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U.S. sanctions against U.S. persons trading with Cuba are not new. What is new is a U.S. law known as "Helms-Burton," which imposes liabilities and sanctions against non-U.S. persons trading with Cuba. This U.S. law seeks to implement U.S. foreign policy by putting such persons' business interests in the United States at risk and by denying them entry into the United States. The desired outcome is to inhibit non-U.S. persons from trading with and investing in Cuba.

The international community generally condemns the U.S. approach as contrary to customary international and treaty law. A number of countries, including Canada, implemented blocking laws to counteract the U.S. approach.

After outlining the principal provisions of Helms-Burton, this article discusses the Canadian legal response and the difficulties Canadian corporations must contend with in applying Canadian law. The article explores numerous practical problems involving the conflicting U.S. and Canadian laws, and suggests possible approaches to deal with these problems.

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I. Helms-Burton

The Cuban Liberty and Democratic Solidarity (LIBERTAD) Act,[1] commonly referred to as Helms-Burton after its congressional sponsors, is probably the most notorious recent U.S. law with extraterritorial implications.[2] Title III of Helms-Burton, entitled "Protection of Property Rights of United States Nationals," creates for U.S. nationals whose property was confiscated by the revolutionary Cuban Government a private right to sue in U.S. federal courts foreign investors trafficking in such property. Although the right to sue is suspended, the potential for claims continues to sow uncertainty for investors in Cuba.[3]

In addition to the uncertainty arising from the temporary suspensions, there is the deliberate uncertainty of Helms-Burton itself. Under Title III of Helms-Burton, the term "traffic" has an extraordinarily broad definition. Trafficking includes selling, transferring, distributing, dispensing, brokering, managing, or otherwise disposing of confiscated property, or purchasing, leasing, receiving, possessing, obtaining control of, managing, using, or otherwise acquiring or holding an interest in confiscated property. The term also includes engaging in any type of commercial activity using, or otherwise benefiting from, confiscated property, and causing, directing, participating in, or profiting from trafficking by another person, or through another person.[4] It should be noted that the definition of "traffic" requires that the person "knowingly and intentionally" engage in the prohibited activity. This definition opens the door to defenses based on due diligence.[5] There are very limited exceptions, the most important of which is the trading or holding of publicly traded securities.[6]

1. Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, Pub. L. No. 104-114 (codified as amended in scattered sections of 22 U.S.C.).

2. Another recent but less well-known U.S. extraterritorial law is the Iran and Libya Sanctions Act of 1996, Pub. L. No. 104-172 ("ILSA"). Instead of conferring a private right of action on property claimants, ILSA requires the president to impose economic sanctions against persons who make investments in the oil or gas industry in Iran and Libya, or who engage in certain exports to Libya. In comparison to Helms-Burton, the activities that trigger sanctions under ILSA are more specific and must be significant. At the time of writing, Canada has not enacted any blocking legislation directed at ILSA. This situation may change, as the Canadian firm Bow Valley Energy Ltd. is under investigation because of its participation in an Iranian energy project. *See* Gary G. Yerkey, *Sanctions: "Sen. D'Amato Considers Tightening Iran-Libya Law by Including Banks*, 14 INT'L TRADE REP. No. 44, 1929 (1997).

3. On July 16, 1996, U.S. President Clinton allowed Title III to come into force as of August 1, 1996. However, he continues to postpone the right to sue provisions on a rolling six-month basis. Under the law, the original date upon which lawsuits could be brought was November 1, 1996. The three-month interim period was designed to encourage traffickers to cease their trafficking and to dispose of their assets in Cuba before they become subject to suit. Liability for trafficking started to accrue from November 1, 1996. *See* CANADA ENCOURAGED BY U.S. PRESIDENT'S DECISION ON HELMS-BURTON ACT, DEPARTMENT OF FOREIGN AFFAIRS AND INTERNATIONAL TRADE NEWS RELEASE NO. 127, July 16, 1996.

4. Helms-Burton Act § 4(13).

5. See Stephen H. Marcus, *The Helms-Burton Act: Navigating the U.S. Legal Environment*, proceedings of a conference entitled *After Cuba—U.S. Extraterritorial Restrictions on Canadian Business* organized by the Canadian Institute, Toronto, June 26, 1996, Tab. IV at 4-5. Authorization of a U.S. national holding a claim to the property also insulates the trafficker from liability.

6. *See* Helms-Burton Act § 4(13)(B).

