

New Era for the Helms-Burton Act and the Canadian and EU Blocking Statutes

The View from Canada

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Navigating Between Conflicting U.S. and Canadian Trade Controls

- ↪ navigating Canadian and U.S. trade controls
 - ↪ generally close alignment of policies
 - ↪ adoption of most stringent rules
 - ↪ critical exceptions
 - ↪ U.S. ITAR/EAR licensing
 - ↪ Cuban trade or investment opportunities

The United States, Canada and Cuba

- problem, whether or not you trade with Cuba
- Canada's expanding economic relationship with Cuba
 - Canada is one of Cuba's largest trading partners
 - Canadian exports to Cuba - machinery, agrifood products, sulphur, electrical machinery, newsprint
 - Canadian imports from Cuba - ores, fish and seafood, tobacco, copper and aluminum scrap and rum
 - Canada is one of Cuba's largest source of foreign direct investment
 - Canadian FDI - nickel and cobalt mining, oil and gas, power plants, food processing

The United States, Canada and Cuba

- ▭ expanding extraterritorial reach of U.S trade embargo
 - ▭ 1962 – imposition of full trade embargo under Trading With the Enemy Act
 - ▭ 1975 – elimination of general license allowing trade by foreign non-banking entities
 - ▭ had to apply for specific license and demonstrate independent operation re decision-making, risk-taking, negotiation and financing
 - ▭ 1990 – Mack Amendment proposed outright prohibition on issuance of licenses to foreign affiliates of U.S. firms
 - ▭ 1992 – Cuban Democracy Act
 - ▭ 1996 – Helms-Burton Act extends aspects of Cuban embargo to non-U.S. companies that have no connection with U.S. entities

Current U.S. Measures vs. Cuba

- Cuban Assets Control Regulations
 - administered by U.S. Treasury' Office of Foreign Assets Control
 - prohibition on foreign entities owned or controlled by U.S. persons from doing business with Cuba
- Export Administration Regulations
 - administered by the U.S. Department of Commerce's Bureau of Industry and Security
 - requires that a re-export license be applied for where U.S. content is 10% or more
- Helms-Burton Act
 - Title III – private right of action vs. “traffickers” in “confiscated property” (right suspended every six months until recently –came into effect May 2, 2019)
 - Title IV – bar on entry in the United States for traffickers, their spouses and minor children

Canadian Response to U.S. Trade Embargo of Cuba

- ↪ diplomatic
- ↪ NAFTA/WTO?
- ↪ primarily FEMA and the 1996 FEMA Order

The Foreign Extraterritorial Measures Act

- ▭ extraterritorial anti-trust motivations
- ▭ authorization for Attorney General to make orders where foreign state or tribunal takes measures impairing Canada's interests regarding international trade or infringing on Canadian sovereignty
- ▭ Canadian Attorney General can
 - ▭ prohibit production or disclosure of records before foreign tribunals
 - ▭ declare that judgements of foreign tribunals not be recognized or enforceable in Canada
 - ▭ require notification of directives or other communications relating to such measures
 - ▭ prohibit compliance with such directives or measures

The Foreign Extraterritorial Measures Act (cont'd)

- ▭ “Helms-Burton amendments”
 - ▭ block recognition or enforcement of Title III judgements
 - ▭ restrict production of records for Title III actions
 - ▭ “clawback” of damages from successful Title III plaintiffs
 - ▭ recovery of defense expenses prior to Title III judgement

- ▭ criminal penalties
 - ▭ corporation – up to CDN\$1.5 million
 - ▭ individual – up to CDN\$150,000 and/or five years imprisonment

The Foreign Extraterritorial Measures Act (cont'd)

- ↪ 1992 “blocking” order, updated 1996
 - ↪ obligation to notify Canadian Attorney General of certain communications
 - ↪ prohibition against complying with certain U.S. trade embargo measures
- ↪ penalty exposure: up to \$1.5 million and/or 5 years imprisonment

The Foreign Extraterritorial Measures Act (cont'd)

- ↪ applies to
 - ↪ any “Canadian corporation” - a corporation that is registered or incorporated under the laws of Canada or of a province and that carries on business in whole or in part in Canada
 - ↪ and its directors, officers, managers and employees in a position of authority

The Notification Obligation

“Every Canadian corporation and every director and officer of a Canadian corporation shall forthwith give notice to the Attorney General of Canada of any directive, instruction, intimation of policy or other communication relating to an extraterritorial measure of United States in respect of any trade or commerce between Canada and Cuba that the Canadian corporation, director or officer has received from a person who is in a position to direct or influence the policies of the Canadian corporation in Canada.”

