Cuba, while applying pressure

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1. This article expands a topic treated in my book *Cuba, the U.S. and the Helms-Burton “Doctrine”: International Reactions* (Gainesville: University Press of Florida, 2000). Research was undertaken during the summer of 2000 (as a follow up of interviews carried out in the summer of 1998) in Brussels and Madrid under the partial sponsorship of a grant awarded by the North-South Center. The author would like to express his gratitude to ASCE for the kind invitation to participate in the Conference and to many members of the European Commission (most of them introduced by Angel Viñas) and the European Parliament, and the staff of the Spanish Ministry of Foreign Affairs and the Spanish Consulate in Miami. As usual, research and editorial support was provided by my Research Assistant Anna Krift.

2. See resolutions of the European Parliament for 1987, 1988, 1990, 1992, 1993 and 1996, in *Twenty Years of European-Latin American Relations* (Madrid: IRELA, 1996), pp. 769-803.

for human rights), Brussels would obtain better results than the U.S. “stick” policy.<sup>3</sup>

Once an initial rapprochement attempt with Cuba collapsed, a hard-line response from Brussels would come as a supplement to the EU criticism against Helms-Burton. While a planned blocking statute was a first for the EU, a critical Common Position on Cuba taken in the Fall of 1996 — the first time on a Latin American country — would also have a place in the annals of the European Union’s incipient foreign policy.<sup>4</sup> The spirit and the letter of the Common Position have been maintained to date, with the expected protests of the Cuban government. This condition has loomed in the background of the negotiations of the failed Lomé Convention membership, with the result that the Cuban government decided to terminate the negotiations in April 2000. According to most observers (EU institutions, ACP structure, individual governments<sup>5</sup>), Havana’s view was that the high political price to be paid (political requirements, especially in the human rights area) was not worth the economic benefits to be gained. In the words of Castro, “demasiado fastidio para tan poca plata” [too much bother for so little money].<sup>6</sup>

### THE BLOCKING STATUTE

Under the Damocles threat of the Helms-Burton law, the European Union decided to denounce this law in the World Trade Organization (WTO). During the second half of 1996, the U.S. government made a considerable effort to convince the European Union to find an elegant face-saving solution. However, the European governments had their hands tied by a new measure adopted by the Council of Minis-

ters (also known as the Council of the European Union) in November. They could not afford to appear to be negotiating under threat. The Parliament and the Commission had already issued sufficient signs of protest.<sup>7</sup> By Spanish initiative, it was now the turn of the Council to counteract the consequences derived from the U.S. law.

Council Regulation (EC) No. 2271/96, the Council’s Regulation containing countermeasures prohibiting the acceptance of the extraterritorial effects of the Helms-Burton law, became effective on November 22, 1996.<sup>8</sup> It is significant that the instrument that was chosen as a countermeasure was the highest in the ranking of EU legislation. Commission regulations are mostly administrative and technical in detail. Council Regulations, however, are concerned with important, broader, controversial matters. Regulations are binding on all member states and do not need to be translated or interpreted into national law.

Since the foundation of its predecessor, the European Community, the European Union has had as one of its objectives the contribution to “the harmonious development of world trade and to the progressive abolition of restrictions on international trade.” Moreover, the EU “endeavors to achieve to the greatest extent possible the objective of free movement of capital between Member States and third countries, including the removal of any restrictions on direct investment — including investment in real estate, establishment, the provision of financial services, or the admission of securities to capital markets.” In accordance with these goals, Council Regulation (EC) No.

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3. For a review of the contrasting EU-U.S. policies towards Cuba, see my chapter included in the edited volume by Richard Haass, ed., *Transatlantic Tensions: The United States, Europe, and Problem Countries* (Washington: The Brookings Institution, 1999).

4. For a detailed review of these events, see *Cuba y la Unión Europea: Las dificultades del diálogo* (Madrid: IRELA, 1996).

5. Interviews held in Brussels and Madrid during the months of June and July of 2000.

6. Confidential conversation held with a high-level Caribbean official.

7. See especially the resolutions of the European Parliament of 1992, 1993 and 1996, and the declarations of the Council and the Presidency of the European Union of 1995. Complete texts are available in the compilation *Europa-América Latina: Veinte años de documentos (1976-1996)* (Madrid: IRELA, 1996).

