

Corporate Counsel

Sanctions

The Battle Between U.S. and Canadian Policies Over Trade With Cuba – To Trade or Not to Trade



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The United States government has opposed the presence of the socialist government in Cuba since its establishment in 1959, and has passed numerous measures throughout the years, including an economic embargo against Cuba, in what had been until recent years, a continually escalating effort to sanction the Cuban government. The U.S. Congress even went so far as to take the novel approach of attempting to extend its policy against Cuba outside of its territory to countries such as Canada through the enactment of certain extraterritorial laws. Canada, however, has taken a diametrically opposed position. Canadian political and economic policy towards Cuba sharply conflicts with that of the United States. Since Fidel Castro opened Cuba to foreign investment in 1991, Canadian companies have invested billions of dollars in Cuba, in ventures such as hotels, utilities and other business formerly controlled by American citizens. Canada is, in fact, one of Cuba's largest trading partners. As such, Canada quickly responded to U.S. attempts to control Canadian trade with Cuba by enacting its own laws that make compliance with U.S. extraterritorial laws a crime. On their face, these conflicting U.S. and Canadian policies make compliance for U.S. companies operating in Canada and Canadian companies operating in

the United States difficult. As a practical matter, however, the United States has continually delayed implementation of the extra-territorial provisions of its laws, causing substantial confusion. This confusion could potentially cause a company whose business plan might not violate either country's laws to take improper actions by mistake. Companies who operate in both countries need to fully understand the inter-play between U.S. and Canadian regulations on this subject so as not to run afoul of either.



Painting inside the Revolution Museum in Havana, Cuba
Credit: Diego Giudice/Bloomberg News

United States Extraterritorial Sanctioning Laws Targeting Cuba

In 1963, the United States imposed an economic embargo against Cuba (the Embargo). The statutory basis for the Embargo is the Trading With the Enemy Act, which provides the President with broad authority to impose restrictions to further U.S. policy.¹ The Embargo is administered by the Office of Foreign Assets Control (OFAC) and implemented through the Cuban Assets Control Regulations (CACR).² CACR prohibits U.S. companies, U.S. owned or controlled entities, U.S. residents and U.S. citizens

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located outside of the United States from engaging in any trade or commerce with Cuba.³ As such, foreign subsidiaries of U.S. corporations are subject to the same CACR restrictions that apply to their U.S. parent corporation.

In 1996, the U.S. government expanded the reach of the Embargo even further by enacting the Cuban Liberty and Democracy Solidarity Act of 1996 (the Helms-Burton Act), which aims to keep foreign investors away from formerly American-owned companies in Cuba brought under government control following the 1959 Cuban revolution.⁴ The Helms-Burton Act creates a private cause of action in U.S. Federal courts against companies who “traffic” in property that was owned by a U.S. national and confiscated by Cuba on or after January 1, 1959.⁵

The Helms-Burton Act defines the term “traffic” very broadly to include transactions such as sales, transfers, brokering, leasing, possessing, managing, using or otherwise acquiring an interest in the property.⁶ The definition of “traffic” can even cover transactions such as joint ventures. As such, the Helms-Burton Act extends the territorial application of the Embargo to foreign companies, including Canadian companies trading with Cuba that may have no connection with U.S. entities. For example, a Canadian company doing business in the United States that purchases sugar from a Cuban state enterprise may be liable to a U.S. citizen if some of the sugar that the Canadian company purchased was grown on the plantation that the U.S. citizen once owned.⁷ Such a broad construction of the term “traffic” would allow the United States to apply the Helms-Burton Act to nearly any company doing business in Cuba.⁸

President Obama announced certain policy changes in January of 2011, including the modification of the CACR to, among other things, authorize U.S. persons to engage in transactions, subject to certain restrictions, with Cuban national individuals who have taken up residence outside of Cuba.⁹ Though this modification may indicate a trend towards eased sanctions against Cuba, constraints on trade or commerce with individuals that reside in Cuba and companies that do business in Cuba remain unchanged.

