

CREATIVE PROBLEM SOLVING AND THE CASTRO CONUNDRUM

JAMES M. COOPER*

When Pope John Paul II set foot on the tarmac of José Martí International Airport in Havana on January 21, 1998, he showed that constructive engagement and dialogue does bring rapid change—even amidst the ideological remnants held over from the Cold War. The Pontiff's first words to both Cuba and the world were prophetic: "May Cuba, with all its magnificent potential, open itself up to the world, and may the world open itself to Cuba."¹ As the Pontiff spoke, Cuban President Fidel Castro, wearing a business suit in lieu of his traditional military fatigues, stood respectfully at his side.²

Given a paid holiday, Cubans lined the streets of Havana to cheer the Papal convoy as it passed. Posters and murals of the Pope lined the walls of the streets alongside portraits of fallen Argentine guerrilla leader and Cuban hero Ché Guevara.³ Among many Cubans, there was a sense of great hope

* B.A., LL.B. Toronto; LL.M. Cantab., Barrister and Solicitor, and Fellow of the Cambridge Commonwealth Society. Mr. Cooper is the Executive Director of the McGill Center for Creative Problem Solving at California Western School of Law. He wishes to thank William Graham, Q.C., M.P., Chairman of the Standing Committee on Foreign Affairs and International Trade in the House of Commons, Ottawa, and Vice-President of the Organization for Security and Cooperation in Europe; Roberto Robaina Gonzalez, Minister of Foreign Affairs of the Republic of Cuba, Havana; John R. MacArthur, President and Publisher of HARPER'S MAGAZINE, New York; and Joel Cooper, Barrister, Solicitor (retired), and father (still active), Toronto, for sharing their views; and William Aceves, Associate Professor of Law, and John Noyes, Professor of Law, both at California Western School of Law, San Diego, for their comments on earlier drafts of this Essay.

1. Mark Fineman & Richard Boudreaux, *Catholics, Communists Join to Welcome Pope*, L.A. TIMES, Jan. 22, 1998, at A1.

2. In his youth, Castro was fascinated with the Bible. As a student at Bélen College, an exclusive Jesuit preparatory school in the outskirts of Havana, the future Cuban leader would begin his love-hate relationship with Catholicism. In a 1961 speech, Castro explained: "I was formed in the midst of the worst reaction and I lost many years of my life in obscurantism, superstition and lies." See TAD SZULC, *FIDEL: A CRITICAL PORTRAIT* 123 (1986). See also GEORGIE ANNE GEYER, *GUERRILLA PRINCE: THE UNTOLD STORY OF FIDEL CASTRO* 31 (1991).

3. Ché (Ernesto Guevara de la Serna) himself returned to Cuba only a few months earlier. After months of digging, a team of Argentine forensic anthropologists found Guevara's remains under an abandoned airstrip in Vallegrande, Bolivia, where he was killed in 1967 attempting to lead a peasant revolution. See John Otis, *The Resurrection of Che*, THE MIAMI HERALD: TROPIC, Apr. 14, 1996, at 12.

about the Pontiff's trip: Would it lead to further religious and political freedoms? Would it lead to an easing of the American economic boycott against Cuba?

The Pope did not let the Cuban people down. In public appearances throughout his tour of the Communist island, the Polish Pontiff urged the Cuban authorities to release political prisoners and foster civil liberties like the freedom of expression and association. The open exchange of ideas had begun. It was not that long ago, however, that Catholicism had been banished from Cuba and its proponents exiled. Now, the Pope's homilies were televised live on Cubavision, Cuba's State Television channel, and were co-anchored by Father Pedro Freites, a Vatican Radio official.⁴

Such an opening in relations between Havana and the Vatican has not occurred by accident, nor has the newfound freedom of religious practice for Cubans. There is something to be said about this approach to constructive dialogue—even for parties that are, by their very nature, ideology, and actions, adversaries. The Vatican's flexible and open approach to discourse with Havana has, indeed, begun to show some tangible results.

The same cannot be said for the United States government's policy towards Cuba. Instead of being open to dialogue and some form of constructive discourse, U.S. policy towards the Communist island nation has virtually shut down all options for engagement. The U.S. economic embargo against Cuba not only continues in force, but has grown even stronger. With the passage of the Cuban Liberty and Democratic Solidarity (Libertad) Act of 1995,⁵ also known as the Helms-Burton Act, the 35-year-old embargo was no longer a flexible Presidential Order, but was chiseled into U.S. law.

The very premise of the Helms-Burton Act is to bring down the Castro regime in Cuba. The statute states that, only by removing Cuban leader Fidel Castro and his brother Raúl and dismantling the Communist regime, can the U.S. government end the embargo. The Act further tightens the embargo against Cuba by punishing foreign companies that do business in Cuba.

However, this statute extends U.S. law outside American jurisdiction. Under international law, a State has free reign to impose laws governing all events within its own sovereign borders, but it may not reach outside of the confines of its territory and impose its will on those subjects not validly under its jurisdiction. The Helms-Burton Act does just that. It proscribes certain behavior of foreign companies that legally undertake business with Cuba. The European Union ("EU"), backed by Canada, Mexico, and almost all other countries in the 132-member World Trade Organization ("WTO"), has argued that the Helms-Burton Act violates open trade rules by extending U.S. jurisdictional reach outside its national territory.⁶ Canada and Mexico

4. Mark Fineman, *Surprise Two and One Half Hour State-Run Telecast Lets Whole Nation See Papal Mass*, L.A. TIMES, Jan. 23, 1998, at A1.

5. 22 U.S.C. §§ 6021-6091 (1997).

6. The dispute has been temporarily suspended pending a negotiated settlement between the European Union and the U.S. government. *See infra*, sec. II. B. 1.

have argued that the Helms-Burton Act violates the North American Free Trade Agreement (“NAFTA”).⁷

The Helms-Burton Act does not just violate international law.⁸ The Act is also bad for trade liberalization, bad for international law, and ultimately bad for United States foreign relations. Most trading partners of the United States have enacted “blocking statutes” that prohibit their companies and citizens from complying with the provisions of the Helms-Burton Act.⁹ In addition to alienating America’s trading partners, the Helms-Burton Act has exposed and played upon the weaknesses in a number of international and regional institutions. The headstrong legislative actions of the United States have breached the fundamental tenets of the international trade system and the United Nations. As a leading member of the global economy, Washington has pushed continually for the liberalization of trade around the world, yet this Act does just the opposite.

That the economic embargo against Cuba continues in force is, in and of itself, a breach of common sense. American companies continue to lose business as a result of extraterritorial measures such as the Helms-Burton Act.¹⁰ Moreover, U.S. policy towards Cuba appears hypocritical in light of the economic relief that the Cuban exile communities in Florida and New Jersey send to Cuba. The punishing sanctions against the island nation have also caused considerable suffering among the Cuban people. Not surprisingly, the Pope met with reporters on the airplane voyage to Havana to state that he wanted the U.S. to change its 35-year-old embargo against Cuba. He also repeated this challenge during his historic visit.¹¹

7. North American Free Trade Agreement, 32 I.L.M. 289 (pts. 1-3), 605 (pts. 4-8 & annexes) (1993) (effective Jan. 1, 1994) [hereinafter NAFTA].

8. The leading scholarship exploring the weaknesses of the Helms-Burton Act comes from Andreas F. Lowenfeld, *Agora: The Cuban Liberty and Democratic Solidarity (LIBERTAD) Act*, 90 AM. J. INT’L L. 419 (1996). For a more generalized critique of the U.S. trade embargo against Cuba, see Shari-Ellen Bourque, Note, *The Illegality of the Cuban Embargo in the Current International System*, 13 B.U. INT’L L.J. 191 (1995). Most American commentators point to the Helms-Burton Act as a violation of international law. See Anthony M. Solis, Comment, *The Long Arm of U.S. Law: The Helms-Burton Act*, 19 LOY. L.A. INT’L & COMP. L.J. 709, 740 (1997) (“The Helms-Burton Act is bad law.”). Some American commentators have seen the Helms-Burton Act in a more positive vein: Brice M. Claggett, *Agora: The Cuban Liberty and Democratic Solidarity (LIBERTAD) Act—A Reply to Professor Lowenfeld*, 90 AM. J. INT’L L. 641 (1996). A more detailed examination of Title IV of the Act can be found in Craig R. Auge, *Title IV of the Helms-Burton Act, Continued: A Questionable Secondary Boycott*, 28 LAW & POL’Y INT’L BUS. 575 (1997). For a more detailed examination of Title III, see Susan J. Long, *A Challenge to the Legality of Title III of Libertad and an International Response*, 7 IND. INT’L & COMP. L. REV. 467 (1997).

9. Canada: Foreign Extraterritorial Measures Act Incorporating the Amendments Countering the U.S. Helms-Burton Act, 36 I.L.M. 111 (1997). See also *infra* notes 59, 63, 89.

10. European-American Business Council, *Is the Price Too High? The Cost of U.S. Sanctions* (Oct. 1997) <<http://www.eabc.org/study.htm>>.

11. *Pope John Paul II Arrived in Cuba After Urging the U.S. to Soften its Embargo*, WALL ST. J., Jan. 22, 1998, at A1.

But the Pope's mission to Cuba was a double-edged sword. Like the U.S. government, the Pope wants to see more political freedom and fundamental human rights protection from the 39-year-old Communist regime. One target for criticism is the one-party rule that has been the mainstay of Cuban politics since the Revolution. During his flight to Havana, the Pontiff told journalists, "You know very well I am thinking of human rights and what I can say to guarantee them."¹² Throughout his visit, the Pope made good on his word, prodding the regime in Havana to change its oppressive ways. In a message aimed at Cuba's monolithic Communist Party, the Pontiff told a crowd of 200,000 people in the capital's Revolution Square that, "[f]or many of the political and economic systems operative today, the greatest challenge is still that of combining freedom and social justice."¹³ The crowd responded by chanting uniformly, "Freedom, freedom, freedom," much to the horror of Communist Party officials.

Such a tone was to be expected. Indeed, the Pope had described his trip as an "apostolic journey," one capable of initiating change. Taking on Communist regimes for not protecting fundamental freedoms is nothing new to the Pope. From standing up for the outlawed Solidarity movement in the midst of Poland's crackdown under Marshall law to criticizing openly the Sandanista regime during a Papal visit to Nicaragua, the Pope's anti-Communist credentials speak volumes. Many credit the Pontiff's intervention in Eastern Europe in the 1980s as the force that brought down the Iron Curtain without mass violence.

Such missionary fervor, however, is not the only key to unlocking the people of Cuba. For example, in Eastern Europe, economic links and diplomatic dialogue sparked a positive change in social discourse, leading to new historic openings. America was there in the 1980s to encourage that change through a number of proactive mechanisms, including cultural exchanges, political dialogue, and trade. The same must be the case for Cuba. New approaches and fresh ideas must be imported into what is an increasingly entrenched position—the Castro conundrum. The hard-line policy of the American government towards Cuba must be reevaluated in light of changing circumstances, and creative approaches to solving the diplomatic problem between Washington and Havana must be applied.

This Essay will examine how the United States' hard-line policy has failed to bring about positive developments in Cuba. Part I of this Essay explores the United States' relationship with Cuba and, in particular, how consecutive American administrations have continued to put economic and political pressure on Havana with few results. Close to 40 years after the Communist Revolution, Castro and his Communist Party still control Cuba. Part I then reviews the Helms-Burton Act as the final and most permanent

12. *Americas: One Small Chink in Cuba's Prison Doors*, THE ECONOMIST, Feb. 21, 1998, at 33.