Thus, the definition of trafficking exposes foreign individuals and companies to potential liability if they are in virtually any manner commercially linked to confiscated property. Any assets they possess within the United States are put at risk. What is even more controversial is that Title III's remedies are disproportionate to the behavior engaged in by many traffickers. A person anywhere in the world with a relatively tenuous connection to confiscated property, such as selling a nominal amount of goods or services to a trafficker, can in theory be held responsible for compensating a U.S. claimant for the entire value of the property in issue, plus interest and the costs of litigation.[7] If the claimant complies with a notice provision, a trafficker in property for which a claim has been certified by the U.S. Foreign Claims Settlement Commission (FCSC) may also be liable for treble damages.[8] The broad definition of traffic and the prospect of treble damages are clearly intended to encourage lawsuits and to provide foreign nationals with a tremendous disincentive to continuing their present business activities in Cuba.

Of additional concern are the provisions of Title IV of Helms-Burton. Title IV empowers the U.S. Government to restrict entry into the United States for the senior executives, officers, controlling shareholders, and agents of foreign companies trafficking in confiscated U.S. property in Cuba. A particularly striking feature of Title IV is that the restrictions on entry extend to both the spouses and minor children of these individuals.[9]

In June 1996 the U.S. State Department published guidelines implementing Title IV. The guidelines describe in some detail the classes of persons who may be denied visas and the procedure used in determining whom to exclude.[10]

Foreign investors and their governments are encouraged by the fact that, to date, the U.S Government has enforced Title IV in a restrained manner. At the time of writing, approximately nineteen executives from only two corporations—one Mexican (Grupo Domos) and one Canadian (the mining firm Sherritt International Corporation (Sherritt))—were denied entry into the United States.[11]

7. *Id.* § 302(a)(1)(A).

8. *Id.* § 302(a)(3). The use of treble damages arose under American antitrust law. Treble damages are designed both as a penal measure and as a tool to actually encourage lawsuits (essentially a system of private enforcement). Considering their penal nature, their appropriateness is questioned by Canada and other nations in the antitrust context. It is also questionable whether they are appropriate in providing compensation for expropriated property.

9. *Id.* § 401(a)(3), (4).

10. Guidelines Implementing Title IV of the Cuban Liberty and Democratic Solidarity Act, 61 Fed. Reg. 30655 (1996).

11. Peter Morton, *Helms-Burton Probe Widens Its Net*, THE FINANCIAL POST, Oct. 1997, at 5. The names of the individual executives are technically confidential, but were widely published in the press. On November 17, 1997, the U.S. State Department announced that officers of BM Group, an Israeli-owned citrus company, were sent determination letters informing them that their activities involving confiscated U.S.-claimed properties in Cuba were within the purview of Title IV. Transcript of State Department News Briefing. According to *The Financial Post* report, there are dozens of other companies being investigated under Title IV.

This article focuses on the issues arising for Canadian corporations under Title III of Helms-Burton. In view of the similarity of the definition of traffic in Title IV, some (but not all) of the analysis concerning Title III may be applied to problems involving Title IV.

II. Canada's Foreign Extraterritorial Measures Act

A. Background

1. *Antitrust Origins*

Canada's blocking legislation is encapsulated in the Foreign Extraterritorial Measures Act[12] (FEMA) and an order issued under FEMA in January 1996.[13] FEMA was not enacted to address extraterritorial U.S. law regarding Cuba, but has since been broadened to do just that.

FEMA was enacted originally to counteract the intrusive discovery procedures and treble damages judgments associated with private antitrust litigation brought in the United States. FEMA was based on the U.K.'s Protection of Trading Interests Act 1980 (PTIA), which was passed for the same reason. A number of other countries also passed similar legislation around this time. The impetus for these laws was the uranium cartel antitrust litigation originating in the United States in the 1970s.

In this litigation, Westinghouse sued Canadian, British, Australian, and French uranium mining corporations allegedly participating in a worldwide uranium cartel. Westinghouse sought treble damages under U.S. antitrust law that were so large they threatened to put the mining companies into bankruptcy. A sensitive aspect of the case was the allegation that the mining companies' home governments sanctioned the cartel because the U.S. Government closed the U.S. market to imports from foreign countries in order to protect U.S. uranium producers.[14] The response of the Canadian Government was to pass the Uranium Information Security Regulations,[15] which prohibited the furnishing of documents or other information regarding Canadian-produced uranium in response to subpoenas or other orders by U.S. courts. These regulations did not protect the Canadian defendants against enforcement in Canada of a U.S. treble damages judgment, however. FEMA cured this deficiency and also included general provisions regarding the turning over of records and information to foreign tribunals. The specifics of these and other aspects of FEMA are discussed below.