The Non-Compliance Obligation

“No Canadian corporation and no director, officer, manager or employee in a position of authority of a Canadian corporation shall, in respect of any trade or commerce between Canada and Cuba, comply with an extraterritorial measure of United States or with any directive, instruction, intimation of policy or other communication relating to such a measure that the Canadian corporation or director, officer, manager or employee has received from a person who is in a position to direct or influence the policies of the Canadian corporation in Canada.”

What is an “Extraterritorial Measure of the United States”?

- defined as the U.S. Cuban Assets Control Regulations and any law, ruling, guideline or other communication having a purpose similar to that of the CACRs “to the extent that they operate or are likely to operate so as to prevent, impede or reduce trade or commerce between Canada and Cuba”
- “trade or commerce between Canada and Cuba” defined as trade (i) between Canadian entities and Cuban entities and (ii) between Canadian entities and Canadian nationals or corporations that are designated as Cuban nationals or corporations pursuant to an extraterritorial measure of the United States (e.g., “specially designated nationals”)

What is an “Extraterritorial Measure of the United States”? (cont’d)

- ↪ U.S. laws that may be considered “extraterritorial measures of the United States”:
 - ↪ Cuban Assets Control Regulations
 - ↪ Export Administration Regulations
 - ↪ Helms-Burton (?)
 - ↪ other

FEMA Enforcement Experience (or lack thereof)

- ↯ there has never been an attempted prosecution under the Canadian blocking order
- ↯ no case law or administrative/prosecutorial guidelines
- ↯ no guidance from the Canadian government
- ↯ numerous investigations - American Express, Eli-Lilly, Heinz, Red Lobster, Wal-Mart and others
- ↯ Wal-Mart's Cuban pyjamas
 - ↯ nationalistic sensitivities

Canadian Controls on U.S.-Origin Items

- FEMA and Canadian restrictions on supplying U.S.-origin goods and technology to Cuba
- U.S.-origin goods and technology (ECL item 5400) – “designed to ensure Canada is not used as a diversionary route to circumvent U.S. embargoes”
 - includes U.S. trade embargoes of Cuba, Iran, Syria and North Korea

Canadian Controls on U.S.-Origin Items (cont'd)

- ↪ ECL item 5400: a permit is required for the export of all U.S.-origin goods from Canada
 - ↪ excludes “goods that have been further processed or manufactured outside of the United States so as to result in a substantial change in value, form or use of the goods or in the production of new goods”
 - ↪ old 50% rule of thumb rule

Canadian Controls on U.S.-Origin Items (cont'd)

- ↪ available GEP No. 12 permits export of U.S.-origin goods and technology to all destinations except Belarus, Cuba, North Korea, Iran and Syria
 - ↪ no written DFATD policy for granting permits for export of U.S.-origin goods and technology to these countries

Canadian Controls on U.S.-Origin Items (cont'd)

- ↪ experience suggests DFATD's administrative policy currently permits U.S.-origin goods and technology to be transferred to Cuba in three circumstances:
 - ↪ a U.S. licence has been obtained or
 - ↪ humanitarian purposes (for the “basic necessities of human life”) or
 - ↪ in support of a previously permitted export or Canadian operations

Resolving Conflicts between Canadian and U.S. Law on Cuba

▭ when apparent conflicts arise, key issues to be addressed include:

1. Is the U.S. measure at issue subject to the FEMA Order?

- is it an “extraterritorial measure of the United States”?

2. Does the U.S. measure operate or is it likely to operate to reduce or impede trade or commerce between Canada and Cuba?