13. Pascal Fletcher & Henry Hamman, *Pope Issues Appeal for Reconciliation*, FIN. TIMES, Jan. 26, 1998, at 6.

component of U.S. policy towards Cuba. Part II of this Essay examines the substantive implications of the Helms-Burton Act and why the international community and America's trading partners have taken Washington to task. Part III proposes alternative approaches to the American-Cuban situation, using an evolving process of Creative Problem Solving. This Essay concludes with a call for more flexible solutions to the Castro conundrum and puts forward an agenda for future discourse.

I. CLOSING THE GRIP: THE UNITED STATES' EMBARGO AGAINST CUBA

A. *The History of the Embargo*

Shortly after Fidel Castro and his July 26th Movement came to power in January 1959 after a long guerrilla campaign against the U.S.-supported regime of Fulgencio Batista, relations with the United States soured. Washington had long viewed Cuba as a quasi-protectorate, if not a compliant supplier of a primary resource—sugar. As Cuba's new leader, Castro courted the Soviet Union.¹⁴ Several members of the Cuban Communist Party took positions in his new revolutionary government, while Cuban sugar was traded for oil from the Soviet Union. Moscow also provided trade credits, technical assistance, and a supply of crude and refined petroleum.

The American government was not happy. A series of actions and reactions further worsened relations between Washington and Havana. On July 6, 1960, the U.S. eliminated Cuba's sugar quota when U.S. President Dwight Eisenhower issued the Determination of Cuban Sugar Quota Proclamation.¹⁵ The Cuban government responded by amending its national laws to allow for the nationalization of American properties located in Cuba. The nationalization of the Texaco oil refinery became a harbinger of things to come. Texaco refused to refine oil received from the Soviet Union, and the Cuban government confiscated all of the company's assets located on the island, eventually also taking over the assets of Esso and Shell.

The U.S. government demanded that the Castro regime pay adequate compensation for all expropriated U.S. properties, and relations between the two States continued to deteriorate. In October 1960, the U.S. instituted an economic embargo banning the exportation of American goods to Cuba. The embargo included exceptions for medicines and some foodstuffs. In February 1962, pursuant to the Foreign Assistance Act and the Trading with the Enemy Act, President Kennedy proclaimed an embargo on all trade with Cuba.¹⁶ Even before Castro announced that his Revolution was Communist, U.S. economic involvement on the island fell. Imports from the U.S. were

14. See SZULC, *supra* note 2, at 562-87.

15. Proclamation No. 3356, *reprinted in* 7 U.S.C. § 1101 (1988), *and in* 74 Stat. C72 (1960).

16. Proclamation No. 3447, 27 Fed. Reg. 1085 (1962), *reprinted in* 22 U.S.C. § 2370 (1994).

reduced from \$543 million in 1959 to \$224 million a year later.¹⁷

Cuba was immediately affected by the U.S. embargo and attempted to mitigate its damages by beginning trade with Soviet bloc States. In essence, the Cuban government merely traded one imperial economic partner for another. By 1989, economic relations with the Soviet Union represented 70 percent of Cuba's trade.¹⁸ This "special relationship" with the Soviet Union and the socialist international trading system managed to shield the Cuban economy from the macroeconomic shocks that hit much of Latin America by the early 1980s. Between 1982 and 1985, as the rest of Latin America suffered with less than one percent annual growth, the Cuban economy enjoyed a 5.1 percent growth rate.¹⁹ This growth did not occur without cost to Cuba, however, as Soviet subsidies amounted to about 22 percent of Cuban disposable income between 1980 and 1987.²⁰

This well of subsidies ran dry with the collapse of the Soviet Union. By 1992, trade subsidies from the Soviet Union ended, with Cuba since suffering a period of plummeting prosperity.²¹ While the Cuban revolution had been successful at attaining high standards in health and education, the Cuban economy is just as dependent on outside trade as it was when the regime of Fulgencio Batista fell on New Year's Day 1959. Sugar has remained king of the Cuban economy. Between 1984 and 1989, 77 percent of Cuba's exports were attributable to sugar.

The strategy of import substitution is a dismal failure. The island's factories operate at only 30 percent capacity, with shortages being the norm. The need for American parts and the lack of Soviet replacements have been problems for over three decades. Food shortages have become common as imports have been seriously reduced to assist in the State's foreign exchange deficit. The average Cuban now gets below the recommended World Health Organization number of daily calories under the State food rationing program. Imported capital goods and intermediate goods, like oil, have become even more scarce, and black markets for food are more prevalent. Record-low sugar harvests have added to the problems. Jobs have been cut, with un-

17. SUSAN SCHROEDER, *CUBA: A HANDBOOK OF HISTORICAL STATISTICS* 433 (1982).

18. Garry Evans, *A Way Out of the Wilderness*, *EUROMONEY*, July 1992, at 40.

19. INTERNATIONAL MONETARY FUND, *WORLD ECONOMIC OUTLOOK* (Washington, D.C. 1987), and CUBAN MINISTRY OF INFORMATION REPORT, *ANUARIO ESTADISTICO DE CUBA* (1989).

20. See A.R.M. Ritter, *The Cuban Economy in the 1990s: External Challenges and Policy Imperatives*, 32 *J. OF INTERAMERICAN STUD. & WORLD AFF.* 117-49 (1990), and Andrew Zimbalist, *Teetering on the Brink: Cuba's Post-CMEA Economic and Political Crisis*, 24 *J. LATIN AM. STUD.* 407-18 (1992).

21. In a recent interview, Cuba's Central Bank President Francisco Soberón claimed that this perpetual economic slump had ended. Soberón claimed that Cuba's Gross Domestic Product ("GDP") grew by 2.5 percent in 1997, a "disappointment" in comparison with 1996's growth of 7.8 percent. The official estimate for GDP growth in 1998 is a modest 2.5 to 3.5 percent. See Pascal Fletcher, *Centrally Planned and Proud of It*, *FIN. TIMES*, Feb. 19, 1998, at 5. With the demise of centrally planned economies and the proven destructive nature of command economics, many economists would see these figures merely as fanciful propaganda.

employment rising rapidly. Prostitution, catering to foreign tourists, has been on the rise. In short, the Cuban economy is on the brink of disaster. Castro calls it Cuba's "special period."

In 1992, Castro put all hopes for resuscitating the economy of his struggling country on the encouragement of foreign investment. A cacophony of Canadian, European, and Mexican business people have taken Castro at his word and invested with him in the island's future. Drawn by pent-up demand, a highly educated workforce, and a commitment to economic reform, these entrepreneurs have put money into Cuba's strategic industries—telecommunications, oil exploration, and resources mining. Tourism has become a growth industry, as Canadian, German, and Spanish concerns have opened for business across the island. By late 1994, over 150 foreign country-Cuban joint ventures, comprising over \$1.5 billion in value, have been created. The only State left out of this entrepreneurial bonanza has been the United States. And this is a compelling factor drawing foreign companies to invest in Cuba—there is no American competition.

The U.S. has by no means been inactive concerning Cuba. Instead of engaging Cuba through economic links to foster political change, the U.S. State Department has worked to punish the foreign companies that conduct business with the Castro regime. Recent history in Eastern Europe has demonstrated the potential for political change that dialogue and trade can facilitate. But when it comes to Cuba, the Cold War is as hot as ever. For over thirty years, the economic embargo against Cuba has remained in force, each presidential administration, save the Carter era, doing more to strengthen it. But Castro's regime has survived eight U.S. presidencies. The embargo has crippled Cuba, but still the Castro regime remains in power. Washington understood that something had to be done to strengthen the embargo and increase its reach. Extraterritorial measures were necessary.

In 1983, the Reagan administration was only too ready to engage in such measures, even if it meant alienating its North Atlantic Treaty Organization ("NATO") allies. The economic embargo was further strengthened during the Bush administration. In 1992, President George Bush ordered an amendment to China's "Most Favored Nation" status contingent on China's reduction of assistance to Cuba. President Bush then backed a bill that further solidified the embargo, and the Cuban Democracy Act of 1992 ("the Torricelli Act") was signed into law during the 1992 Presidential campaign.²² President Bush, anxious to leverage his anti-Communist credentials, chose to sign the bill into law during a ceremony in the Cuban-American community in Miami. The Torricelli Act extended the reach of the embargo against Cuba through the use of sanctions. It was intended to "encourage" the Cuban government to begin a transition to democratic governance, by imposing severe penalties on U.S. subsidiaries operating in third countries that trade

22. The Act was first proposed by Congressman Robert Torricelli in 1988 and became law some four years later. 22 U.S.C. §§ 6001-6010 (Supp. IV 1992). For President Bush's speech, see 28 WEEKLY COMP. PRES. DOC. 2071 (Oct. 23, 1992).

with Cuba. Section 1708 of the Act states that Cuba can regain American-based assistance by implementing “free and fair elections for a new government.”

Section 1704 of the Torricelli Act allows the President to apply sanctions against any country that trades with Cuba. Section 1706 of the Act provides for an even more restrictive application of the embargo that was already in place.²³ Vessels previously docked in Cuba were to be severely limited in the ability to dock in the U.S. subsequently. A waiting period of 180 days had to follow, thereby limiting the ability of third parties to conduct trade with both Cuba and the United States and to take advantage of such geographical proximity for delivery of goods.²⁴

The international response to this Act was swift—Cuba’s trading partners were not impressed. But that did not stop elements in Congress from playing the Cuba card and further angering America’s trading partners. North Carolina Senator Jesse Helms built on the embargo where the Torricelli Act had left off. The Republican Senator, along with Indiana Congressman Dan Burton, sponsored the Cuban Liberty and Democratic Solidarity (Libertad) Act of 1995,²⁵ better known as the Helms-Burton Act, legislation so ridiculous in nature that it looked like it would languish in Congress as a hangover from the Cold War. Senator Helms forthrightly explained the Act’s intention: “Let me be clear. Whether Castro leaves Cuba in a vertical or horizontal position is up to him and the Cuban people. But he must and will leave Cuba.”²⁶

With such Cold War rhetoric, it was no surprise that for two years the Helms-Burton Act was not seriously considered, let alone adopted. Under the newly installed Clinton administration, relations between Washington and Havana saw some progress. Attempting to break with the Cold War mentality of the past, the new White House refused to be hamstrung by history. Knee-jerk reactions would be a thing of the past. Instead, dialogue and engagement ensued. President Clinton’s policy regarding Cuba was termed “calibrated response.” Washington responded proportionately to Cuban reforms; small shifts in Havana’s policies were to be met with small shifts in U.S. policy towards Cuba.

In the summer of 1994, such ripples turned into waves—waves of Cuban refugees. Over fifty thousand *balseros* (rafters) fled the Communist island in search of a better life in the United States, or at least a decent meal.²⁷ Hostility to the regime had been increasing, as had open defiance towards the Communist Party’s rule. Cuba’s leader needed a safety valve to relieve the pressures that a broken economy and an increasingly frustrated and hungry people could bring to bear on his regime. Castro had used the boatlift

23. 22 U.S.C. §§ 6001-6010 (1997).

24. *Id.* § 6005 (b)(1).

25. *Id.* §§ 6021-6091.