12. R.S.C. ch. F-29 (1985) as amended by Bill C-54, proclaimed in force Jan. 1, 1997.

13. FOREIGN EXTRATERRITORIAL MEASURES (UNITED STATES) ORDER, 1992, as amended, SOR/96-84, Jan. 15, 1996 (the FEMA Order). The impetus for the FEMA Order almost certainly was the Helms-Burton bill, but nowhere in the Order is this made explicit.

14. For background, *see* William C. Graham, *The Foreign Extraterritorial Measures Act*, 11 CANADIAN BUS. L. J. 410 (1986).

15. C.R.C., c. 366, revoked by SOR/94-515, July 19, 1994.

2. *U.S. Embargo of Cuba as an Unanticipated Use of FEMA*

Ironically, FEMA has yet to be used to blunt the impact of U.S. antitrust litigation. Rather, FEMA was deployed in a makeshift fashion three times in relation to U.S. extraterritorial measures regarding Cuba. At the time FEMA was enacted, it is likely that little thought was given to relying upon it to block the impact of U.S. extraterritorial laws regarding Cuba. At that time, the U.S. Cuban embargo law permitted foreign subsidiaries of American parent corporations to engage in licensed trade with Cuba if the subsidiary generally operated independently from its parent.[16] Realizing that FEMA required fine-tuning to deal with Helms-Burton, the Canadian Government quickly amended FEMA in the fall of 1996, soon after the enactment of Helms-Burton, to explicitly extend FEMA's application to "foreign trade laws" such as Helms-Burton.[17]

B. Overview of FEMA

1. *Helms-Burton Scheduled as Objectionable Foreign Trade Law*

Section 2.1 of FEMA permits the Attorney General and the Minister of Foreign Affairs to list in a schedule to the legislation foreign trade laws that, in the opinion of the Attorney General, are contrary to international law or international comity. The only foreign trade law listed at the time of writing is Helms-Burton.[18] The focal point of the recent amendments to FEMA is Title III of Helms-Burton. As becomes apparent in the following discussion, FEMA does not address the denial of entry provisions of Title IV of Helms-Burton.

2. *Restrictions on Production of Documents in Helms-Burton Litigation*

FEMA permits the Canadian Government to impose far-reaching restrictions on any discovery process or giving of evidence involving Canadian defendants in Helms-Burton litigation. Section 3 of FEMA permits the Attorney General to issue an order prohibiting or restricting production and disclosure to a foreign tribunal of documents located in Canada or under the possession or control of a Canadian citizen or resident. The Attorney General may also issue an order prohibiting or restricting the giving of evidence by a Canadian citizen or resident. These orders may be issued when the Attorney General is of the opinion the foreign tribunal is exercising powers that "adversely affect significant Canadian interests in relation to international trade or commerce involving a business carried on in whole or in part in Canada or that otherwise . . . infringe Canadian sovereignty, or jurisdiction or powers . . . related to the enforcement of a foreign trade law."

16. See *Extraterritoriality in the 1990s*, Investment Canada Working Paper No. 15, n. 58 (1993).

17. *See* Government Announces Measures to Oppose U.S. Helms-Burton Act, Department of Foreign Affairs and International Trade News Release No. 115, June 17, 1996. FEMA amendments received First Reading on September 16, 1996, and were proclaimed in force on January 1, 1997.

18. Curiously, the Cuban Assets Control Regulations, 31 C.F.R. 515 ("CACR"), are not listed in the FEMA schedule.

To date, no order under section 3 has been issued in relation to Helms-Burton proceedings. If the suspension of lawsuits under Title III of Helms-Burton is lifted, it can be expected that the Attorney General will issue orders under section 3 of FEMA. If the Attorney General convinces a court that an order under section 3 may not be complied with, the court may issue a warrant under section 4 authorizing seizure of records and delivery of them to the court or a designated person for safekeeping.

3. *Notification and Noncompliance Obligations*

The notification and noncompliance obligations of FEMA are central to the current Canadian response to the extraterritorial application of the Cuban embargo and Helms-Burton.