8. Council Regulation (EC), No. 2271/96. *Official Journal of the European Communities* (November 29, 1997). Earlier in the process, Canadian and British press were following the preparations. As a sample, see: “Europe’s Cuba law,” *Maclean’s*, Nov. 11, 1996, vol. 109, no. 46, p. 36; “A facade of unity: Europe’s foreign policy,” *The Economist*, Nov. 2, 1996, vol. 341, no. 7990, p. 49.

2271/96, the so-called “blocking statute,” made the following points:

- The United States has enacted laws [the Torricelli and Helms-Burton laws<sup>9</sup>] that purport to regulate activities of persons under the jurisdiction of the member states of the European Union; this extra-territorial application violates international law and has adverse effects on the interests of the European Union.

Therefore, the Regulation provides protection against the extraterritorial application of these laws and binds the persons and interests affected to inform the Commission.

- No judgment of a court outside the European Union regarding the effects of these U.S. laws will be recognized and no person shall comply with any requirement or prohibition derived from them.
- Any person affected shall be entitled to recover any damages caused by the application of these laws.

Through the Regulation, the European Union aimed to concentrate on removing the most adverse effects of Title III and Title IV of the Helms-Burton law, that is, those sections of the law perceived as having extraterritorial application.

### THE FIRST “UNDERSTANDING”

Several warnings issued by the EU during the development of the Helms-Burton law demanding changes that were not heeded led Brussels and Washington to a dead-end street. After the law came into effect, the EU warned that the temporary suspension of Title III — the provision of the law that permits action against “trafficking” in expropriated properties — was not sufficient. The rest of the law was still considered a violation of the principles of commercial exchange guaranteed by the World Trade Organization (WTO). The United States countered that the Helms-Burton law was not an issue of concern to the

WTO, since the limitations imposed on trade with Cuba were a matter of national security. Ironically, this amounted to an explicit admission that the law had a *political* objective, as its most ardent advocates had made abundantly clear all along. However, this give-and-take between Europe and the United States had other additional moves. It appeared that the EU left the sensitive issue of Cuba untouched and seemed not to be concerned with the political and social evolution (or lack of it) of the Cuban regime. Brussels wanted to get the record straight.

In an effort to defuse tensions, on January 3, 1997, President Clinton suspended, for the second time, the controversial Title III of the law. The early 1997 post-electoral honeymoon between Brussels and Washington had replaced the rocky 1996 relationship. However, an important roadblock remained, as the “drop-dead date” of April 12, 1997, approached — the deadline for the European Union to formalize its first complaint about Helms-Burton in the WTO. The United States claimed exemption under national security provisions and threatened to boycott or ignore the WTO proceedings, stating that the Helms-Burton law was not fundamentally a trade issue. Europe continued the pressure. Observers pointed out that the threat to claim exemption for the United States would severely embarrass the WTO and hurt the enforcement powers of the fledgling trade organization.

On the eve of the deadline, and after fifty hours of negotiation, the United States and Europe reached an Understanding to avert the transatlantic trade dispute, or at least postpone it until the following October 15. Under the accord, the White House committed itself to work with the U.S. Congress to relax the section of the law that would penalize foreign companies for investing in Cuba (Title III) and remove the section that would deny visas to executives of corporations that have invested in expropriated property in Cuba (Title IV). In return, Europe agreed to take action to discourage investment in Cuba involving expropriated

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9. An Annex specifically listed all US legal measures that the European Union considers unacceptable. It also included the Iran and Libya Sanctions Act of 1996. See Marc C. Hebert, “Unilateralism as Defense Mechanism: An Overview of the Iran and Libyan Sanctions Act of 1996,” *Yearbook of International Law*. University of Miami Law School. Vol. 5, 1996-97, pp. 1-28.