26. Kevin Fedarko, *Open for Business*, TIME, Feb. 20, 1995, at 39.

27. See George J. Church, *Cubans, Go Home*, TIME, Sept. 5, 1994, at 28.

from the Cuban port of Mariel in 1980 to rid his island of its dissidents and criminals, as some 125,000 Cubans sought refuge on U.S. shores, an unmitigated success for the Cuban government. Again, he let his people flee to the United States, this time on even more make-shift flotillas.²⁸

The waves of refugees created a crisis for the United States. The Clinton administration had a moral obligation to take in the hungry and sick of the world, but not so many of them all at once. President Clinton insisted that he would not let the boat people into the U.S. proper, confining the *balseros* who were intercepted by the U.S. Coast Guard to the U.S. Naval Station at Guantánamo Bay in Cuba. In the meantime, thousands more left the island. Washington realized that it had to negotiate some kind of deal with the Castro regime to stem this flow of humanity and diffuse the politically explosive situation.

On September 9, 1994, the U.S. and Cuba signed a new migration agreement in which the U.S. pledged that it would allow a minimum of 20,000 Cubans to enter the U.S. annually. In exchange, Cuba pledged to prevent any further unlawful departures from the island. This agreement was followed up with another one on May 2, 1995, when the Clinton administration and the Castro regime agreed to deal with outstanding refugee issues from the previous summer. Cubans interdicted at sea would no longer be taken to a safe haven but repatriated to Cuba. The approximately 32,000 Cuban *balseros* who had been moved to the U.S. naval base in Guantánamo Bay and were eligible for entry into the U.S. would be permitted to go to the U.S. mainland. A compromise had been reached and some form of relations commenced. Creative Problem Solving had shown some results.

In May 1995, Clinton announced that he would oppose the Helms-Burton Bill, still languishing in Congress. The Cubans then took a number of unilateral steps towards some reform. The Cuban government approved a license for Cable News Network, increased relations with the Catholic Church, further opened the Cuban economy to joint ventures, slowly allowed some forms of private enterprise, and released some political prisoners.

Such an incrementalist and flexible approach, part of President Clinton's calibrated response, was a start and saw some results. But leftover sentiments from the days of the Cold War urged the U.S. to soldier on in destroying the Communist regime in Cuba, even if it did not pose a direct national threat to the United States. Brothers to the Rescue, a Cuban exile group based in Miami, continued its flights in and around Cuban airspace, ostensibly to assist *balseros* caught in the Florida Straits. On February 24, 1996, two of the group's airplanes—U.S. registered aircraft—were intercepted and shot down by Cuban MiG jets after allegedly invading Cuban

28. The situation got so surreal that a French film crew, in Cuba to shoot a scene for a soap opera, had to stop shooting the beach scene for several days, as *balseros* kept floating into their set.

airspace and dropping anti-Castro leaflets.²⁹

Suddenly, the Helms-Burton Bill came back to life. It was an election year, and Bill Clinton did not want to alienate the highly motivated Cuban-American voters in Florida and New Jersey. There was some saber-rattling³⁰ and political gerrymandering, and a few weeks later, on March 12, 1996, the Helms-Burton Act was signed into law. President Clinton's "calibrated response" policy had gone down in the Florida Straits with the two Cuban exile airplanes.³¹ So had his freedom to maneuver politically around the issue of Cuba.

B. *The Helms-Burton Act – Much Ado About Something*

The most striking provision of the Helms-Burton Act is the enshrinement of the U.S. economic embargo against Cuba in U.S. law. Title I, Section 102 codifies all current Executive Orders and Regulations, making it necessary for the U.S. Congress, and not the President, to amend any existing law.³² Prior to this change, the embargo was based solely on Presidential Executive orders. It could be tightened or loosened at the President's discretion as conditions and, more likely, geopolitics dictated. President Clinton has now been left with close to no discretion in formulating U.S. policy towards Cuba. The Clinton Administration's policy of "calibrated response" has been dismantled in the process.

So was any hope of a multilateral approach to bringing democratic reform to the island. Title III of the Helms-Burton Act, dealing with the "Protection of Property Rights of United States Nationals," allows U.S. nationals to sue anyone "trafficking" in property confiscated by the Cuban government in U.S. federal court.³³ The provision extends the right to sue to citizens who were not U.S. citizens at the time of the confiscation. Thus, the

29. On December 17, 1997, a U.S. judge ordered Cuba to pay close to \$187 million in damages to the families of the three Cuban-Americans who were killed in the incident on February 24, 1996. Deutche Presse-Agentur, *Cuba Ordered to Pay Damages for Plane Shootdown*, Dec. 17, 1997.

30. See James Cooper, *Washington is Overreacting to the Cuban Attack*, THE GLOBE & MAIL, Feb. 27, 1996, at A17.

31. There are some who believe that Castro may have precipitated the resurrection of the Helms-Burton Bill, then languishing in Congress, by purposely shooting down the two airplanes, flown by the Miami-based Brothers to the Rescue, on February 24, 1996. Knowing that the impending U.S. legislation would send a chilling effect to foreign investment on his island, Castro may have wished to slow down the dollarization of his country's economy and the concurrent bifurcation of society into those with dollars and those without. In essence, the passage of the Helms-Burton Act has been a boon to Castro's regime. Domestic support for the Communist regime had been flagging. The regime could shut down a pro-democratic political council in Cuba that had been planning more dissident activities. Moreover, the party-controlled Cuban press could assist Castro in playing the nationalist card by claiming that the U.S. simply wanted to return Cuba to the pre-1959 *status quo ante*.

32. Pamela S. Falk, *The U.S.-Cuba Agenda Opportunity or Stalemate*, 39 J. INTERAMERICAN STUD. & WORLD AFF. 153, 161 n.2 (1997).

33. Helms-Burton Act § 302 (1995).

Helms-Burton Act provides U.S. citizens (including Cuban exiles who have become U.S. citizens) with property claims against the Cuban government the right to sue foreign investors who purchase an equity interest in, manage, or enter into joint ventures using property and assets that, in some cases, had been confiscated from U.S. nationals. In essence, Title III empowers wealthy Cuban Americans to commence an action against corporations of all nationalities with a view to extorting some sort of financial settlement from them because of the threat of treble damages that will be applied under some very vague criteria. Before the ink from President Clinton's pen dried on the Helms-Burton Act, Nicolas J. Gutierrez, Jr., of Miami's Adorno & Zeder, created 75 Florida corporations as potential plaintiffs so that even non-U.S. nationals could sue under the new Act.³⁴

This aspect of the Act was a very serious extension of the extraterritoriality of American law. President Clinton knew the possible explosive nature of Title III, and that there would be a flood of individual and class action lawsuits. From bilateral State visits to international multilateral summits, he would be forced to defend the fact that American legislators were making rules to punish foreign companies that trade with Cuba. A saving grace, albeit a temporary one, came when President Clinton negotiated with Congress the right to suspend Title III for periods of six months. While Title III was to become effective August 1, 1996, it was suspended on July 16, 1996,³⁵ and again on January 3, 1997. On July 16, 1997, Title III was suspended a third time.³⁶ It is likely that such suspensions will continue as long as Clinton deems it necessary to court international public opinion and favor with American trading partners whose companies are now doing business in Cuba. Despite these interim measures to suspend the enforcement of Title III, it is little wonder that the international community has been up in arms about the Helms-Burton Act's illegal reach.

Title III has not stood alone in causing such furor. Title IV of the Helms-Burton Act, entitled "Exclusion of Certain Aliens," has also created its share of international tension. It denies admission to the United States to foreign nationals—including corporate officers, principals, or shareholders with a controlling interest of an entity, and their spouses, minor children, or agents—who are determined to be involved in the trafficking of confiscated U.S. property.³⁷ Exceptions exist in cases of trade for humanitarian medical reasons or in which persons are defending themselves in legal actions regarding the confiscation. The U.S. government sent out letters to international companies operating in Cuba, informing the recipients that they and their families were at risk of becoming *persona non grata* in the U.S. because of charges the companies were operating in Cuba on property seized

34. Ann Davis, *Helms-Burton First Test Comes Soon*, NAT'L L.J., Apr. 1, 1996, at A6.

35. Drew Fagan, *Clinton Stalls Anti-Cuba Law*, THE GLOBE & MAIL, July 17, 1996, at A1.

36. *Clinton Extends Delay of Cuba Sanctions*, FIN. TIMES, July 17, 1997, at A1.

37. Helms-Burton Act § 401 (1995).

by the Castro regime from American interests.³⁸

The Helms-Burton Act does not just attempt to punish foreigners. The legislation further enhances the embargo by prohibiting any United States citizen from financing, in any manner, a foreign person trafficking in United States property nationalized, expropriated, or otherwise seized without adequate and effective compensation by Castro's regime.³⁹

In short, the Helms-Burton Act strengthens the economic embargo against the Cuban people. In an era where the American government has engaged Communist regimes in China, North Korea, and Vietnam, its approach to Cuba remains less forgiving and a complete violation of both international law and common sense.

II. WHY THE HELMS-BURTON ACT IS A POOR IDEA

A. *Violations of International Law*

There is little doubt that the American embargo against Cuba violates international law. The question is at which level the greatest violation occurs. The embargo is an affront to the United Nations Charter; it violates international conventions governing international trade; and it is a breach of the NAFTA. The United States is a contracting party to all of these international instruments.

1. *Violations of the Charter of the United Nations and the Charter of the Organization of American States*

The doctrine of State sovereignty is a fundamental principle of the international system. The U.S. embargo against Cuba, and in particular the implementation of rules penalizing third parties from third-party countries, is an attempt by the American government to enforce American laws on subjects of the laws of other countries. Such extraterritorial legislation is fundamentally a violation of international law.⁴⁰

It should be little wonder, then, that the international community has gone as far as censuring the United States for continuing the embargo on a regular basis. On November 3, 1993, the Forty-Eighth General Assembly of the United Nations adopted a resolution calling for the end of the United States' trade embargo against Cuba.⁴¹ The resolution condemns "the promulgation and application of Member States of laws and regulations whose

38. Drew Fagan, *U.S. to Expand Cuban Ban*, THE GLOBE & MAIL, July 20, 1996, at B1.

39. Helms-Burton Act § 103 (1995).

40. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS §§ 402-403 (1986). These sections set forth limitations on jurisdiction to prescribe, adjudicate, and enforce laws and regulations under international law.

41. G.A. Res. 48/16, U.N. G.A.O.R.

extrajudicial effects affect the sovereignty of other states."⁴² Similar resolutions were passed by the General Assembly on October 26, 1994; November 2, 1995; and November 12, 1996.⁴³ In the latter resolution, the General Assembly again overwhelmingly approved a resolution urging the U.S. to end its decades-old embargo against Cuba.⁴⁴ The vote was 138 to 3 (with 24 abstentions), by far the greatest majority for the international censure. On November 5, 1997, the General Assembly again urged the repeal of extraterritorial laws like the Helms-Burton Act.⁴⁵ The reason for such international condemnation is clear—the U.S. is attempting to impose its values and laws on subjects of other countries' laws, thereby breaching the sovereignty of those third-party countries.

Extraterritoriality clearly violates international law, as evidenced by the Charter of the United Nations. Article 2(4) of the U.N. Charter prohibits "the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the Purposes of the United Nations."⁴⁶ Some have argued that an economic sanction like an embargo is a form of force and a direct violation of this provision. Moreover, the intended purpose of the embargo is to bring about the change of regime in Cuba, another breach of the political independence of the island nation and a violation of this fundamental tenet of international law.⁴⁷ The United Nations "is based on the principle of sovereign equality of all its members."⁴⁸ Every country retains its inalienable right to self-determination—the pursuit of its own economic, social, and political destinies. Within its sovereign borders, the State is king. Thus, no State can promulgate laws that affect entities in other States. Accordingly, extraterritoriality is prohibited by the U.N. Charter.