Section 5 of FEMA permits the Attorney General and the Minister of Foreign Affairs to issue orders to block the application of foreign measures taken by a foreign state or foreign tribunal that infringe upon Canada's sovereignty. Section 5 of FEMA is broadly drafted so as to enable the government to deal with any measures affecting international trade or commerce that adversely affect or are likely to adversely affect significant Canadian interests in this area, or otherwise infringe or are likely to infringe upon Canadian sovereignty. Under the authority of section 5 of FEMA, the Attorney General and the Minister may require any person in Canada to give notice to the Attorney General of "any directives, instructions, intimations of policy or other communications relating to such measures from a person who is in a position to direct or influence the policies of the person in Canada." Thus, the Canadian Government may issue an order that directives issued by the foreign parent of a Canadian subsidiary, directing the Canadian subsidiary to abide by U.S. law concerning Cuba, are notifiable.[19]

Secondly, section 5 permits the Attorney General and the Minister to prohibit any person in Canada from complying with foreign measures adversely affecting Canadian international trade interests, or with any directives relating to such measures issued by persons in a position to direct or influence the policies of the Canadian person. Thus, the Canadian Government may order a Canadian corporation (whether Canadian or foreign-owned) not to comply with the U.S. embargo against Cuba. Details of the FEMA Order incorporating the notification and noncompliance obligations are explored below.

4. *Penalties for Violating Canadian Blocking Law*

Section 7 of FEMA permits the government to prosecute violations of an order issued under FEMA either by indictment or by summary conviction. Moreover, contraventions of an order prohibiting production of records and giving of evi-

19. The United States historically takes the view that its sanctions legislation may apply not only to corporations incorporated in the United States, but also to corporations incorporated elsewhere that are controlled by U.S. corporations.

dence in Helms-Burton litigation, or of an order requiring notification of a Cuba directive or noncompliance with the U.S. embargo, may be prosecuted even if the offence was committed outside Canada. This provision appears designed to remove any defense based on extraterritorial application of Canadian criminal law against a Canadian person or corporation committing an offense outside Canada in an attempt to evade the application of Canadian law.

Until the 1996 amendments, the maximum fine under the indictment procedure was Cdn. $10,000, with an additional or alternative maximum imprisonment penalty of five years. The fine on indictment is now Cdn. $1,500,000 for a corporation and Cdn. $150,000 for an individual. The maximum fine on summary conviction was Cdn. $5,000, with an additional or alternative maximum imprisonment penalty of two years. The fine on summary conviction is now Cdn. $150,000 for a corporation and Cdn. $15,000 for an individual. With a generous allowance for fluctuations in the exchange rate, the increased fines are intended to match the US$1 million penalty under the U.S. embargo legislation.

A prosecution may be instituted only with the consent of the Attorney General. This provision is likely intended to prevent local law enforcement officials from prosecuting such offenses until the foreign policy implications are considered at the highest federal level.

Section 7 of FEMA allows the court to take certain circumstances into account in sentencing. The circumstances listed are nonexclusive and include:

- the degree of premeditation;
- the size, scale, and nature of the offender's operations; and
- whether any economic benefits occurred to the offender.

These factors suggest that a small corporation that was not aware of its Canadian obligations and that did not profit from its activities is unlikely to receive a heavy fine. In such circumstances, a prosecution likely would occur, if at all, under the summary conviction procedure with its much lower maximum fines. In light of the potential negative political fallout in Canada—in which the corporation could be viewed as an innocent victim of conflicting foreign policies—such a corporation probably would not even be prosecuted.

Conversely, a large corporation (perhaps a subsidiary of a U.S. parent) with a significant Canadian presence that consciously elects to violate Canadian law might as a legal matter be at risk of prosecution and a higher fine under the indictment procedure. However, once again the potential political fallout of prosecuting an otherwise good corporate citizen would be carefully gauged beforehand by the Canadian Government. In light of the danger of escalating U.S.-Canada tensions over Cuba, the Attorney General might decide not to prosecute. Which situations, then, might lead to prosecution? This issue is discussed in more detail below, in the context of some specific examples.[20]

20. A Canadian Bar Association delegation in which the author participated was told by officials from the Departments of Justice and Foreign Affairs at a meeting held in Ottawa on November 20, 1996 (CBA Meeting), that an exemption concept was considered, but rejected.

5. *Helms-Burton Judgments Unenforceable*

Section 7.1 of FEMA specifically states that judgments rendered by U.S. courts in Title III claims cannot be recognized or enforced in Canada. Previously, section 8 of FEMA only permitted the Attorney General to block the recognition and enforcement of antitrust law judgments, or to reduce them to an amount as specified in the order. Section 8(1.1) now allows the Attorney General to block judgments and treble damages awards under foreign trade laws.[21] This power is superfluous in relation to Helms-Burton judgments by virtue of section 7.1.