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property and to drop its WTO complaint against the United States.<sup>10</sup>

The unprecedented Understanding included the following major points:

- Both sides confirmed their commitment to continue their efforts to promote democracy in Cuba. On the EU side, these efforts were set out in the Common Position.
- The United States reiterated its presumption of continued suspension of Title III during the remainder of the President’s term, so long as the EU and other allies continued their stepped up efforts to promote democracy in Cuba.
- The EU and the United States agreed to step up their efforts to develop agreed disciplines and principles for the strengthening of investment protection, bilaterally and in the context of the Multilateral Agreement on Investment (MAI). These disciplines should inhibit and deter the future acquisition of investments from any State which has expropriated or nationalized such investments in violation of international law.
- The United States would begin to consult with Congress with the view to obtaining an amendment providing the President with the authority to waive Title IV of the Act. In the meantime, the United States noted the President’s continuing obligation to enforce Title IV.

In light of the above, the EU agreed to the suspension of the proceedings of the WTO panel. The EU reserved all rights to resume the panel procedure, or begin new proceedings, if action is taken against EU companies.<sup>11</sup>

Based on that agreement, both parties pledged to cooperate to bring democracy to Cuba, and claimed to have obtained mutual benefits and gains for their own respective interests. The chief EU negotiator of the Understanding, EU Commissioner Sir Leon Brittan, considered that, in exchange for withdrawing the EU claim in the WTO, the EU had obtained concessions from the United States, such as the protection of investments in other regions (such as Libya and Iran).<sup>12</sup> His counterpart, U.S. Under Secretary of State Stuart Eizenstat, emphasized having spared the WTO of irreparable damage by creating “a first and true opportunity for developing a multilateral discipline that will ban investment in confiscated properties.”<sup>13</sup>

When the deal was made public, the main backers of Helms-Burton rushed to claim victory. However, while the office of Senator Helms considered the agreement positive, his co-sponsor, Representative Burton and Cuban-American Representatives Ros-Lehtinen and Díaz-Balart denounced it as a “surrender”<sup>14</sup> and an attempt to confuse Congress. This attitude would become the rationale for subsequent measures presented to the U.S. Congress to oppose moves to relax the U.S. embargo. Early on, European observers detected a solid front of opposition to the overtures by President Clinton.<sup>15</sup>

### A NEW TRUCE

On May 18, 1998, at the conclusion of the EU-US Summit held in London under the chairmanship of UK Prime Minister Tony Blair (as EU president) and U.S. President Bill Clinton, the European Union and the United States announced a new agreement. Both parties declared that they had agreed to a new Understanding that in essence would freeze the application of the controversial Helms-Burton and D’Amato Acts in reference to investment

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10. *The Washington Post*, April 12, 1997; Christopher Marquis, “Europe, U.S. Make Cuba Deal,” *The Miami Herald*, April 12, 1997; Cynthia Corzo, “EU y Europa pactan sobre Ley Helms,” *El Nuevo Herald*, 12 abril 1997.

11. Understanding, April 11, 1997.

12. Xavier Vidal-Folch, “La UE no ha perdido nada,” *El País*, 27 abril 1997.

13. Statement released by the State Department on “Multilateral Agreement on Property Rights,” transcribed under the title of “Enfoque multilateral a los derechos de propiedad,” in *Diario las Américas*, 27 abril 1997.

14. Ileana Ros-Lehtinen, “La administración Clinton se rinde ante las demandas europeas,” *Diario las Américas*, 20 abril 1997.

15. “Eurodiputados prevén el Congreso se niegue a suavizar Helms-Burton,” EFE, 18 abril 1997.

in Cuba, Libya and Iran.<sup>16</sup> The agreement has to be read as a confirmation and an expansion of the spirit and the letter of the previous 1997 Understanding. Officials of the U.S. Permanent Representation to the European Union in Brussels admitted that their main task had been to convince the Europeans that the State Department and the White House were their allies and the real “enemy” was the U.S. Congress, a view confirmed by different negotiators of the EU member states and officials of the European Commission.<sup>17</sup>

On balance, this 1998 agreement marks a major milestone in the evolution of EU-U.S. relations. The major points of the May 1998 agreement were:

- It confirmed the 1997 promise by the EU not to pursue retaliatory measures against the United States in the WTO.
- Surprisingly, producing the protests of numerous observers and governments, the EU accepted the U.S. assessment that some of the Cuban past expropriations might have been executed in violation of international law.
- The White House, in exchange, promised to pressure the U.S. Congress to further neutralize the application of the Helms-Burton legislation.
- The United States and the European Union agreed to establish a Registry of Claims and to

work jointly in the negotiation of the Multilateral Agreement of Investment (MAI), a negotiation that appeared at that time to be on track to yield a successful agreement.