Canadian Laws Blocking U.S. Extraterritorial Laws

In response to the extraterritorial measures passed by the United States, Canada enacted the Foreign Extraterritorial Measures Act (FEMA), authorizing the Canadian Attorney General to issue orders blocking foreign extraterritorial measures that affect international trade and commerce and infringe Canadian sovereignty.¹⁰ The most recent order issued under FEMA, the Foreign Extraterritorial Measures Order in 1996 (the “1996 FEMA Order”), was a direct response to the enactment of the Helms-Burton Act.¹¹ The 1996 FEMA Order is intended to block compliance with U.S. anti-Cuba laws by Canadian corporations in order to preserve Canada’s strong trading relationship with Cuba.¹²

The 1996 FEMA Order imposes two obligations on Canadian individuals and corporations with respect to certain U.S. extraterritorial measures that affect trade with Cuba: (1)

an obligation to notify the Canadian Attorney General of communications received by Canadian corporations regarding these measures; and (2) a prohibition against complying with these measures or any directives related to them.¹³ More specifically, Canadian corporations or their directors, officers, managers or employees in position of authority are prohibited from complying with any extraterritorial measure of the U.S. relating to trade or commerce between Canada and Cuba and any directive, instruction or other communication relating to such measure that has been received from a person in a position to direct or influence the policies of the corporation in Canada.¹⁴ This prohibition applies to any act or omission constituting compliance with the relevant U.S. legislation, whether or not compliance with that measure or communication is the only purpose of the act or omission.¹⁵ U.S. extraterritorial regulations include any law, ruling, guideline or other communication having a purpose of impeding or reducing trade or commerce between Cuba and Canada, and include the CACR and the Export Administration Regulations.¹⁶

Avoiding Application of the Helms-Burton Act

Despite its broad reach, the Helms-Burton Act has never been implemented since its passage. The Helms-Burton Act allows the U.S. president to suspend the effective date of the private right of action for periods of up to six months by reporting in writing to the appropriate congressional committee that the suspension is necessary to the national interests of the United States.¹⁷ President Clinton used this provision to suspend the effective date of the private right of action before it even took effect in August of 1996. His decision came after the European Union and Canada announced their opposition to the act, arguing that it violates various international trade treaties.¹⁸ Since then, Presidents Clinton, Bush and Obama have continually suspended the effective date, thereby effectively blocking application of the Helms-Burton Act.¹⁹ Nevertheless, the act may be implemented in the future.

If the Helms-Burton Act becomes implemented, Canadian companies that do business in the United States and U.S. companies that do business in Canada that wish to comply with FEMA without breaching the Helms-Burton Act can rely on some of the limitations of the Helms-Burton Act for protection. One limitation is provided by the certified claims requirement. U.S. citizens whose property was confiscated by the Castro regime could apply for certification of their claim by the Foreign Claims Settlement Commission (FCSC).²⁰ The certification process was closed in 1972. A list of certified claims is published by the FCSC. Claimants with uncertified claims may bring an action under the Helms-Burton Act only if they were not eligible to file a claim with the FCSC.²¹ Another Helms-Burton Act limitation is that an action may be brought only if the amount in controversy exceeds \$50,000.²²

The Helms-Burton Act also allows lawsuits to be settled out of court without requiring U.S. government approval.²³ Using this loophole, Canadian companies that traffic confiscated U.S. citizens’ assets can negotiate a deal with the U.S. citizens who

have claims to those assets, whereby the U.S. citizens agree not to bring forth a claim against the Canadian company in exchange for a share of the profits.²⁴ Alternatively, Canadian companies must conduct extensive due diligence in Cuba to ensure that no U.S. confiscated assets that trigger the Helms-Burton Act are involved in their prospective investments.



Man carries bag in Old Havana, Cuba
Credit: Diego Giudice/Bloomberg News

Finally, if a judgment is entered against a Canadian company under the Helms-Burton Act, FEMA allows Canada to block enforcement of foreign judgments, if “recognition or enforcement of the judgment in Canada has adversely affected or is likely to adversely affect significant interests in Canada.”²⁵ As such, FEMA can allow Canada to expressly deny recognition to any judgment obtained under the Helms-Burton Act. Moreover, Canadian companies sued under the Helms-Burton Act are authorized to recover an equivalent judgment, costs of litigation, and consequential damages in Canadian courts.²⁶

Avoiding Application of FEMA

With respect to the Canadian response to the Helms-Burton Act, Canada’s Minister of International Trade has stated that FEMA will remain a last resort.²⁷ Nevertheless, if the Helms-Burton Act is ever implemented and Canadian companies comply with it or comply with any other U.S. law that operates to hinder trade

with Cuba, such as CACR, Canadian companies must be careful not to trigger the 1996 FEMA Order. To determine whether the 1996 FEMA Order applies to a particular action, a Canadian company must ask certain questions, including the following:

(1) Is this a Canadian corporation?

A “Canadian corporation” is defined as a corporation that is registered or incorporated under the laws of Canada or of a Canadian province and that carries on business in whole or in part in Canada.

(2) Is a person within the Canadian corporation receiving communications regarding trade or commerce between Canada and Cuba?