A court asked to recognize and to enforce a Helms-Burton judgment might have been able to decline the request even in the absence of the blocking provisions of FEMA. A court might otherwise decline to recognize and to enforce a Title III judgment on traditional grounds, on the basis it violates Canadian public policy, it is based on a law of a political nature, or as a treble damages award it is a penalty judgment.[22]

6. *"Claw-back" Mechanism Blunting Enforcement of Helms-Burton Judgments*

Modelled after the PTIA, FEMA contains a broad "claw-back" provision that was formerly available only in respect of an antitrust judgment. Under section 8.1, a Canadian citizen or resident, or a corporation incorporated in Canada or a person carrying on business in Canada,[23] may apply to the Attorney General for an order in connection with a judgment given under Title III. The Attorney General may declare that the Canadian defendant may recover, under the procedure in section 9, any amount obtained under the judgment, together with expenses and loss or damage suffered. Conceivably, by including expenses, losses, and damages, the clawed-back amount could exceed the amount

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The only flexibility in the Canadian countermeasures is in discretion to prosecute and in the mitigating circumstances that may be taken into account by a court in sentencing under section 7 of FEMA.

21. There may be some question as to the constitutional validity of section 8 of FEMA because it could be viewed as intruding upon a provincial responsibility under the Constitution, *i.e.*, property and civil rights in the province. However, it is possible that a recent resurgence of the federal trade and commerce power and judicial appreciation for consistency in enforcement of judgments across Canada might have enhanced the constitutional validity of section 8 since it was enacted. *See* General Motors v. City National Leasing, [1989] 1 S.C.R. 641 (private right of action in the *Combines Investigation Act* held constitutional) *and* Morguard Investments Ltd. v. De Savoye, [1990] S.C.R. 1077.

22. *See* J-G. CASTEL, CANADIAN CONFLICT OF LAWS (3d ed., 1994) at 163, 271, 275 for a discussion of the grounds upon which judgments may not be enforced. Section 8(4) of FEMA states that a court cannot draw an inference from the fact the Attorney General has not made an order under section 8(1.1). Otherwise, it might have been inferred that the absence of an order implies that the judgment is acceptable to the Canadian Government.

23. Canadian subsidiaries of U.S. parent corporations and U.S. persons carrying on business in Canada in unincorporated form may avail themselves of the Canadian blocking law. The blocking protection of FEMA may be attractive to corporations incorporated outside Canada that are engaged in Cuban trade. Such corporations may wish to restructure their operations and, among other things, consider incorporating in Canada.

of the Helms-Burton judgment itself. For example, damages resulting from consequential loss may be available.

Under section 9(1) of FEMA, the Canadian defendant may sue the U.S. Helms-Burton plaintiff in Canada and recover from the plaintiff the amount obtained from the Canadian defendant under the U.S. judgment or the punitive element of the damage award (*i.e.*, the damages in excess of single damages), together with the expense of defending the U.S. proceedings and instituting the Canadian proceedings and any losses or damages suffered by reason of the enforcement of the U.S. judgment. Thus, the Canadian defendant may claw-back the judgment obtained in the United States against the Canadian defendant. Under section 9(1.1), even if no final judgment is given under the U.S. proceedings against the Canadian defendant, the Canadian defendant (with the consent of the Attorney General) may at any time during the U.S. proceedings sue the U.S. plaintiff and recover the expense of defending the proceedings.

Of course, given the U.S. public policy articulated in Helms-Burton, it is questionable whether the Canadian defendant would be able to enforce a Canadian claw-back judgment through the U.S. courts. The Canadian defendant likely would have to content itself with enforcing its judgment against the Canadian assets of the U.S. plaintiff.

Sections 9(1) and 9(1.1) are backed up by an enforcement provision in section 9(2). This provision allows the Canadian court awarding the claw-back damages to order the seizure and sale of any property in which the foreign plaintiff or persons controlling it have a direct or indirect beneficial interest. The property that may be seized and sold includes the shares of any Canadian corporation in which the foreign plaintiff holds a beneficial interest, even if the share certificates are located outside Canada. While this provision might itself be considered extra-territorial, its presence might deter even further a Helms-Burton plaintiff from pursuing enforcement of its award in Canada.