- The United States agreed to respect the current status of foreign investment in Cuba and not to make pre-May 1998 expropriations the target of legal suits under Title III of the Helms-Burton law; future expropriations and subsequent investment in such properties would be mutually scrutinized.
- In a most controversial move, the EU agreed to discourage post-1998 investments in properties whose ownership was questionable by denying the customary diplomatic protection, insurance, commercial and tax incentives, and other support.
- Investment in properties illegally expropriated after May 18, 1998, would be prohibited.

In sum, the agreement confirmed the approach laid out a year earlier. EU insiders have branded this agreement as an example of “creative conflict management.”<sup>18</sup> However, the agreement was not free of problems. It was reluctantly accepted by some of the EU member states,<sup>19</sup> different commentators,<sup>20</sup> and U.S. sources.<sup>21</sup> Understandably, Cuba opposed the

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16. “Understanding with Respect to Disciplines for the Strengthening of Investment Protection,” *The European Union News*, May 18, 1998. For a detailed analysis of the evolution of the content and language of the agreement, see *Inside U.S. Trade* (May 1, 1998, and May 15, 1998) and *Americas Trade* (May 15, 1998).

17. Interviews held in Brussels, July 5-9, 1998.

18. Horst G. Krenzler and Gunnar Wiegand, “EU-U.S. Relations: More than Trade Disputes,” *European Foreign Affairs Review*, 4: 153-180, 199.

19. AFP, “Francia y España obstaculizaron trato,” *El Nuevo Herald*, 18 mayo 1998; *Inside U.S. Trade*, “Member States Poised in Fight to Accept U.S.-EU Agreement on Helms-Burton”, May 22, 1998; “José Miguel Larraya, “Duro ataque de los socios del gobierno al acuerdo UE-EE.UU. sobre Cuba”, *El País*, 4 junio 1998.

20. Hermenegildo Altozano, “España, la ley Helms-Burton y el Acuerdo Multilateral de Inversiones”, *Expansión*, 14 mayo 1998.

21. Thomas W. Lippman, “Politicians at Odds on Sanctions as Policy,” *The Washington Post*, May 19, 1998; Jonathan Miller, “How Europe forced Cuba deal,” *The Miami Herald*, May 24, 1998. Studies published in U.S. legal journals have been critical and skeptical about the juridical validity of the agreement, its effectiveness as a political tool, and its future applicability regarding property rights. For example, see Edwin D. Williamson, “U.S. -EU Understanding on Helms-Burton: A Missed Opportunity To Fix International Law on Property Rights,” *Catholic University Law Review*, Vol. 48, No. 2, Winter 1999, pp. 293-322; Stefaan Smis and Kim Van der Borght, “The EU-U.S. Compromise on Helms-Burton and D’Amato Acts,” *American Journal of International Law*, Vol. 93, January 1999, pp. 227-236.

arrangement.<sup>22</sup> Moreover, its implementation was conditioned on hard-to-get congressional cooperation.<sup>23</sup> The deal was linked to the overall development of policies regarding sensitive European interests in Libya and Iran.<sup>24</sup>

The combination of the shortness of time to develop language to be inserted into the Summit Declaration and the need for such language to please all parties generated a very confusing document. First, the EU position stressed the “political” nature of the agreement, denying legally binding status, explicitly stating that the implementation of the Understanding was void until evidence of a waiver on Title IV was in hand. Second, the EU declared that it was not obliged to follow the U.S. position on the questionable legality of the Cuban expropriations, with the clarification that investment in Cuba was still possible, and that the denying of official support was at the discretion of EU governments. Third, guidelines pointed out that any prohibition of investment in Cuba would only apply to expropriations that would take place after May 18, 1998, the date of the agreement, but not to any of the controversial expropriations that took place before. Finally, the EU Commission advised its diplomatic representations to highlight that the accord rested on the good faith of the U.S. Congress waiving Titles III and IV; only if the latter occurred would the deal be effective.<sup>25</sup>