(3) Does the communication relate to a U.S. extraterritorial measure that operates to reduce or hinder trade or commerce between Canada and Cuba?

(4) Is the person receiving the information a director, officer, manager or employee in position of authority within the Canadian corporation?

(5) Is the source of the information in a position to direct or influence the policy of the Canadian corporation in Canada?

(6) If goods are to be supplied to Cuba, are they of U.S. origin?

Usually, the Canadian Department of Foreign Affairs and International Trade (Foreign Affairs) will consider a good to be of U.S. origin for export control purposes if it has at least 50 percent U.S. content. In calculating the U.S. content, material, labor and overhead costs are included.

Generally, it is not a violation of Canadian law to refrain from selling goods to Cuba if they are U.S. origin goods because such goods are listed on the Canadian Export Control List (ECL). A good listed on the ECL may not be exported from Canada without the exporter first obtaining an export permit from Foreign Affairs. Export permits are provided on a case-by-case basis.

If the answer to any of the questions listed above is “No.” then, generally, the 1996 FEMA Order will likely not apply against the Canadian company. As such, Canadian companies that anticipate receiving communications regarding compliance with U.S. extraterritorial measures that hinder trade or commerce between Canada and Cuba should proceed in a manner that allows them to answer “No” to at least one of the questions listed above to protect themselves from liability under the 1996 FEMA Order.

Conclusion

U.S. companies operating in Canada and Canadian companies operating in the United States are caught in a battle of policies between Canada and the United States regarding trade with Cuba, exposing them to risk of liability on both sides of the U.S.-Canadian border. Such companies must assess the legal risk of

trading with Cuba in relation to their investments in and profits from Cuban commerce. In measuring the legal risks of trade with Cuba, it is important to note that both, U.S. and Canadian enforcement of the Helms-Burton Act and the 1996 FEMA Order, respectively, as well as other similar U.S. and Canadian measures, has been scarce. Both countries seem to exercise restraint, as evidenced by the continual suspension of the Helms-Burton Act in the United States. Nevertheless, U.S. companies operating in Canada and Canadian companies operating in the United States should conduct careful due diligence with respect to the Cuban products and services that they choose to trade and take all legal actions necessary to avoid triggering U.S. extraterritorial laws regarding Cuba and Canadian laws seeking to block such extraterritorial jurisdiction.

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¹ Cuba: What You Need to Know About the U.S. Embargo, Office of Foreign Assets Control, U.S. Department of the Treasury.

² *Id.*

³ *Id.*

⁴ Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996, 22 U.S.C. § 6021, *et seq.*

⁵ *Id.*

⁶ *Id.* at § 6023.

⁷ See Andreas F. Lowenfeld, *Congress and Cuba: The Helms-Burton Act*, 90 *Am. J. Int'l L.*, 419, 425-6 (1996).

⁸ See *Id.*

⁹ 76 Fed. Reg. 5072 (Jan. 28, 2011).

¹⁰ Foreign Extraterritorial Measures Act, R.S.C. 1985, c. F. 29.

¹¹ Foreign Extraterritorial Measures (United States) Order, SOR/96-84 (1996) (the "1996 Order").

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at S. 6.

¹⁶ The 1996 Order.

¹⁷ 22 U.S.C. § 6085(b).

¹⁸ See Jeffrey Dunning, *The Helms-Burton Act: A Step in the Wrong Direction for United States Policy Toward Cuba*, *Journal of Urban and Contemporary Law*, 213 at 217-18 (1998).

¹⁹ Michael Voss, *Obama Renews Cuba Trade Embargo*, BBC News, (Sept. 2009).

²⁰ 22 U.S.C. §§ 1621 to 1645 (2004).

²¹ See 22 U.S.C. § 6082(a)(5).

²² *Id.* at § 6082(b).

²³ See 22 U.S.C. § 6082(a)(7) ("an action under this section may be brought and

may be settled, and a judgment rendered in such action may be enforced, without obtaining any

license or other permission from any agency of the United States").

²⁴ Jeffrey Dunning, *The Helms-Burton Act: A Step in the Wrong Direction for United States Policy Toward Cuba*, *Journal of Urban and Contemporary Law*, at 232-233 (1998).

²⁵ Foreign Extraterritorial Measures Act, R.S.C. 1985, c. F. 29.

²⁶ *Id.*

²⁷ Russell C. Trice, *Helms-Burton: Canada and Mexico v. The United States – Blocking Legislation is an Unwise Barrier Between Neighbors*, 4 *Sw. J.L. & Trade Am.* 87 (1997).