The claw-back provisions of FEMA are most likely to deter U.S. plaintiffs with significant Canadian assets, such as a subsidiary operation. They are unlikely to deter U.S. plaintiffs with few or no assets or business interests in Canada. In addition, the claw-back provisions of FEMA do not insulate the U.S. or other foreign assets of Canadian defendants from seizure by a Helms-Burton plaintiff.

III. The FEMA Orders

A. 1990 FEMA Order

The first FEMA order was issued on October 31, 1990, in anticipation of the enactment of the Mack Amendment.[24] The Mack Amendment would have amended the Cuban Assets Control Regulations (CACR) so that, in effect, all

24. Foreign Extraterritorial Measures (United States) Order, (1990) SOR/90-751, Oct. 31, 1990 (the 1990 FEMA Order).

trade with Cuba originating in Canada by any company that was U.S.-owned or controlled would be prohibited. The Mack Amendment ultimately did not pass. However, the 1990 FEMA Order was not revoked until October 1992, when it was superseded by a new FEMA order.[25]

B. 1992 FEMA Order

The 1992 FEMA Order was passed in response to the amendments to the CACR effected by the Cuban Democracy Act of 1992.[26] The Cuban Democracy Act accomplished the result intended by the Mack Amendment by prohibiting U.S. export control officials from issuing any licenses for trade between Cuba and foreign subsidiaries of U.S. corporations (except in respect of medicines and medical supplies). As a result, trade between Cuba and foreign subsidiaries of U.S. corporations was prohibited by U.S. law.

In response, the 1992 FEMA Order required Canadian corporations and their officers to give notice to the Attorney General concerning any directives which they received regarding trade or commerce between Canada and Cuba relating to an "extraterritorial measure of the United States" from a person in a position to direct or to influence the policy of the corporation in Canada. "Extraterritorial measure of the United States" was defined narrowly to refer only to a particular provision of the Cuban Democracy Act. In addition, Canadian corporations were prohibited from complying with an extraterritorial measure of the United States, as defined, and with any directives relating to it.

In effect, the 1992 FEMA Order required Canadian subsidiaries of U.S.-owned or controlled corporations to continue to trade with Cuba as if the licensing regime that was revoked by U.S. legislation had not been revoked. There were no prosecutions for violations of the 1992 FEMA Order, although a number of cases apparently were investigated.[27] The failure to prosecute may have been due to the limited coverage of the 1992 FEMA Order, prosecutorial restraint in view of the delicate foreign policy consequences, or simply a lack of evidence.

C. 1996 FEMA Order

Anticipating the possible enactment of Helms-Burton, on January 15, 1996, the 1992 FEMA Order was amended significantly to broaden its scope to blunt the impact of not only the amendments to U.S. law effected by the Cuban Democracy Act of 1992, but also the provisions of the CACR generally, as well as any

25. Foreign Extraterritorial Measures (United States) Order, (1992) SOR/92-584, Oct. 9, 1992 (the 1992 FEMA Order).

26. National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, 106 Stat. 2315 (1992). The Act was signed into law by President Bush in the late stages of an election campaign in which the vote of the Cuban expatriate population in Florida was crucial.

27. William MacEachem, *Ottawa Targets Cuba Policy*, The Financial Post, Jan. 23, 1996, at 1.

similar measure passed by any branch or body of U.S. federal, state, or local governments.

As the 1992 FEMA Order arguably did not cover nontangible forms of trade, the amendments cover measures relating to trade in services and technology, as well as goods. In addition, the FEMA Order introduces a definition of "trade or commerce between Canada and Cuba" that includes Canadian nationals or corporations that were black-listed as Cuban nationals or corporations by the Office of Foreign Assets Control (OFAC) of the U.S. Treasury Department. As a result, a Canadian corporation discontinuing trade with a Canadian corporation associated with Sherritt because that associated corporation was black-listed by the U.S. Treasury Department might violate the FEMA Order.[28]

The FEMA Order broadens the notification obligation to expand the group of persons responsible for notifying and to require notification to be made forthwith and to contain prescribed information.

The FEMA Order broadens the prohibition against complying with an extraterritorial measure of the United States. It requires not only the Canadian corporation, but also its directors, officers, managers, and employees in a position of authority not to comply with the U.S. measure. Most significantly, section 6 of the FEMA Order states that the prohibition against complying with an extraterritorial measure of the United States or with any directive to do so applies "in respect of any act or omission constituting compliance." The prohibition applies "whether or not compliance with the extraterritorial measure or communication is the only purpose of the act or omission." This language is designed to capture situations, which apparently arose under the 1992 FEMA Order, in which a corporation might be able to invoke several other reasons, in addition to its concern for the U.S. Cuban embargo, for ceasing trade with Cuba. The problem of mixed motives is discussed in detail below.