The Understanding was immediately criticized by several governments. Belgium explicitly claimed that article 73C of the Maastricht Treaty prohibits limitations to capital movement and investment.<sup>26</sup> The French representatives insisted that the “ball is in the U.S. court,” and that the EU simply has to wait for the U.S. legal modifications and waivers.<sup>27</sup> Legal commentators pointed out the apparent contradiction between the new political Understanding and the strict legality of the previous measures taken by the European Union, especially the Council Regulation and the Joint Action of November 1996.<sup>28</sup> At the political level, critical voices stressed that the new Understanding violated the spirit of the Regulation because it recognized the political aim of the Helms-Burton law in implementing restrictive economic measures with the objective of producing a change in the Cuban regime.<sup>29</sup> A contrast becomes evident between the explicit declarations of the European Union’s Regulation (away from interference in the internal affairs of Cuba) and the explicit aim of the Helms-Burton law (conditioning the end of the embargo on the termination of the current regime). Regarding the EU constitutional field, observers questioned the competence of the sole EU negotiator, EU Commission Vice President Leon Brittan, to sign agreements that transcend the commercial boundaries of the explicitly pooled sovereignty and, in con-

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22. “Castro insta a la UE a rechazar el acuerdo sobre la ley Helms-Burton,” *Expansión*, 20 may 1998; AP, “Castro condemns agreement,” *The Miami Herald*, May 20, 1998; AFP, “Castro califica el acuerdo entre EE.UU. y la UE de ‘amenazante y no ético,’” May 20, 1998; Mauricio Vicent, “Castro advierte que ningún entendimiento entre la UE y EE.UU. puede realizarse a costa de Cuba,” *El País*, 25 mayo 1998.

23. “Helms Tells European Union: ‘No Deal,’” Committee on Foreign Relations, May 18, 1998; “Helms Aide Tells EU to ‘Drop Dead’ on Request for Helms-Burton Fix,” *Inside U.S. Trade*, May 29, 1998; “Congress Strongly Criticizes U.S.-EU Agreement on Helms-Burton Law,” *Inside U.S. Trade*, May 22, 1998; “Ginrich critica acuerdo de Clinton con Europa,” *El Nuevo Herald*, 23 mayo 1998.

24. “Senators Urge Albright Not to Grant ILSA Waivers for Libya Projects,” *Inside U.S. Trade*, May 29, 1998. For a comparative review of the Helms-Burton and ILSA controversies regarding “problem” countries, see the volume edited by Haass, *Transatlantic Tensions*.

25. From European Commission sources and classified documents, June and July 1998.

26. Confidential notes of COREPER meeting, June 23, 1998.

27. *Ibid.*

28. See the paper by Hermenegildo Altozano, “Consideraciones sobre el entendimiento UE-EE.UU. de 18 de mayo de 1998 respecto a medidas (disciplinas) para fortalecer la protección de inversiones.” Seminario sobre “Cuba: Nuevas perspectivas tras el acuerdo sobre la Ley Helms y el relajamiento del embargo,” Cuba Negocios, Madrid, 3 julio 1998.

29. This view is shared by numerous sources in the Permanent Representations of the member states in Brussels. Interviews held July 5-9, 1998.

trast, pertain to the foreign policy and security sector that still is the prerogative of the member states.<sup>30</sup>

Spanish negotiators in Brussels admitted that the agreement was imperfect. In particular, they stressed that the new Understanding had only political value and lacked juridical force. On the one hand, they pointed out that the Helms-Burton law had acted as a deterrent to Spanish investments in Cuba. The Understanding extended the freeze of U.S. retaliation from the six-month Presidential waiver to an indefinite term. They also were pleased by the fact that no investors in “illegally” expropriated properties would be under the threat of U.S. penalties and that only official incentives would be denied. With the new deal, only certain investments would be subjected to discussion. In sum, the new pact created a climate of lessened tensions; a potential environment of permanent conflict with the United States had disappeared.