Promulgation of extraterritorial laws can also be viewed as contrary to the Charter of the Organization of American States ("OAS"), of which the United States is a founder and principal player.⁴⁹ The OAS Charter prohibits the extraterritorial reach of a State's authority: "Each State has the right to develop its cultural, political and economic life freely and naturally. In this free development, the State shall respect the rights of the individual and the

42. *Necessity of Ending the Economic, Commercial and Financial Embargo Imposed by the United States of America Against Cuba*, G.A. Res. 52/10, U.N. G.A.O.R., 52d Sess., U.N. Doc. A/Res/52/10 (1997).

43. Resolution 49/9 and 50/10, respectively.

44. G.A. Res. 51/17, U.N. G.A.O.R. See *U.N. Renewals Call for an End to Cuba Embargo*, N.Y. TIMES, Nov. 13, 1996, at A6.

45. U.N. Doc. A/52/L.11 (Nov. 12, 1997).

46. U.N. CHARTER art. 2(4).

47. Article 2(4) of the Charter of the United Nations was declared a norm of *jus cogens*, a peremptory norm of international law from which no derogation is permitted, in *Case Concerning Military and Paramilitary Activities in and Against Nicaragua* (Merits), I.C.J. REP., 14 (1986) [hereinafter *Nicaragua*].

48. U.N. CHARTER art. 2, ¶ 1.

49. The U.S. had Cuba expelled from the Pan-American organization in 1962.

principles of universal morality.”⁵⁰ The OAS Charter also provides the following:

No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against the personality of the State or against its political, economic, and cultural elements.⁵¹

Clearly, this article limits any OAS member’s ability to extend its sovereign rule extraterritorially in order to influence and control the internal affairs of another State.

Beyond the laws that come from these international conventions, there exists a body of customary international legal norms that derive from State practice and State acquiescence to such practice. They also firmly proscribe extraterritoriality. According to the International Court of Justice, there exists in customary international law, as evidenced by the United Nations Charter and the Charter of the Organization of American States, a duty of non-intervention in the domestic affairs of another State.⁵²

2. *Violations of International Trade Law*

In addition to the laws that regulate the international system for the maintenance of inter-state relations and international order, the U.S. embargo against Cuba violates other fundamental provisions of international law. For example, the General Agreement on Tariffs and Trade (“GATT”)⁵³ was established to promote international trade and prevent contracting parties from mandating unfair trading practices in the international marketplace. Article V specifically reserves freedom of transit of international goods, no matter their origination, providing in part the following:

There shall be freedom of transit through the territory of each contracting party, via the routes most convenient for international transit, for traffic in transit to or from the territory of other contracting parties. No distinction shall be made which is based on the flag of vessels, the place of origin, departure, entry, exit, or destination, or on any circumstances relating to the ownership of the goods, of vessels or of other means of transport.⁵⁴

As concerns its own trading relations, the United States is fully within its rights to choose with whom it will do business internationally. Accord-

50. CHARTER OF THE ORGANIZATION OF AMERICAN STATES, art. 17.

51. *Id.* art. 19.

52. See *Nicaragua*, *supra* note 47.

53. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A5, 55 U.N.T.S. 188 [hereinafter GATT].

54. *Id.* art. V(2).

ingly, the U.S. can choose not to trade with Cuba. However, a fundamental principle of the GATT convention and the international trading regime, of which the United States is a founding architect, prohibits its contracting parties from taking any action that restricts the flow of trade of another Member State.⁵⁵ Article IX of GATT specifically forbids any limitation or restriction upon the importation of a product of another GATT Contracting Party.⁵⁶

On the other hand, the U.S. government has attempted to justify its trade law infractions by pointing to Article XXI of GATT, the provision that relieves signatories from applying GATT provisions to the extent necessary to preserve the security interest of the regulating State. A contracting party to GATT then may be permitted to impose protectionist measures, but only in the event that such measures are necessary to preserve its national security.⁵⁷

In an era of globalized economic relations, the Helms-Burton Act is a step backwards. Just ask America's trading partners.

B. *Damage to U.S. Trade Relations*

1. *Protest from Europe*

The European Union ("EU") has never been happy with the extraterritorial zeal of U.S. law. From American antitrust legislation to copyright protection, there have been constant clashes with the Europeans over the extraterritoriality of U.S. laws. This criticism is all well deserved. In 1992, the European Community (now the European Union) protested the Torricelli Act, stating in part the following:

[T]he European Community and its Member States cannot accept the extraterritorial extension of U.S. jurisdiction as a matter of law and policy . . . The Bill . . . would also prohibit any vessel from engaging in trade with the United States if the vessel has entered a port in Cuba during the preceding 180 days. Such a measure would be in conflict with

55. *Id.* art. V.

56. *Id.* art. XI(1).

57. The U.S. has claimed that its actions against Cuba could be justified under Article XXI of the GATT treaty, a provision that specifically exempts contracting parties from compliance with provisions of the treaty where potential threats to national security exist. With the end of the Cold War and the U.S.' growing trade relations with China and Vietnam, the U.S. government cannot seriously contend that Cuba remains a threat to U.S. national security. Before the Senate Foreign Relations Committee, Wayne Smith, Senior Fellow at the Center for International Policy, stated: "The Cold War is over. Cuba is no longer even a potential threat to us or any other country. It is not even a foreign policy concern." *U.S. Policy Towards Cuba: Hearings Before the Senate Foreign Relations Committee*, 103d Cong., Oct. 7, 1994, 2nd Sess. On the other hand, the Graham Amendment, currently before Congress and part of a defense budget bill awaiting President Clinton's signature, describes Cuba as a threat to U.S. national security. See Dalia Acosta, *Politics-Latam: Parlatino Condemns U.S. Graham Amendment*, INTER PRESS SERVICE, Nov. 17, 1997.

long-standing rules on comity and international law. . . .⁵⁸

The opposition to the Helms-Burton Act has been even louder, including the European Commission coming out strongly against it.⁵⁹ As its leaders met in Florence in June 1996, the European Union threatened to retaliate against these or other American attempts to impose extraterritorial secondary boycotts against the target countries.⁶⁰ It was a major foreign policy and international trade theme of the leaders' conference.

On October 16, 1996, the EU foreign ministers requested a dispute panel at a WTO meeting in Geneva to challenge the U.S. legislation. But as a sop to the United States, the EU provided a more measured response to the situation in Cuba and its opposition to the Helms-Burton Act in December 1996. The EU formally announced that it "encouraged a process of transition to pluralist democracy in Cuba . . . [but also] acknowledged that Cuba had [begun] a 'tentative' economic opening. [The EU] condemned the use of coercive measures that served to increase the economic hardship of the Cuban people."⁶¹ It wants better human rights conditions for the Cuban people, but it also wants to trade with Cuba and not be told by the U.S. that it cannot do so.

The European Commission showed its collective disdain for the extraterritoriality of the Helms-Burton Act by providing legislation that allows EU companies to seek compensation in court for damages resulting from being penalized under the Helms-Burton Act.⁶² The basic intention of the so-called "blocking statute" was to encourage European companies to disobey the U.S. legislation and enable them to counter-sue European subsidiaries of U.S. companies.

Individually, too, the members of the European Union have undertaken such legislative responses against the United States for enacting extraterritorial policies concerning Cuban trade. In 1980, the United Kingdom passed into law the Protection of Trading Interests Act, which was a response to American extraterritorial measures. This Act encourages British companies to ignore American laws that affect foreign sovereignty, like those regarding third countries and Cuban trade.⁶³ Other European States, such as France,

58. Letter from Ambassador Demarche of the European Community to the U.S. Department of State, Apr. 7, 1992.

59. European Union: Council Regulation 2271/96 of 22 November 1996, Protecting Against the Effects of the Extra-Territorial Application of Legislation Adopted by a Third Country, 36 I.L.M. 125 (1997). See also Vaughan Lowe, *Helms-Burton and EC Regulation 2271/96*, CAMBRIDGE, L.J. 248 (1997); Dr. Jürgen Huber, *The Helms-Burton Blocking Statute of the European Union*, 20 FORDHAM INT'L L.J. 699 (1997).

60. Craig R. Whitney, *Europe Assails U.S. Effort to Punish Investing in Cuba and Iran*, N.Y. TIMES, June 23, 1996, at A9.

61. Falk, *supra* note 32, at 154.

62. Neil Buckley & Guy de Jonquières, *E.U. Sets Up Machinery to Retaliate over Cuba Penalties*, FIN. TIMES, July 19, 1996, at 6; Reuters, *EU Set to Approve Plan to Resist U.S. Cuba Bill*, THE GLOBE & MAIL, July 30, 1996, at B7.

63. On June 17, 1996, the U.K. Parliament passed the new English Arbitration Act,

have made diplomatic protests in response to U.S. penalties against companies incorporated outside the United States that have been found by American authorities to be breaching American laws. Most recently, France showed its disdain for U.S. foreign policy by signing an agreement with Cuba that protects the interests of French companies that invest in Cuba.⁶⁴

But not every EU Member State is so adamant about criticizing the impugned U.S. legislation. Indeed, the reaction to the Helms-Burton Act has shown some chinks in the European Union's armor.⁶⁵ Europe's external trade policy has been a hallmark of the regional organization's success. The power that the now 15 members of the EU collectively wield is quite significant. Under the tutelage of Sir Leon Brittan, the Vice-President of the European Commission responsible for trade policy, the EU has been able to open markets across the world, lead in trade liberalization, and secure access for European countries.⁶⁶ The excesses of predatory trading by EU partners have been curbed as well.

To avoid a major breach with the U.S. that could threaten the future of the World Trade Organization, the EU postponed its challenge to the Helms-Burton Act.⁶⁷ In exchange, the United States agreed to continue to waive Title III of the law—the provision of the law allowing U.S. citizens to sue investors who profit from seized property—and to seek a change to Title IV—the provision that bars executives of companies investing in confiscated property, and their families, from entering the United States. In addition, the two parties agreed to work out a common policy on properties seized by the Communist government in Cuba after Fidel Castro took power in 1959.

In maintaining the Helms-Burton Act on the statute books, the United States has also acted in a manner that is disruptive and counterproductive to a functioning international trade regime. In a ridiculous flurry of diplomatic exchanges concerning the EU's protest of the Helms-Burton Act, the American government has threatened to undermine the whole WTO process, telling the Europeans that the U.S. would invoke a "national security exception" based on an assertion that Cuba poses a security threat to the United

which partially addresses this issue. See United Kingdom Arbitration Act of 1996, 35 I.L.M. 155 (1996).

64. Craig R. Whitney, *Ignoring U.S., France Signs Accord Protecting Cuba Ties*, N.Y. TIMES, Apr. 26, 1997, at A3. See also Marian Nash Leich, *Conflict of Jurisdiction—U.S. Economic Regulation*, 76 AM. J. INT'L L. 836, 840 (1982).

65. The Helms-Burton Act row has caused some rifts internally at the European Union. The EU led the charge that the American legislation was a violation of GATT and threatened to go to the World Trade Organization to press its case. The EU's powerful and cohesive opposition included threats of retaliatory measures against the U.S. Denmark, the country that rejected entry into the European Union's Maastricht Treaty in its first referendum on the issue, threatened to break EU ranks. Copenhagen would not allow its trade policy to be dictated to by Brussels. A last-minute deal was worked out, and the fifteen Member States could still speak as one. The weak foundations of the European Union were demonstrated, however.