- compliance with the U.S. measure may not reduce trade or commerce between Canada and Cuba

Resolving Conflicts between Canadian and U.S. Law on Cuba (cont'd)

3. Is the communication at issue in the nature of a directive or intimation of policy?
 - depending on the context, a simple statement as to what U.S. law provides regarding trade with Cuba may not be notifiable

Resolving Conflicts between Canadian and U.S. Law on Cuba (cont'd)

4. Is the source of the communication in a position to direct or influence the policies of the Canadian corporation in Canada?
 - consider the position or authority of the person that has made the communication to the Canadian entity

Resolving Conflicts between Canadian and U.S. Law on Cuba (cont'd)

5. Does the Canadian entity's act or omission constitute "compliance"?
 - by following a particular course of action, is the Canadian entity actually complying with applicable U.S. law?
 - what is the reason for the act or omission?
 - is the reason compliance with Canadian law?
 - are there other reasons unrelated to the U.S. trade embargo?

Resolving Conflicts between Canadian and U.S. Law on Cuba (cont'd)

6. If the issue concerns goods or technology to be supplied to Cuba, what is their U.S.-origin content?
 - if they are of U.S.-origin, Canadian law may not allow for their export to Cuba
 - need to consider and possibly apply for Canadian export permit

Managing the Relationship Between U.S. and Canadian Export Controls and Trade Sanctions

- ↪ critical conflict points
 - ↪ training programs
 - ↪ compliance manuals
 - ↪ communications and instructions
 - ↪ server accessibility
 - ↪ meetings and telephone conversations
 - ↪ M&A due diligence
 - ↪ contracts – e.g., supply agreements with U.S. companies, intercompany agreements, purchase orders, etc.
 - ↪ end-use certificates

Managing the Relationship Between U.S. and Canadian Export Controls and Trade Sanctions (cont'd)

- ↪ cannot simply adopt U.S. trade control policies for Canadian operations
- ↪ export control and trade sanctions compliance manuals and any related directives should be “home grown”

Managing the Relationship Between U.S. and Canadian Export Controls and Trade Sanctions (cont'd)

- ↪ when potential conflicts arise:
 - ↪ case-by-case analysis, very context-specific
 - ↪ addressing exposure of U.S. citizens in Canada
 - ↪ involvement of Canadian and U.S. counsel

- ↪ cultural - sovereignty issues particularly sensitive

Canadian Rules on Boycotts and Discriminatory Practices

- ▭ in addition to export controls, trade embargoes, asset freezes and blocking orders
 - ▭ Canada's federal boycott policy
 - ▭ provincial discriminatory business practice legislation

Canada's Boycott Policy

- ↪ October 21, 1976 federal policy; does not prohibit compliance with international economic boycotts
- ↪ identifies “unacceptable” activities taken in connection with such boycotts
 - ↪ requiring a firm or individual to engage in discrimination based on race, nationality, etc. of another Canadian firm
 - ↪ refusing to purchase from or sell to another Canadian firm
 - ↪ refusing to sell Canadian goods to any country or refraining from purchasing from any country
 - ↪ restricting commercial investment or other economic activity in any country
- ↪ sanction is denial of government support and assistance in such transactions

Provincial Discriminatory Business Practices Legislation

- ↯ Discriminatory Business Practices Act (Ontario)
- ↯ prohibits refusing to engage in business with others where:
 - ↯ refusal is an account of on “attribute” (e.g., geographical location) of the others or of a third person with whom the others do business; and
 - ↯ refusal “is a condition of the engaging in business” of the company making the refusal and another person
- ↯ prohibits entering into a contract in which one party refuses to engage in business with another person on account of an attribute of that other person or of a third person with whom that person conducts business
- ↯ prohibits seeking or providing negative statements of origin
- ↯ requires reporting of requests to engage in discriminatory business practices

Provincial Discriminatory Business Practices Legislation (cont'd)

- ▭ penalty/sanction exposure
 - ▭ cause of action for damages against person who contravenes
 - ▭ banned for providing goods or services to Ontario government for five years
 - ▭ up to \$100,000 fine

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