On the other hand, Spain’s diplomats noted that Commissioner Brittan had acted not only in representation of the Commission but also on behalf of the European Union, in matters that exceeded strictly commercial boundaries. Second, they expressed concern about the fact that the final text apparently granted former Cuban citizens the right to have access to a future register of illegal expropriations under the setting of the MAI, a major contention point of Helms-Burton. And third, the Understanding added confusion to the concept of covered transactions.<sup>31</sup>

### AN INTERNAL SPANISH AFFAIR

In Spain’s Parliament, the Understanding became the subject of a heated and colorful confrontational debate between the Minister of Foreign Affairs and an overwhelming majority of the political opposition. The Spanish deputies were particularly irritated by the fact that the Spanish government remained si-

lent on the most controversial items of the Understanding. In particular, they complained about what they considered was loss of sovereignty and the incorporation of the demands of the Helms-Burton law into the politically binding agreement.

One of the topics of the Congressional debate was the peculiar way in which Foreign Minister Matutes justified and defended the legality of the Understanding. In the course of the debate, he stated that he had a “voluminous” report (in fact, only twelve double-spaced pages) drafted (commissioned by the Ministry of Foreign Affairs) by Maximiano Bernad, a professor of International Law at the University of Zaragoza and holder of a Jean Monnet chair, endorsing the EU-U.S. deal. Although this report was not physically circulated in the hearings, it apparently was filed together with at least two other similar endorsements written by other specialists. All of this documentation has remained classified, raising more questions than answers regarding the legal status of the Understanding and the way it was negotiated by the parties, a topic which also became the target of harsh and sarcastic criticism by members of Congress and attorneys. In contrast with the expectations, the report does not add any surprising new elements to the official declarations made by the Spanish government. It simply reinforces most of the announcements made:

- The agreement does not imply unusual obligations rendered by the EU, because it does not translate into a juridical commitment. This is basically a political deal, meant to be expanded to an international agreement. The content is not strictly commercial, but it transcends the competences of the supranational “first pillar.”<sup>32</sup> In the event that one of the parties does not fulfill the

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30. Subsequent drafts of the “side letter” signed by Brittan show that a statement stating that the Commission was representing the European Union was finally deleted.

31. From confidential documentation dated in May of 1998 and interviews conducted in July of 1998.

32. The “First Pillar” is composed of the shared sovereignty in economic, social and cultural policies. Critics both in Spain and other EU member states have reminded that deals pertaining to foreign relations and defense belong to the “second pillar,” while justice and home affairs are included in the “third pillar.” Both are considered intergovernmental in nature and therefore out of bounds for the European Commission.

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deal, the situation returns to step one. The EU reserves all actions.

- While it does not legally bind parties, the Understanding includes a EU declaration rejecting secondary embargoes, extraterritorial legislation, and retroactive application.
- The U.S. government promises to keep application of Title III frozen and offers to convince the U.S. Congress to do the same with Title IV.
- The potential illegality of future Cuban expropriations is a matter to be jointly decided by both parties, a mechanism that confirms the U.S. willingness to renounce unilateral declarations. Both parties agree to cooperate.<sup>33</sup> The absence of an additional agreement with a more convincing legal status has reduced the Understanding to a temporary — though hopefully permanent — truce between Washington and Brussels. In fact, from the U.S. point of view, the only decision that still matters is the execution of the “escape hatch” waiver provision granted to the President in the U.S. legislation for the suspension of Title III. Title IV can still be potentially activated as it is demonstrated by the frequent demands made by Senator Helms to pressure the State Department for the denial of visas to executives of “traffickers” (most noticeably, Sol Meliá of Spain).

The ambivalent atmosphere of the agreement has not been lost to Spanish critics, who disagreed with the Spanish government regarding its claim that current and future investments in Cuba were better protected than before the Understanding. During the parliamentary debate, Congressman Ignasi Guardans described the prospects of Spanish investment in Cuba as

a higher risk than “opening a hotel in Rwanda.”<sup>34</sup> Sharing the views of most of his colleagues, he protested the right that Commissioner Brittan had to enter into agreements involving issues of national sovereignty (diplomatic protection) that were not within the realm of the Commission. The fact that this parliamentarian was the spokesman for the center-right Catalan party that had insured the survival of the Spanish government with its congressional backing since the election of 1996, exemplifies the use of the Helms-Burton law in the internal politics of Spain and a confirmation that political line-up is not a guaranteed boundary when Cuba is the subject.<sup>35</sup>