The FEMA Order places Canadian corporations and their directors and management in a dilemma in relation to compliance with Canadian and U.S. law.

28. The following entities associated with Sherritt Inc., a predecessor corporation of Sherritt, were added in June 1995 to the list of Specially Designated Nationals on the basis they are owned or controlled by or act or purport to act directly or indirectly on behalf of the Cuban Government and are therefore subject to the prohibitions of the CACR: The Cobalt Refinery Company Inc. (an Alberta corporation); International Cobalt Company Inc. (a Bahamas corporation); La Compania General de Niquel S.A. (also known as General Nickel Company S.A., a Cuban state company, GNC); and Moa Nickel S.A. (also a Cuban state company). Changes to the List of Specially Designated Nationals of Cuba, 60 Fed. Reg. 33029 (1995). At the time of writing, Sherritt itself was not listed as a Specially Designated National. In late 1995, partly out of concern for the bill that became the Helms-Burton law, Sherritt Inc. reorganized by splitting into Sherritt, a publicly traded New Brunswick corporation that assumed Sherritt's Cuban nickel business, and Sherritt Inc. (since April 1996 known as Viridian Inc.), which assumed its fertilizer business. Sherritt owns a 50% interest in the Specially Designated Nationals listed above, with the exception of GNC. GNC owns the remaining 50% interest. See Sherritt Rights Offering Prospectus dated November 20, 1995. Viridian was acquired by Agrium Inc., another fertilizer company, on December 10, 1996. *See* Agrium Inc. News Release dated December 10, 1996.

The Regulatory Impact Analysis Statement accompanying the FEMA Order recognizes that

> the amendments will place some corporations and persons in Canada in a situation in which they cannot comply with United States law and other measures. This will, however, be due to the extraterritorial imposition of United States law and other measures on Canadian trade with Cuba in violation of Canadian sovereignty and in violation of generally accepted principles of international law. Should a person be prosecuted in the United States for a violation of a United States measure, the existence of this order may be considered by American courts.[29]

Its precise impact, however, will be for those courts to determine.

No guidelines or interpretation bulletins have been published concerning the FEMA Order, and it is unlikely any will be made available.[30] The news release issued with the FEMA Order simply states the 1992 FEMA Order was amended "to block attempts by the United States to restrict trade between Cuba and U.S.-owned subsidiaries based in Canada."[31] Corporations wishing to understand their obligations under the FEMA Order therefore are forced to undertake a very close reading of the FEMA Order and to consult legal counsel.

The following sections of this article examine in detail the notification and noncompliance obligations in the FEMA Order.

D. Notification Obligation

1. *Types of Notifiable Communications*

The notification obligation in the FEMA Order now extends to directors of Canadian corporations and requires Canadian corporations and their directors and officers forthwith to give notice to the Attorney General regarding any policies or communications they receive relating to an extraterritorial measure of the United States. The 1992 FEMA Order did not require notification to be made on an urgent basis. The FEMA Order specifies the content of the notice to be sent to the Attorney General, including the names of the persons from whom the communication originated and by whom the communication was received, the text of the communication, the date the communication was received, and the period during which the communication is intended to be effective.

The type of communication that must be notified is described as "any directive, instruction, intimation of policy or other communication . . . ," echoing the

29. This statement is an allusion to the possible availability of the foreign sovereign compulsion defense in a prosecution of a Canadian corporation in a U.S. court for alleged noncompliance with the CACR. If there is a true conflict between U.S. and foreign law, U.S. courts may decline to exercise jurisdiction. *See* Hartford Fire Ins. Co. v. California, 113 S. Ct. 2891 (1993).

30. At the CBA Meeting, the delegation was informed that the government does not intend to provide for advisory opinions or to issue guidelines.

31. "Canada Amends Order Blocking U.S. Trade Restrictions," Government of Canada News Release No. 8, January 18, 1996.

wording in FEMA itself. While the nature of a "directive" or "instruction" is relatively clear in most cases, the meanings of "intimation of policy" and "other communication" are perhaps less clear. "Intimation of policy" seems designed to capture a communication that does not take the form of a directive or instruction, but essentially amounts to the same thing because it is corporate "policy" and as such must be adhered to. "Other communication" is potentially very expansive. On its face, this phrase could potentially even cover communications subject to legal protection, such as solicitor-client communications,[32] or communications that take the form merely of information, *e.g.*, the transmittal of the text of the CACR and no more.