66. See Leon Brittan, *New Tactics for EU Trade*, FIN. TIMES, Nov. 11, 1996, at A20.

67. David E. Sanger, *Europe Postpones Challenge to U.S. on Havana Trade*, N.Y. TIMES, Feb. 13, 1997, at A1.

States. The WTO panel would then be denied jurisdiction, as the matter would no longer involve a trade dispute.

When the WTO named three international experts to adjudicate the dispute, the U.S. went so far as to challenge publicly the WTO's fitness to adjudicate the dispute and announce that it would not cooperate with the panel. This stance by the U.S. government is not a good portent of things to come, as new trade issues arise and new negotiations of the liberalization of other sectors of trade come closer. Sir Leon met with American legislators on May 7, 1997, to discuss the pending settlement over the dispute. Sir Leon said that the April 1997 agreement with the U.S. was "not a solution to the problem, but has defused it and is a launch pad for further progress."⁶⁸ EU Commissioner Hans van den Broek has confirmed that the EU would revive the WTO disputes panel if Washington reneged on the April 1997 deal.⁶⁹ In the meantime, the European Parliament weighed in and took the European Commission to task. On May 15, 1997, the European Parliament passed a resolution criticizing the Helms-Burton Act and the extraterritorial policies of the United States and urged the European Commission to reintroduce its case at the WTO unless Parliament receives a satisfactory answer for its abandonment.⁷⁰

The deadline on dealing with the issue then passed with little action. The October 15, 1997, deadline came and went, yet no resolution appeared in sight. Negotiation sessions at an Organization for Economic Cooperation and Development ("OECD") multilateral meeting in November proved to be fruitless, as did a December 1998 Transatlantic Summit between the U.S. and the EU. Sir Leon's visit to the State Department in mid-March 1998 did little to put an end to this diplomatic row.⁷¹ By settling temporarily with the United States, the EU left Canada and Mexico holding the bag to fight the American legislation, disappointed and angry over the EU's inconsistent approach to world trade issues. The result is a trade row between Canada and the EU. Sir Leon Brittan chided Canada's lack of action on the NAFTA front. "We put our head above the block and Canada has declined to do so," Sir Leon told reporters as he headed into quadrilateral trade talks with his counterparts in Canada, Japan, and the United States on May 1, 1997.⁷² The EU's Trade Commissioner continued: "I find it a little curious that we have gone ahead and challenged the United States, taken a very high-profile action and got some progress from the United States as a result of that, very substantial progress. Canada has held back on (action through) NAFTA."

And while Sir Leon may have been right about Canada's attack of the

68. Reuters, *EU's Brittan Meets U.S. Lawmakers on Helms-Burton*, May 7, 1997.

69. Reuters, *Congress Plans to Tighten Anti-Cuba Law, Euro-MP*, May 15, 1997.

70. European Parliament Session News Press Release, *WTO and the Helms Burton Act*, May 15, 1997.

71. Nancy Dunne, *Swords Sheathed Over Cuba*, *FIN. TIMES*, Mar. 24, 1998, at A6.

72. Heather Scofield (Reuters), *Brittan Chides Canada for Slow Action on Helms-Burton*, May 2, 1997.

Helms-Burton Act under NAFTA, Canada has long been a vocal opponent of both U.S. legislation that encroaches on Canadian sovereignty and the U.S. embargo against Cuba.

2. Protest from Canada

Canada has a long experience with the extraterritorial application of U.S. law in its own jurisdiction, stretching back to the days of embargoes against Canadian companies doing business with China and the application of American antitrust laws to prevent government-approved activities in Canada in the cases of radio patents, potash, and uranium exports. Canadian foreign policy towards Cuba has traditionally favored trade in non-strategic goods. In 1968, as the Trudeau government slashed defense spending, it focused on cultivating good relations with certain leftist governments that the Americans found intolerable. Cuba was first on the list.

Currently, Canada is Cuba's largest trading partner. Canadians represent the largest proportion of tourists visiting Cuban beaches, and Canadian corporations hold the greatest number of joint ventures of all foreign investors. For the Canadians, the embargo was always a problem. Events of May 1991 foreshadowed what was to come for the Canadians. Regor International, a Canadian corporation, ordered 29,000 cases of Pepsi from Pepsi Cola Montreal, but Pepsi canceled the order when it learned that the final destination for the product was Cuba. Pepsi Cola Montreal claimed that, due to discussion between its Canadian office and the head office in the United States, it would be unable to fill any orders where the product's ultimate destination was Cuba.

The Canadian Minister of Foreign Affairs responded to this soft drink debacle by reprimanding the U.S., specifically opposing the direct and indirect extraterritorial application of U.S. trade policy towards Cuba through the U.S. government or U.S. parent corporations. The reprimand has grown particularly loud due to the new set of American legislation that goes beyond its own sovereign jurisdiction. As the Helms-Burton Act was making its way into U.S. lawbooks, Prime Minister Jean Chrétien told President Clinton that Canada would "never accept the notion of extraterritorial application of American laws."⁷³

Canada has demonstrated its independent foreign policy by voting to condemn the U.S. embargo against Cuba in the United Nations. The Canadian government resumed sending aid to Cuba in mid-1994, starting with desperately needed food, medicine, and vitamins. When Lloyd Axworthy, Canada's Minister of Foreign Affairs, made a much publicized visit to Cuba in January 1996 and signed agreements with Havana for trade and aid,⁷⁴ U.S.

73. Susan Delacourt, *PM Denounces U.S. Cuba Bill*, THE GLOBE & MAIL, Mar. 4, 1997, at A1.

74. Paul Knox, *Canada, Cuba Agree on Trade, Aid*, THE GLOBE & MAIL, Jan. 23, 1997, at A1.

Senator Jesse Helms called the visit "shameful,"⁷⁵ likening it to former British Prime Minister Neville Chamberlain's appeasement of Adolf Hitler in 1938.⁷⁶ With the sovereignty issues that the Helms-Burton Act had engendered, it should have been no surprise then that by year-end Canada had implemented legislation to allow Canadians to seek recovery in their courts for any losses suffered as a result of American legislation.⁷⁷ The Foreign Extraterritorial Measures Act received royal assent on December 30, 1996, and went into force two days later.⁷⁸

Canada has also proceeded on regional and international fronts. The Canadian government initially agreed to join the EU at the WTO in challenging the Helms-Burton Act.⁷⁹ With the EU negotiating a separate deal with the U.S. to avoid a trade challenge of the legislation, however, Canada may be fighting the dispute before the WTO alone.⁸⁰ The Canadian government has indicated that, depending on the outcome of a challenge to the Helms-Burton Act at the WTO, a case may go forward under NAFTA.⁸¹ In April and May 1996, Canada held consultations with the United States under the dispute settlement provision of NAFTA.⁸² The Canadian government has also held discussions with the Mexican government to rally support. And while the debate over the Helms-Burton Act remains behind diplomatic doors, the option to use NAFTA in a more adversarial way remains. "I've still got the NAFTA challenge in my back pocket," warned Canadian Trade Minister Art Eggleton. "If things break down and don't proceed, then I can always use that."⁸³

Of course, a win under NAFTA is not a sure thing. The United States could always claim a national security exemption under NAFTA, among others. If Canada were to lose the case, an international precedent for the legality of Helms-Burton-type legislation would arise. A number of Canadian interests in Washington would also be jeopardized.⁸⁴ The most damaging re-

75. Drew Fagan, *Our Man in Havana Wakes up Washington*, THE GLOBE & MAIL, Jan. 25, 1997, at D1.

76. Reuters, *Cuba Visit Likened to Appeasing Hitler*, THE GLOBE & MAIL, Jan. 21, 1997, at A14.

77. Larry Rohter, *Cuba Measure Strikes Back at the U.S.*, N.Y. TIMES, Jan. 11, 1997.

78. *Supra* note 9; see also Dow Jones Service, *Anti-Helms Bill Receives Royal Assent*, THE GLOBE & MAIL, Dec. 31, 1996, at B7.

79. Reuters, *Canada Joins EU in Fighting Anti-Cuban Law*, THE GLOBE & MAIL, Oct. 3, 1996, at B6.

80. Laura Eggertson & Peter Cook, *Canada to Fight Cuba Law Alone*, THE GLOBE & MAIL, Feb. 13, 1997, at A1.

81. *Id.* at A15.

82. NAFTA, *supra* note 7, art. 2006, ch. 20.

83. Heather Scoffield, *EU Chides Canada for Low Action on Helms-Burton*, Reuters, May 1, 1997.

84. It is easy to see how the Helms-Burton Act runs counter to the negotiations designed to liberalize investment rules among the 29 countries of the Organization for Economic Cooperation and Development. The impugned legislation continues to affect more than Canadian-American relations, for it threatens future multilateral efforts to reduce barriers to trade. In the days leading up to talks, Trade Minister Sergio Marchi warned that the

sult of a Canadian NAFTA complaint could be the strengthening of an already growing chorus of U.S. Congressional members who do not like the NAFTA dispute settlement mechanisms. Indeed, the U.S. Congress has shown increasingly little patience in dealing with the dictates of international tribunals, viewing the process as a loss of U.S. sovereignty. As a result, the Canadians are waiting to see what the EU does with respect to its WTO challenge, temporarily in abeyance. As long as President Clinton keeps suspending the implementation of Title III of the Helms-Burton Act, the Canadians have a pyrrhic victory at least. No Canadian companies would be open to lawsuits in U.S. federal court.

3. Protest from the U.S.' Other Trading Partners

Mexican television ran a series of commercials for a Mexican long-distance carrier. "Hi, I'm Burton Helms. I came to Mexico for the pleasure of doing your business," says the leering American executive in new television advertisements for the long-distance service of Teléfonos de Mexico, the telecommunications giant.⁸⁵ The idea behind the commercial is to show Mexican consumers that Telemex is a home-grown company, whose network reaches to Mexico's most remote towns.

It is ironic that Telemex is the company using the unpopular American legislation for its own benefit. Grupo Domos of Mexico, a Mexican telecommunications company, is under investigation over the "trafficking" of American property in Cuba.⁸⁶ The Cuban government sold 49 percent interest in the country's telephone system to the telecommunications giant from Monterey, and the American government has been hounding the company ever since.⁸⁷

Such aggressive policies from Washington have not gone unnoticed in Mexico City, as powerful opposition politicians have constantly attacked the U.S. government. Senator Hector Sanchez Lopez, a member of the Party of the Democratic Revolution, said that the Mexican government "complains about the extra-territoriality of the [Helms-Burton] law but under the table, it encourages Mexican companies with investments in Cuba to withdraw from it; commercial interests have overtaken our foreign relations principles."⁸⁸

Helms-Burton Act was "obviously a deal-breaker in terms of the Multilateral Agreement on Investment." See *Helms-Burton Strikes Again*, B.B.C., B.B.C. Summary of World Broadcasts, Sept. 30, 1997.

85. Julia Preston, *A Telecom Revolución in Mexico*, N.Y. TIMES, Nov. 14, 1996, at D1. See also Tim Coone, *Number, Please?*, LATIN TRADE, Feb. 1997, at 27.

