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The Next Wave of US Extraterritorial Sanctions regarding Cuba – *potential impacts for Canadian companies*

On May 2, 2019, after 22 years of semi-annual deferrals by multiple presidents, the United States brought Title III of its *Helms-Burton Act* into force.[1] The *Helms-Burton Act* significantly broadened US economic sanctions against Cuba. The activation of the controversial Title III now allows certain US nationals to bring suits in US Federal Court against foreign companies who "traffic" (i.e. derive an economic benefit) from property expropriated by the Cuban Government after the Cuban revolution.

Such proceedings are available for both "certified claims" (i.e. claims of US persons or companies who were already US citizens at the time of confiscation, and who applied at the relevant time for their claims to be properly "certified" by the relevant US authorities) as well as claims known as "Cuban American claims" (i.e. claims by persons who were not US citizens at the time of confiscation, but who later became naturalized Americans).

Having regard to the very high degree of media attention that these provisions attracted, it can be expected that many claimants who may benefit from Title III could initiate proceedings quickly.

International opposition to the *Helms-Burton Act*

Canadian Foreign Affairs Minister Chrystia Freeland and the European Union Commissioner for Trade Cecilia Malmström issued

[1] The *Helms-Burton Act* is also known as the *Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996,* USC title 22 §§ 6021-6091.

a joint statement on April 17, 2019 expressing concern about the US Government's decision to activate Title III. Both highlighted the existence of so-called "blocking statutes" that provide some degree of protection to domestic companies by blocking the enforcement or recognition of Title III judgments in Canada and in the EU, in addition to other aspects of the *Helms-Burton Act*.[2]

The Canadian blocking regime is established under the *Foreign Extraterritorial Measures Act* ("**FEMA**").[3] In Canada, FEMA historically has been used primarily to block attempts by US authorities to enforce sanctions restricting trade with Cuba against foreign affiliates and contract counterparties of US companies.[4] A cabinet order issued under FEMA[5] requires Canadian companies and their officers and directors to notify the Attorney General of Canada ("**AG**") in certain circumstances when they receive communications related to trade or commerce between Canada and Cuba. Such Canadian companies are also prohibited from complying with these directives (and/or directly complying with the US sanctions).

Multinational companies face serious challenges in seeking to comply with both the US trade sanctions regarding Cuba and with the Canadian FEMA regime, since the regimes contain potentially conflicting criminal offences which can give rise to "double jeopardy" situations. Legal counsel in both jurisdictions should be consulted before communications are made or contracts are signed in such situations.

FEMA's blocking mechanisms in relation to Title III

FEMA's Title III blocking mechanisms are somewhat more targeted than the general FEMA notification requirements and prohibitions. The basic principle adopted by Canada is to prevent or offset the legal exposure of Canadians to the Title III regime where American

[2] The EU blocking regime is contained in Council Regulation (No 2271/96). Blocking mechanisms were also introduced in response to the *Helms-Burton Act* in 1996 by the United Kingdom under the *Protection of Trading Interests Act, 1980* and by Mexico under the *Law of Protection of Commerce and Investments from Foreign Policies that Contravene International Law.*

[3] RSC 1985, c F-29.

[4] In 2015, FEMA was also used to block an extraterritorial attempt by the Government of Alaska to force an American firm that had a contract to redevelop the ferry terminal facility in Prince Rupert, British Columbia, to purchase iron and steel materials only from US suppliers.

[5] *Foreign Extraterritorial Measures (United States) Order*, *1992, amendment*, SOR/96-84.

claimants seek the assistance of Canadian courts to obtain evidence for use in their claims or to enforce any judgments issued by US courts.

Evidence gathering

FEMA permits the Government of Canada to prohibit or restrict a Canadian citizen or resident from producing records under his/her control and giving evidence to a foreign court in respect of *Helms-Burton* litigation. The AG may issue an order in this regard where disclosure would adversely affect Canadian business interests related to international trade or commerce carried on, in whole or in part, in Canada.[6] Thus, Canadian businesses who are targets of Title III proceedings in the US may want to seek the assistance of the AG to block production of evidence located in Canada in response to discovery procedures in US legal proceedings.

Further, Canadian courts may issue warrants authorizing the seizure of records located in Canada to prevent their use in foreign proceedings. The AG must convince the Canadian court that an order made relating to the production of records or giving of information likely will not be complied with, putting Canadian business interests at risk. Records seized pursuant to such a warrant must be delivered to the court or a designated person for safe-keeping.

Enforcement of foreign judgments and recovery of damages

Under FEMA, Canadian courts are also prohibited from recognizing or enforcing any judgment issued by US courts under the *Helms-Burton Act.* [7]

These Canada-centered protective measures will be considerably less effective if the Canadian company also does business in, or owns assets located in the US. In such cases, it will be important to consider possible limitations under domestic US law itself. For instance, there may be cases where the US Federal Court may not

[6] The AG may also issue a blocking order where the enforcement of a foreign trade law is believed to infringe Canadian sovereignty, jurisdiction or powers.

[7] The AG can also declare a foreign court's antitrust judgment as unrecognizable and unenforceable in Canada, or can reduce such a judgment to an amount specified in an order (for instance, by negating the trebling of damage awards that is contemplated under US antitrust laws).

have the required jurisdiction over the defendant. Also, some limited statutory exceptions to Title III exist in industries such as travel and telecommunications.

FEMA also contemplates that Canadians who are targeted by Title III litigation may use Canadian courts to recover damages that they have been ordered to pay in the US. A Canadian citizen or resident, or a Canadian company or person carrying on business in Canada, can apply to the AG for an order related to an issued or potential US Title III judgment. A Canadian defendant in the US proceedings may thereby become a claimant in the Canadian courts and "claw-back" damages under the US-issued judgment obtained against the defendant or, where a final judgment has not yet been issued, recover the cost of defending the US proceedings.

A Canadian court awarding these claw-back damages to a Canadian defendant can order the seizure and sale of property in which the US plaintiff has a direct or indirect beneficial interest. Such seizures may include shares of any Canadian company in which the US plaintiff has a beneficial interest regardless of whether the share certificates are located in or outside Canada.

In light of the activation of Title III, Canadian businesses doing business in Cuba would be well advised to obtain an updated assessment on any potential exposure to US trade sanctions and the protective mechanisms that may be available to them.

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a cautionary note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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