The language in the congressional debate over the Understanding was colorful and full of expressions that normally are not in the tamed vocabulary of the Minister of Foreign Affairs. For example, he said that the displeased backers of the D’Amato law (sanctioning investment in Libya and Iran) had stated that the U.S. negotiators had caved under the pressure of the European Union, and —using an expression that today is empty of its original sexual connotation— “se han bajado los pantalones.” He also added that Republican leader Gingrich expressed himself in similar terms.<sup>36</sup>

Confirming and expanding their different approaches and commentaries of the agreement, representatives of governments, attorneys, business representatives and academics gathered in Madrid for a symposium on the subject under the sponsorship of Cuba Negocios (a business lobby for investments in Cuba) and the Spanish government’s Casa de América. Among others, the following points were made:<sup>37</sup>

- Representatives of the Spanish government and of the European Commission seemed on the defensive, reiterating the political nature of the agreement, its positive contribution to the pro-

33. “Informe sobre el Acuerdo alcanzado en Londres el 18 de mayo de 1998.”

34. See complete texts of the debates: Congreso de los Diputados. *Boletín Oficial de las Cortes Generales*. 3 junio 1998. No. 107. Comisión Mixta para la UE. pp. 2211-2227. Acuerdo entre los Estados Unidos y la UE; Congreso de los Diputados. *Boletín Oficial de las Cortes Generales*. 10 junio 1998. No. 167. Pleno del Congreso. Efectos del Acuerdo entre la UE y los Estados Unidos.

35. For a panoramic review of Spain’s relations with Cuba, see my book entitled *La siempre fiel* (Madrid: Universidad Complutense, 1999).

36. Congreso de los Diputados, 3 junio 1998, p. 2221.

37. *Cuba: nuevas perspectivas tras el Entendimiento sobre la Ley Helms* (Madrid: Cuba Negocios, 1999).

tection of investment, and its potential to become a legally binding measure.

- For former owners, the understanding sends the message that they have a right to be compensated by the expropriating authority (the Cuban government) and keep their rights intact regarding third parties (foreign investors); for Cuba, the agreement is considered by Cuban-American attorney Matías Travieso-Díaz as positive because it reduces confusion and confrontation over properties. However, critics (led by U.S. lawyer Robert Muse) stressed the fact that Titles I and II are still active — their purpose is to impose a certain political and social system in Cuba.
- Spanish critics protested that the agreement was negotiated in a clandestine manner. U.S. attorneys critical of the agreement raised the same protest. The commitments made surpassed the competences of the EU negotiators because they include state sovereignty.
- The distinction made between a political agreement and a juridical treaty was rejected by attorneys. Washington attorney Robert Muse offered the comparison that when “an animal walks and barks like a dog, it is because it is a dog.” Spanish attorney Hermenegildo Altozano declared that the international law system does not include the figure of a “political agreement” alongside unilateral declarations, estoppel, manifest will of obligation, etc.
- The most damaging aspect of the agreement is the fact that the Helms-Burton law is still legally intact; it is only partially (Title III) suspended every six months by President Clinton; roughly, that means about two years of truce, according to Travieso-Díaz.
- The agreement legitimizes the sanctions policy of the United States, according to attorney Robert Muse. In his view, by entering into the agreement, Europe has lost negotiating leverage.
- Spanish socialists (led by Congressman Jesús Caldera) deemed the agreement as a tool for U.S. businesses to recover lost ground. After being isolated in the first part of the 1990s on its Cuba policy, the United States has made a come back.

After two years of opposing the Helms-Burton law, Europeans now accept its basic terms.

- The source of the problems was a confrontation between the United and the European Union, and the agreement is only binding on the two signatories. Therefore non-EU or U.S. companies are not protected.
- The agreement reflects European cynicism by recognizing the existence of questionable investments and accepting the commitment to deny diplomatic protection and monetary incentives on future operations in targeted properties while at the same time the Spanish government has increased the number of official visits and mission to Cuba, as an explicit endorsement of investments, as Congressman Ignasi Guardans reminded. This contradiction was dramatized by selecting a Sol Meliá hotel as the residency of Spanish premier José María Aznar while attending the Ibero-American Summit in 1999.
- In general, the business community felt that the Helms-Burton Act dissuaded investment in Cuba, meeting its main objective. In consequence, the agreement (labeled as “shameless” by Lorenzo Higuera, President of Costa Habana, a real estate joint venture) does not benefit Spanish investments in Cuba, increasing the climate of insecurity.