86. Drew Fagan, *U.S. to Expand Cuban Ban*, THE GLOBE & MAIL, June 20, 1996, at B1.

87. See Garza's *Cuba Venture*, FIN. TIMES, May 7, 1994; *Mexico Plays Growing Role in Helping Cuba Withstand U.S. Trade Embargo*, WALL ST. J., Aug. 3, 1994; and *Fidel's End Run Around Uncle Sam*, BUS. WK., May 9, 1994, at 47. Telemex has run into trouble recently as U.S. regulators complain of the company's virtual stranglehold on Mexico's long distance carrier industry.

88. Adolfo Garza, *Trade Agreements under Senate Scrutiny*, AGENCE FRANCE PRESSE,

Rightist politicians, too, find fault in the government's hypocrisy.

On October 23, 1996, the Mexican government officially enacted its blocking statute, the Act to Protect Trade and Investment from Foreign Statutes which Contravene International Law.⁸⁹ Mexico has also made moves to reduce its overwhelming dependence on the United States, by entering into negotiations for a free-trade pact with the European Union.

It is not just Mexico that is upset with the extraterritorial measures that American legislation is enforcing. Malaysian Prime Minister Matathir bin Mohamad visited Cuba and defiantly announced that the Helms-Burton Act would not stop bilateral ties between his country and Cuba.⁹⁰ The U.S. government has also targeted Israeli and Italian corporations legitimately doing business in Cuba, sparking criticism from members of those respective States' governments.

During President Clinton's recent historic visit to South Africa, South African President Nelson Mandela lectured him on the folly of the U.S. government's policy towards Cuba.⁹¹ Even the Japanese have ignored the U.S. embargo towards Cuba. On March 18, 1998, Japan and Cuba signed a debt accord that rescheduled \$780 million of debt owed by the Cuban government to more than 180 Japanese companies. Such companies are Cuba's single largest creditor. Cuba's ambassador to Japan, Ernesto Meléndez, explained that the debt agreement was "an example that the international community is not taking notice of the U.S. embargo."⁹²

The Helms-Burton Act even drew the fire of the Pope during his visit to Cuba. In a letter to the Cuban youth, the Pope called the American embargo on Cuba "deplorable" and said that the embargo affected the most needy in society. He also criticized such sanctions as "always deplorable because they hurt the most needy."⁹³

Sept. 4, 1997.

89. Ley de Protección al Comercio y La Inversión de Normas Extranjeras que Contravengan el Derecho Internacional, *Diario Oficial de la Federación* of October 23, 1996, at 9-10, 36 I.L.M. 133 (1997). See also James F. Smith, *Free-Trade Treaty Sought by Mexico*, E.U., L.A. TIMES, Dec. 9, 1997, at A1.

90. *Prime Minister in Cuba Says Helms-Burton Law Will not Stop Ties*, Text from Tele Rebelde & Cuba Vision, Sept. 30, 1997.

91. Elizabeth Shogren, *Mandela Gives Clinton Lecture on Libya, Cuba*, L.A. TIMES, Mar. 28, 1998, at A1; see also Victor Mallet, *Mandela Attacks "Unfair" Trade Bill*, FIN. TIMES, Mar. 29, 1998, at A2. President Mandela admonished President Clinton during a news conference: "The United States as the leader of the world should set an example to all of us to help eliminate tensions throughout the world. And the best way of doing so is to call upon its enemies to say 'Let's sit down and talk peace.'"

92. Pascal Fletcher, *Havana Signs Japanese Debt Deal*, FIN. TIMES, Mar. 19, 1998, at A6.

93. The letter was handed to a delegation of Catholic youths at a mass in Camaguey, 500 kilometers (300 miles) southeast of Havana. He added, however, that the 35-year-old embargo was not responsible for all of Cuba's troubles.

C. *The Embargo Against Cuba Violates Common Sense*

Aside from contravening fundamental tenets of international law and incurring the wrath of America's most treasured trading partners, the Helms-Burton Act itself is antithetical to U.S. practical and commercial interests. The Act is completely contrary to the U.S. policy as applied elsewhere in the world: the push for trade relationships that encourage the liberalization of repressive regimes.⁹⁴ Historically, international trade and constructive engagement have brought about political change. Such was the case in Eastern and Central Europe during the 1980s.

But when it comes to the continuing embargo against Cuba, constructive engagement and any sense of consistency in foreign policy seem to have gone by the wayside. The United States government is ready to pursue flexible policies relating to those few Communist regimes that remain in the world—China, North Korea, and Vietnam—often in the face of egregious and systemic human rights abuses. Washington has granted Most Favored Nation treatment to Beijing despite the latter's poor record on democratic governance and human rights protection.⁹⁵ Trade links with China have not only gone without punishment, but with U.S. government assistance. On the other hand, Cuba remains a trading pariah for the United States. Relations with Havana, even for companies that are not subject to U.S. laws, are loaded with many risks.

And while the State Department sent out letters to the families of corporate executives from foreign countries who do business with the Cuban government warning of their possible blacklisting from entry to the United States as per Title IV of the Helms-Burton Act, the U.S. government has looked the other way as its own corporations and citizens have sought out business opportunities in Cuba. The U.S. Treasury Department formally prohibits all but journalists, scholars, and those visiting immediate family members from spending money in Cuba. Nonetheless, thousands of Americans travel to Cuba annually to visit family members using circuitous flight routes. Likewise, despite regulations that prohibit Americans from doing business with the Communist regime, American business people can be found throughout Havana. Coming through Mexico, the Bahamas, or Canada, they seek investment opportunities, often through foreign corporate en-

94. In many respects, the United States' economic embargo against Cuba is similar to the Arab boycott against Israel. For years, the United States was a vocal opponent to the use of secondary boycotts by the Arab States against companies that did business with Israel and even legislated against its own companies participating in the boycott. How dare the Arab world tell American companies with whom they may and may not trade, asked Washington. See Craig R. Auge, *Title IV of the Helms-Burton Act: A Questionable Secondary Boycott*, 28 LAW & POL'Y INT'L BUS. 575 (1997).

95. On May 19, 1997, President Clinton told the Young Presidents Organization in Washington that "I have decided, as all my predecessors have since 1980, to extend Most Favored Nation status to China for the coming year." Office of the Press Secretary, *Remarks by the President to the Young Presidents Organization*, May 19, 1997.

tities to skirt U.S. regulations. In 1995, about 1,000 Americans visited the island on exploratory missions.

And why not? The American media has set up operations there. President Clinton authorized CNN to open a Havana bureau and cleared the way for nine other American news organizations to set up shop in Cuba.⁹⁶ "American products are all over the island," according to Mark Entwistle, the Canadian ambassador to Cuba.⁹⁷ Coca-Cola soft drinks, General Electric microwaves, Black & Decker power tools, and General Motors automobile parts are all for sale on the island. Since the U.S. has maintained its embargo against Cuba, most of the products are shipped through a third country such as Mexico, Panama, or Venezuela. But even with such a backdoor to doing business with Cuba, U.S. businesses are losing out. A survey by the European-American Business Council was especially critical of sanctions imposed by the U.S. government, as they tend to do more harm to U.S. companies.⁹⁸ Clearly, there are increasing reasons why not only the extraterritorial measures promulgated by Congress but also those prohibiting American corporations from trading with Cuba must be removed.

The lack of common sense in continuing the embargo does not just stop with the U.S. government or with U.S. corporations doing business in Cuba through the backdoor. It emanates from the very people that lobbied Congress and the Clinton administration to pass the Helms-Burton Act in the first place. Legally transferred remittances to Cubans from American citizens amounted to over \$800 million in 1996 alone.⁹⁹ This amount of economic aid is over four times the amount of foreign investment coming from companies like those targeted by the Helms-Burton Act. Gross earnings from the tourism industry are forecast to reach close to \$1.8 billion in 1998.¹⁰⁰ If any one group is doing business with the Cubans, or at least is providing them with some economic sustenance, it is the exile community so committed to toppling the Castro regime. In sum, the Helms-Burton Act is not good for the long-term national interests of the United States.

The glaring inconsistencies in U.S. policy towards Cuba and the international censure with which the Helms-Burton Act has been greeted suggest

96. *News Outlets to Open in Cuba*, THE GLOBE & MAIL, Feb. 13, 1997, at A18; Steven Lee Myers, *Clinton Clears U.S. Media to Open in Cuba*, N.Y. TIMES, Feb. 13, 1997, at A6.

97. Laura Eggertson, *Americans in Cuba: Ambassador*, THE GLOBE & MAIL, Jan. 31, 1997, at B5.

98. The European-American Business Council conducted a study to measure the impact of economic sanctions on multinational companies and found that economic sanctions have harmed 80 percent of the companies surveyed. With respect to Cuba, the Helms-Burton Act has harmed 64 percent of companies surveyed. See <HYPERLINK <http://www.eabc.org/study/htm>> and <<http://www.eabc.org/study/htm>>. See also *Sanctions Hurt U.S. Companies Most, Study Finds*, B.B.C., Oct. 1, 1997.

99. Ernest H. Preeg, *Myths of Cuba: U.S. Embargo: The Illusion of Compliance*, CARIBBEAN UPDATE INC. (Thomson Corp.), Nov. 2, 1997. More recent figures estimate that total annual remittances account for up to \$1 billion. See Pascal Fletcher, *Centrally Planned and Proud of it*, FIN. TIMES, Feb. 18, 1998, at 5.

100. See Fletcher, *supra* note 99, at 5.

that the Clinton administration and Congressional lawmakers in Washington must change their current course. Not only is dialogue close to impossible under the current American policy towards Cuba, but dialogue with America's allies and trading partners has become embroiled in the Castro conundrum. Under United States law, the embargo against Cuba can be lifted only when the Cuban leader is removed from power. Moving away from the inflexible rules-based system that put the United States government into this situation in the first place requires new thinking—a move towards Creative Problem Solving.

III. CREATIVE PROBLEM SOLVING APPROACHES TO THE AMERICAN-CUBAN SITUATION

A. *The Fundamentals of Creative Problem Solving*

Creative Problem Solving is an evolving approach to law.¹⁰¹ It combines law, sociology, social psychology, and organizational behavior in a holistic fashion.¹⁰² As a subject matter of academic study, it is primarily being advanced in law schools in the United States,¹⁰³ although no one jurisdiction has any monopoly over the subject matter.¹⁰⁴ In essence, Creative Problem Solving expands the perspectives from which lawyers, lawmakers, diplomats, and other professionals may serve their respective clients and society as a whole. The practice of Creative Problem Solving requires a certain flexibility of mind and a bent towards the interpersonal sensitivity that enables one to apply the most appropriate skill at the most appropriate time. To resolve the broad diversity of human problems that confront professionals and conflict managers—lawyers, diplomats, and mediators, to name but

101. For articles that approach or integrate Creative Problem Solving, see Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754 (1984); Gary S. Laser, *Educating for Professional Competence in the Twenty-First Century: Educational Reform at Chicago-Kent College of Law*, 68 CHI.-KENT L. REV. 243 (1992); Roger Fisher & William Jackson, *Teaching the Skills of Settlement*, 46 SMU L. REV. 1985 (1993); Carrie Menkel-Meadow, *To Solve Problems, Not Make Them: Integrating ADR in the Law School Curriculum*, 46 SMU L. REV. 1995 (1993); Paul Brest & Linda Krieger, *On Teaching Professional Judgment*, 69 WASH. L. REV. 527 (1994); *Symposium: Creative Problem Solving*, 34 CAL. W. L. REV. 267 (forthcoming 1998).