### SOME CONCLUSIONS

The EU-U.S. Understanding has earned a place as an example of diplomatic negotiation. The agreement can be considered as a case of successful arrangement (whatever are the negative labels received from different quarters), among other reasons because it fulfilled the main objectives sought by its parties: it averted a serious confrontation. In other words, the EU has refrained from opening a process against the United States in the WTO, and the United States has maintain the partial freezing of the Helms-Burton law. Many observers agree that in effect the Understanding confirmed the death of the Helms-Burton law, although the Understanding by itself has not been the only cause for its virtual termination.

There may be some arguments in identifying the major factors behind the agreement and the subsequent neutering of the most damaging aspects of the

## The “Understanding” Between the European Union and the United States

Helms-Burton law. For example, the Understanding was possible mainly because Cuba is not worth a commercial war between the two major world economies. The Helms-Burton law was in effect stillborn with the inclusion of the clause that allowed the President of the United States to suspend Title III, its most internationally controversial ingredient. In any event, from the point of view of the theory of negotiations, the Understanding is a model because it granted both parties a sense of success. The more times passes without conflict, the more successful the parties will feel.

As a first lesson for the future, negotiators should learn that secretive negotiations, particularly of highly politicized issues, although expeditious — apparently secrecy was crucial for the conclusion of the agreement and probably for its initial implementation — raises doubts among the public and legislators and invites confrontation. The second lesson is the legal-political frontier, where a compromise with extremely important repercussions cannot solely be based on temporary political criteria. The third lesson is that in any international controversy involving the United States and Cuba, ideological lines disappear. Cuba is a symbol (or an excuse) for standing up to the United States, especially when economic interests are at stake.

For the continued success of the agreement, some policy plan is needed on the European front. While maintaining in force all the previously approved measures, a cautious attitude (both on Cuba and U.S. policies) should continue. For example, the 1996 Council Regulation, giving legal guarantees and protection to European companies investing in Cuba while mandating the prohibition of accepting the U.S. demands, should be not only maintained but also fully implemented. The EU Common Position and Joint Action of 1996 imposed on Cuba as conditions for better economic and aid relations, should also not only remain in place, but be energetically enforced.

Coordination of policies (especially within the EU structure) should be a priority to avoid U.S. and Cu-

ban protagonists taking advantage of divisions on the European side. When possible, contradictions or violations of EU mandates should be avoided, as was the case of the STET-ITT deal, by which the Italian company compensated the U.S. communication conglomerate for the use of the previously-owned Cuban phone system. This is not an easy task. It is impaired by the fragile EU Common Foreign and Security Policy (CFSP) and the tenuous Common Position on Cuba. The latter is described by cynics as one that is neither “common” (unified and shared) nor a “position” (in means and ends).<sup>38</sup>

It is predicted that no major changes in the U.S. policy towards Cuba will take place before the new government is firmly in place in mid 2001. As a prelude of changes that may occur after the November 2000 U.S. presidential elections, the most reasonable expectation is a gradual and slow dismantling of the embargo, giving the impression that it is in place but in an eroded fashion. This solution is intended to award all parties a sense of accomplishment, with no clear losers or winners. It will give the U.S. hardliners and the Cuban exiles a sense of policy continuity, while affording the liberals a chance to try something else.

At the same time, the slow dismantling of the sanctions would impose on the Cuban government the pressure of the uncertainty of a transition, without the dangers of a suddenly open floodgate of political change with unforeseeable results not only in the economic sector, but also in the social minefield. This will match the wishes of U.S. security experts envisioning a scenario of a “soft landing,” and an end to the Castro regime without upheavals (massive migration, partisan confrontation) that would rebound on the United States and provoke its intervention.

Both parties recognize that bringing back democracy to Cuba is a shared goal. In any event, all plans are subject to the actions of the Cuban regime. This crucial actor, however, does not seem to evolve in any encouraging direction away from maintaining its authoritarian orthodoxy.

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38. For an updated review of EU's relations with Cuba, see IRELA's Special Report, *Revision of European Policy on Cuba? Perceptions and Interests of EU Member States*. Madrid, April 2000.