102. For a brief exploration of the role of Creative Problem Solving in legal education, see James M. Cooper, *Educating Lawyers for the New Era*, S.D. UNION-TRIB., Mar. 1, 1998, at G-3. For a more in-depth analysis, see James M. Cooper, *Towards a New Architecture: Creative Problem Solving and the Evolution of Law*, 34 CAL. W. L. REV. (forthcoming 1998).

103. For a thorough exploration of the role that problem solving and negotiation should play in the law school curriculum, see Paul Brest, *The Responsibility of Law Schools: Educating Lawyers and Problem Solvers*, 58 LAW & CONTEMP. PROBS. 5 (1995).

104. Although limited to problem solving from a linear perspective, a good primer can be found in STEPHEN NATHANSON, *WHAT LAWYERS DO: A PROBLEM SOLVING APPROACH TO LEGAL PRACTICE* (London: Sweet & Maxwell 1997). Creative Problem Solving, by contrast, is non-linear in nature.

a few—Creative Problem Solvers must have the skills to select collaboration and facilitation in some contexts, and a litigious, adversarial, and competitive approach in other contexts.

In Creative Problem Solving, problems are viewed as multidimensional, often requiring non-legal or multidisciplinary solutions. Most conflicts have interconnected causes, and their effects often impinge on competing jurisdictions and disciplines. In short, entrenchment of law and legal precepts can sometimes work against the solving of problems. In fact, Creative Problem Solving requires the parties to part with a linear understanding of the history of the situation. By focusing on a problem's past, we are often stuck in entrenched positions, from which no collaborative solution can be found.

Likewise, conflict, so often viewed as a zero-sum game, must be re-evaluated. With all the binary byproducts that come with conflict—rights and liabilities, winners and losers, victor and vanquished—a new multipolar, nonlinear approach must be embraced. The use of Creative Problem Solving techniques—interactive listening, consensus-building, and proactive dialoguing—can assist in resolving situations and in building, maintaining, and strengthening positive relationships with other, seemingly adversarial, parties. In using such tools, conflict can be viewed as the exploration of opportunities—opportunities for integrative bargaining and opportunities for workable win-win solutions.

In the context of diplomacy and statecraft, Creative Problem Solving requires a policy of flexibility and openness to collaborate with allies and adversaries alike. The entrenchment of rights and formalities, the sword of historical grievances and attendant search for restitution, and the recourse to unilateral and monodirectional actions are the enemies of Creative Problem Solving. They are tools that will ensure failure.

After more than thirty-five years of pursuing policy objectives that have failed miserably, it is time for Washington to approach Havana with new thinking. Castro remains in power, Havana continues to deny the Cuban people fundamental freedoms and human rights, and the anti-Castro exile community in Miami waits for the fall of the Castro regime. It could be 1961 as much as it is 1998.

B. Applying Creative Problem Solving to the American-Cuban Situation

Creative Problem Solving allows for measured gestures and a move towards normalized relations with the Cuban government. The Pope showed what constructive engagement could do in Eastern Europe. The so-called "Jaruzelski Effect" was not the only reason to undertake such a mission.¹⁰⁵ It

105. In June 1979, the newly installed Pope returned to his native Poland and helped to ignite the Solidarity trade union movement. He returned to Poland again in June 1983 and stood up for the outlawed Solidarity, in the face of increasing crackdowns by the regime of strongman Wojciech Jaruzelski. In June 1991, the Pope made his first trip to a free Poland,

is not just about changing the political face of one's adversary and encouraging a change in regime. It is also about alleviating the hardships that the Cuban people are facing daily—the lack of health and medical facilities and proper nutrition that has come with the tightening of the economic embargo.

Many Americans are calling for an end to the economic boycott against Cuba. It started with the Church. Following a visit to Cuba, Boston-based Cardinal Bernard Law wrote a column in *The Boston Globe* criticizing the U.S. government's economic embargo against Cuba.¹⁰⁶ Indeed, religious organizations have taken the lead in calling for an end to the U.S. embargo against Cuba. On January 21, 1998, the day the Pope arrived in Cuba, an advertisement ran in *The New York Times* that called for an end to the U.S. economic embargo against Cuba. It also called for Washington to "reevaluate its policies towards Cuba."¹⁰⁷ Signed and sponsored by a number of religious institutions in the United States, the advertisement called for "a healing and dialogue" between "the people of Cuba and the people of the United States" to help end the "years of suspicion and hostility between our governments that have deformed the relationship between our countries."¹⁰⁸

American leaders have long recognized that their government's embargo against Cuba was harming the Cuban people and doing little to change the Communist regime. Finally, they are beginning to say so publicly. United States business leader David Rockefeller has criticized the Helms-Burton Law, explaining his "sensation of horror" when President Clinton signed it into law.¹⁰⁹ Rockefeller has founded Americans for Humanitarian Trade with Cuba, a lobby group that includes Dwayne Andreas, Chairman of Archer Daniels Midland, Carla Hills, President Reagan's Trade Representative, Lloyd Bentsen, former Senator and Secretary of the Treasury in the first Clinton administration, and John J. Sheenhan, Retired U.S. Army General and former head of the Atlantic Command. Along with members of the U.S. Chamber of Commerce, this blue-ribbon business group is lobbying for the passage of two pieces of legislation pending in Congress to lift the embargo on the sale of food and medicine to Cuba.¹¹⁰

The first piece of legislation, the Cuban Humanitarian Trade Act of 1997, was introduced in June 1997 in Congress and was cosponsored by a bipartisan group of 84 representatives. The Cuban Women and Children Humanitarian Act, introduced in the Senate in November 1997, was also supported by a bipartisan group. Both bills aimed to revoke the ban on the

drawing huge crowds and much praise for his work in bringing down the Iron Curtain and returning democracy to Poland.

106. Diego Ribadeneira, *Boston Cardinal Critical of U.S.*, BOSTON GLOBE, Apr. 11, 1996.

107. *Groups' Ad Criticizes Boycott of Cuba*, L.A. TIMES, Jan. 17, 1998, at B5.

108. *Id.*

109. *Rockefeller Blasts Helms-Burton Law*, IAC NEWSLETTER DATABASE (Thomson Corp.) Nov. 1, 1997.

110. Stanley Meisler, *U.S. to Look at Easing Cuba Aid Ban*, L.A. TIMES, Jan. 27, 1998, at A6.

sale of medicine and food to Cuba—clearly the most inhumane and odious portions of the embargo.

Before the whole embargo can be lifted, however, a more gradual approach may be in order—a renewal of the policy of “calibrated response” first favored by the Clinton administration. A greater dialogue with Havana is necessary before the economic sanctions can be lifted. It is not just the U.S. government that has to change its ways. Some good faith measures by the Castro regime are also in order. The main justification behind the embargo against Cuba is that economic sanctions will get political results. In essence, the embargo is intended to force the Cuban government to change its economic and political policies. What the powers in Washington do not understand is that Cuba has already made many changes that should be viewed more positively.

For starters, the Cuban government reactivated a joint venture law, first passed in 1982, which guarantees repatriation of profits and even allows majority foreign ownership in certain cases. In the summer of 1993, the Cuban government depenalized the use of the U.S. dollar. For years, the mere act of being in possession of a U.S. dollar bill was a crime punishable by a prison sentence. That same summer, the Cuban government set up a series of shops, similar to those that were exclusively created for tourists, on the island where local Cubans could buy imported consumer goods.

A year later, two significant measures were implemented to tap private initiative. Most State farms were transformed into worker-run cooperatives, which received the right to use the property while title to the property itself still belonged to the State. Once food shortages became too severe, farmers were permitted by law to sell some of their produce on the open market. By late 1994, farmers’ markets were resurrected, allowing agricultural producers to sell foodstuffs at unregulated prices. These markets had been introduced in the early 1980s, but were disbanded six years later after the leaders of the Cuban government saw abundant cases of profiteering. In 1994, the Cuban government also widened opportunities for self-employment. Many urban workers displaced by the economic chaos befalling Cuba were now able to sell their services. Some creative entrepreneurs managed to hire others by charging them a nominal fee to be part of a “self-employment coop.”¹¹¹

Hence, some moves toward economic freedoms have been made, although there is much more work to be done in allowing entrepreneurial activity without burdening it with overtaxation and overregulation. Creative Problem Solving allows for the recognition of actions taken. The U.S. government must acknowledge these steps by the Castro regime as part of its

111. It is true that the result of dollarizing the economy has been mixed—two economies now exist concurrently. A two-tiered society, one dollarized and the other stuck in the inconvertible Cuban peso, is a fact of life in Cuba. With its bent on tourism and foreign exchange, prostitution became rampant, making Havana of the 1990s look very similar to that of the 1950s before the Cuban revolution.

slow march towards fuller dialogue. Indeed, some of the opening in Cuban society—the legalizing of some entrepreneurial activities, for example—can be attributed to the low-level diplomatic dialogue between the Clinton administration and Havana in 1994 and 1995. The next step for Havana has to come in the form of political action—the one-party system under the Cuban Communist Party must be opened and the freedom of association and expression protected. This step may be unlikely at first, given Castro's complete rejection of a multiparty open political process.

Equally unlikely is that a total reversal of U.S. policy towards Cuba can occur in quick succession. The best first gesture by the United States, and one which would be a measure of good faith shown to her trading partners, would be the repeal of the Helms-Burton Act. The Creative Problem Solving approach to the Castro conundrum requires that the inane regime created by the Helms-Burton Act be scrapped, thereby providing at least a partial lifting of the overall economic embargo.

The embargo has ravaged the island's economy. One Cuban study estimates that non-enforcement of the Torricelli Act and just a partial lifting of the embargo could quickly produce a doubling of import capacity and a 25 percent hike in the Cuban national income.¹¹² Maybe then the Cuban government could afford to import the food and medicine it so richly requires.

IV. CONCLUSION: THE POPE, THE PRESIDENT, AND THE POLITBURO

As the Pope was ready to board his airplane for Rome, having wound up his historic visit to Cuba, Fidel Castro spoke to the aging missionary and replied to the Pontiff's calls for more political freedoms. From the tarmac in Havana, Castro said, "For all your words, even those with which there might be disagreement, I offer my thanks."¹¹³ Indeed, the Pontiff's trip had been a watershed in the history of the Communist nation. A formal dialogue had begun between the two aging representatives of the world's last bastions of overarching dialectical ideologies—the Roman Catholic Church and Communism. Indeed, some results began to show from the visit almost immediately.

It was not by accident that, just weeks after the Pope's visit, the Cuban government announced that it would be releasing more than 200 prisoners, many of them political detainees.¹¹⁴ This move was the biggest pardon of prisoners in more than two decades, and was, according to Foreign Minister Roberto Robaina, in response to an appeal for clemency made by Pope John

112. Elena C. Alvarez, *Algunos Escenarios Sobre la Evolución Future del Bloqueo*, Paper Presented at XVII Congress of the Latin American Studies Association (Atlanta, Mar. 1994), at 36.

113. S. Lynne Walker, *Pope's Stirring Appeal for Liberty Electrifies Cubans*, S.D. UNION-TRIB., Jan. 30, 1998, at A3; *One Small Chink in Cuba's Prison Doors*, ECONOMIST, Feb. 21, 1998, at 33.

114. *Cuba to Free 200 Prisoners*, FIN. TIMES, Feb. 13, 1998, at 1.

Paul II during his historic visit.¹¹⁵ On April 7, 1998, twelve political prisoners, all of whose cases were raised by the Pope during his visit with Castro, were flown into exile in Canada. The twelve were all serving sentences for deemed political crimes against Cuba.¹¹⁶

Moreover, just weeks after the Pope's visit, a marked change occurred in Havana's policies that most concerned the Vatican. At his acceptance speech, having been reelected President of Cuba for an additional five-year term, Castro announced to Cuba's National Assembly that, as a "revolutionary and public figure," he was against abortion, especially when it is used as a form of birth control.¹¹⁷ Throughout the Pope's visit to Cuba, the Pontiff rallied for family values and criticized the rampant abortion rate in Cuba—estimated to terminate as many as 40 percent of all pregnancies.¹¹⁸ The Cuban leader's comments on abortion were a clear indication that he had listened to the Pope's alarm and was making concessions.

During his visit to Cuba, the Pope called for the reopening of Cuba's religious schools, closed by the Revolution since 1961. The Pope also consistently pressed for the need to protect fundamental freedoms, such as the right of assembly and expression. The fact that such calls were carried on Cuban State Television and were not deleted from the broadcast was a case in point that such an opening, albeit small, had begun.¹¹⁹ Indeed, the dialogue between the Vatican and Havana had shown some tangible results.

There were also some consequences of the Pope's visit concerning the Helms-Burton Act. The Pontiff derided the U.S. embargo against Cuba and its effects on the Cuban people. The United Nations Children's Fund (UNICEF) has reported that the embargo is one of several factors adversely affecting children in Cuba. Moreover, women's health services have seriously declined in the past few years, and there is no access to drugs for the sick and ailing. A lack of supplies has led to the closure of forty percent of the water chlorination plants, increasing the incidence of typhoid fever, dysentery, viral hepatitis, acute diarrheal diseases, and parasitism, all serious threats to children's health. It is no surprise that the Pope, on the last day of his visit to Cuba, called the U.S. embargo against Cuba an "oppressive eco-

115. A few days following the initial report, however, Robaina made clear that this gesture was not intended as a bargaining ploy to obtain an easing of the U.S. economic embargo. He also announced that the Cuban government would actually be releasing 300 prisoners, as opposed to the 200 first announced. See *Pardons "Not Bargaining Ploy,"* FIN. TIMES, Feb. 16, 1998, at 2; *One Small Chink in Cuba's Prison Doors,* ECONOMIST, Feb. 21, 1998, at 33.

116. Pascal Fletcher, *Havana Departs 12 to Cuba,* FIN. TIMES, Apr. 7, 1998, at A5.

117. Pascal Fletcher, *Castro: No to Chastity Belts, No to Cokes,* FIN. TIMES, Feb. 26, 1998, at 6. See also *Brother Fidel and the Women of Cuba,* ECONOMIST, Feb. 28, 1998, at 42 [hereinafter *Women of Cuba*].

118. See *Women of Cuba,* supra note 117.

119. One could argue that, since the Pope's visit was sanctioned and sponsored by the Cuban government and the Communist Party-led administration had given the Cuban people the day off to see the Pope, this alleged opening was merely a guise and not the institutionalization of fundamental political freedoms and human rights.

conomic measure—unjust and ethically unacceptable—imposed from outside the country.”¹²⁰ Indeed, the embargo is not changing the Cuban government, but it is starving the Cuban people. Since the Pope’s visit, U.S. legislators and business people have taken their lobbying efforts into high gear to legislate exceptions—including the provision of food and medicine—to the long-standing economic embargo.

On March 20, 1998, President Clinton announced an easing of the embargo against Cuba. Washington was to end the bureaucratic procedure that stifled the shipment of medical supplies to Cuba. In addition, remittances to Cubans from Cuban Americans were legalized.¹²¹ Clinton also resumed humanitarian charter flights of cargo and caregivers directly from the U.S. Lastly, the President urged Congress to collaborate in developing a bipartisan approach to easing food shipment restrictions.¹²² All of these measures were directed to helping the Cuban people rather than their dictatorial leader. “The Cuban people are beginning to look beyond Fidel Castro,” explained Secretary of State Madeleine Albright. “We must do the same.”¹²³ Washington has even begun to soften its diplomatic isolation of Cuba. On April 6, 1998, at a meeting of the Caribbean Community (“Caricom”), Secretary of State Albright announced that the U.S. would not attempt to dissuade Caricom from admitting Cuba to its membership.¹²⁴

Even with the continuation of the U.S. economic embargo against Cuba, Fidel Castro’s reign of power is not in immediate jeopardy. Canadian Prime Minister Jean Chrétien may have expressed it best in referring to the embargo against Cuba: “They’re just making it possible for Castro to stay in power, because he has an excuse, he can blame the Americans.”¹²⁵ Castro’s Marti-esque national hand is further strengthened. The demon to fight, according to Castro and his propaganda machine, is still the U.S. imperialist tendency. The continuing economic crisis has not harmed his popularity. Through a combination of tactical skills, endurance, and nationalist fervor that taps into the Cuban people’s collective psyche, his leadership goes unchallenged.¹²⁶ That the Communist Party is the only legal political party also

120. S. Lynne Walker, *Pope’s Stirring Appeal for Liberty Electrifies Cubans*, S.D. UNION-TRIB., Jan. 30, 1998, at A3.

121. While remittances of up to \$1200 per family were formally suspended in 1994, Cuban Americans continued to ignore this rule—to the tune of an estimated \$500 to \$800 million annually.

122. Tyler Marshall, *New Policy on Cuba Will Aim to Aid All but Castro*, L.A. TIMES, Mar. 20, 1998, at A1.

123. Walter Russell Mead, *Remaking U.S.—Cuba Policy*, L.A. TIMES, Mar. 39, 1998, at M2.

124. Canute James, *Washington Eases Stance Over Cuba*, FIN. TIMES, Apr. 7, 1998, at A4.

125. Madeleine Drohan, *Chrétien Blames U.S. for Helping Cuba*, THE GLOBE & MAIL, Jan. 23, 1997, at A13.

126. Even if the political nature of Havana will not change significantly, good reasons exist to keep in contact with the Castro regime. The resumption of the nuclear power plant at Juraguá, mothballed long ago, is a case in point. To ensure that international nuclear en-

helps.¹²⁷

On February 24, 1998, Castro was officially reelected President of Cuba for another five years,¹²⁸ and, barring ill health, there is every likelihood that his next administration will outlive that of Bill Clinton's. Accordingly, dialogue with Castro's regime is essential to bring Havana into line with the international community's demands for protection of fundamental political and human rights on the island.¹²⁹

But dialogue is not possible under the regime created by the Helms-Burton Act. Instead, inflexibility has taken the day, for the policy towards Cuba has been taken out of the President's hands and chiseled into stone. No U.S. President can lift or even relax the embargo until Fidel Castro and the existing Cuban regime fall from power. By enshrining into American law the embargo against Cuba, all forms of flexible diplomacy have been forfeited. The Helms-Burton Act stipulates that the U.S. economic embargo can be lifted only when a "transitional government" comes to power in Havana. To remove all doubt, a transitional government is defined as one that legalizes all political activity, releases all political prisoners, holds free elections under international supervision, respects private property, promises to restore confiscated property to its pre-1959 owners, and excludes Fidel Castro and his brother, Raúl, Defense Minister and head of the Cuban Armed Forces.

To facilitate a dialogue between Havana and Washington, the Helms-Burton Act must be repealed. The Clinton administration must have the foresight to undertake this challenge bravely.¹³⁰ Despite the enactment of the Helms-Burton Act, the world's trading States are doing business in Cuba. More than 1800 companies from 61 countries participated in a recent trade fair in Cuba. Many business people are doing business with the Castro regime. It is time that the United States government formally allow its compa-

ergy safety standards are met, the American government should be monitoring the project. Any nuclear mishap could devastate more than Cuba. As the accident at the Chernobyl nuclear plant proved, nuclear waste does not respect territorial boundaries. The project has already cost more than \$1 billion, and requires another \$750 million to finish construction. This project should further entice the U.S. to work with the Cuban government, not against it. An ounce of prevention could be worth a pound of cure in the event of a nuclear waste cloud flying over the Florida Straits. Larry Rohter, *Cuba's Nuclear Plant Project Worries Washington*, N.Y. TIMES, Feb. 25, 1996, at A6.

127. Fidel Castro could also do with a lesson on Creative Problem Solving. Unwilling to compromise, the Cuban President has denounced these measures. From his perspective, the whole embargo must be lifted, not a few small exceptions legislated into the arduous regime.

128. Pascal Fletcher, *Castro: No to Chastity Belts, No to Cokes*, FIN. TIMES, Feb. 26, 1998, at 6.

129. See *Situation of Human Rights in Cuba*, U.N. Resol. 51/113, U.N. Doc. A/RES/51/113 (1997).

130. Mike Clary, *Pope's Cuba Visit Fosters Attitude Shift*, L.A. TIMES, Feb. 28, 1998, at 14. In the wake of recent public opinion polls showing strong support among Cuban Americans for the continuation of the embargo, it is unlikely that such a move will occur soon.

nies and citizens to do the same.

We have the right to expect more from the Clinton administration during its second term. President Clinton has long championed the notion of global free trade and the dangers that come with trade protectionism. He favors multilateral and flexible approaches to international problem solving. President Clinton appreciates the order that following international law can bring. But the current U.S. policy towards Cuba, as typified by the embargo, violates international law as well as common sense. The United States should not be punishing Cuba's trading partners, let alone Cuba. In an era where globalization and the breakdown of borders are commonplace and trade liberalization is trumpeted, trade embargoes are counterproductive.

Enacting legislation with a view to unseating a foreign leader is more than bad diplomacy—it is bad politics. Having outlasted eight Presidents—Bill Clinton being the ninth—Fidel Castro has shown he is a skilled negotiator. Having fought a three-year guerrilla campaign in the Sierra Maestra mountains and lived through an invasion and various assassination attempts, he has demonstrated keen survival skills. The harsh results of the economic embargo have yet to force him to change his regime's policies on fundamental human rights. As a bone in the throat of the United States, he has developed uncanny strategic sense. He is also apparently quite a host, as the Pope's trip to Cuba showed.

In the days leading up to the Papal visit, Castro invited U.S. President Bill Clinton to pay a similar visit to Cuba. On Saturday, January 17, 1998, during a six-hour televised speech to the nation, the Cuban leader challenged the American President to come to Cuba and to teach the Cuban people "about capitalism, neo-liberalism and globalization."¹³¹ Coincidentally, that same day President Clinton suspended for the fourth time the implementation of Title III provisions of the Helms-Burton Act, further stalling the ability of Cuban exiles (now U.S. nationals) to sue foreign corporations in U.S. courts for "trafficking" in expropriated property in Cuba.

Maybe it is time for President Clinton to work towards dismantling the Helms-Burton Act and making travel plans to Cuba. Men more holy than he have made the pilgrimage. Indeed, the American President has much to learn from the Pontiff. President Clinton once admitted that "[t]he Pope is a very persuasive fellow."¹³² Mr. Castro could admit the same. Perhaps they can all learn from each other. But that happens only by talking to each other.

131. Reuters, *Castro Mockingly Invites Clinton to Visit Cuba*, Jan. 17, 1998, and United Press International, *White House Questions Cuba's Invitation*, Jan. 20, 1998.

132. Pascal Fletcher, *Cubans Make Light of the First Coming*, FIN. TIMES, Jan. 17, 1998, at 3.