Some reasonable limits should be placed on the types of communications subject to notification. It is a well-accepted principle of statutory construction that in any phrase grouping various concepts together, a general closing word or catch-all concept should be interpreted consistently with the more specific elements of that grouping. Adopting this principle, it seems reasonable to interpret "other communication" in the FEMA Order as a communication that takes its meaning from the previous terms (directive, instruction, intimation of policy). A communication that is instructional in nature is therefore notifiable.

Mere information concerning an extraterritorial measure of the United States should be insufficient to trigger the notification obligation. However, the particular circumstances of the situation should be reviewed. The transmission of mere information might also amount to an "intimation of policy." For example, consider a communication consisting of the text or substance of U.S. law regarding Cuba accompanied by an observation that U.S. law purports to extend to U.S.-owned or controlled subsidiaries abroad and that U.S. persons may be liable to prosecution for a violation by the subsidiary. The relationship between the U.S. parent corporation and its subsidiary in Canada may be such that this communication might well be construed as an intimation of policy not to engage in trading activities with Cuba.

It is important to note that a directive does not need to have been implemented in order to be notifiable. Also, a countermand directive by the Canadian corporation does not negate the notifiable character of the directive.

Standard export instructions and general codes of conduct to which not much thought were given previously now raise questions concerning their notifiability. For example, a code of conduct dealing with various aspects of international business, including foreign corrupt practices and foreign antitrust laws, might

32. *See* Richard G. Dearden, *Trade with Cuba—Canada and the United States Set on a Collision Course*, 1996 A.B.A., Sec. of Int'l Law & Practice 8. At the CBA Meeting, a Department of Justice official with principal responsibility for the FEMA Order commented that his personal view was that true solicitor-client communications should not be caught by the notification obligation. However, he pointed out the potential for abuse in this area; *e.g.*, routing directives that on their face are notifiable through in-house legal departments.

also incidentally mention U.S. embargo legislation extending to a number of countries, including Cuba.

A corporate code applicable to international operations may be redrafted so that the revised version is not notifiable. For example, instructions regarding Cuba could be amended to make clear that prohibitions on trading with Cuba are subject to local law, and that foreign subsidiaries, branches, and other foreign affiliates or overseas business units should consult with local legal counsel to determine the requirements of local law.

2. *Circumstances Creating Notifiable Communications*

Although the notification provisions of the FEMA Order may have been designed to catch communications issued by the U.S. parents of Canadian subsidiaries, Canadian corporations that are not U.S.-controlled also must be sensitive to the notification provision. For example, a president of a Canadian-controlled corporation is "a person who is in a position to direct or influence the policies of the Canadian corporation in Canada" as described in section 3 of the FEMA Order. If the president issues a memorandum to employees stating that the corporation will not trade with Cuba to safeguard its competitive standing in tendering for government contracts in the United States, the corporation and its directors and other officers seem to be obligated to provide a notice to the Attorney General concerning the memorandum issued by the president.[33]

The notification obligation arguably only applies when the corporation and its directors and officers are aware of the terms of a notifiable communication. It seems there should be no affirmative duty for the corporation to undertake an extensive, time-consuming, and expensive search of its files to unearth any potentially notifiable communications, particularly if the corporation pursues Cuban business opportunities as it would any other opportunities. A related case arises when a directive is received by a low-level employee and not communicated to the corporation's directors and officers. Arguably, this communication is not caught by the notification obligation.[34] Are communications that predate the FEMA Order notifiable? They probably are, to the extent that they have a continuing influence over the affairs of the corporation.[35]

33. They also seem to be obliged to disregard the president's memorandum by virtue of the noncompliance obligation, discussed below.

34. There is a distinction made in the notification obligation in section 3 of the FEMA Order and in the noncompliance obligation in section 5 of the FEMA Order between the categories of persons who have responsibility for abiding by the obligation. The notification obligation is restricted to directors and officers, while the noncompliance obligation includes not only directors and officers, but also managers and employees in a position of authority.

35. Although there is a presumption that legislation is not intended to have a retroactive application, there is no presumption against the immediate and general application of legislation; quite the reverse is presumed. The obligation to notify does not reach into the past and alter the law or the rights of persons as of an earlier date; rather, the application is prospective only to the facts in the present time; *see* Gustavson Drilling, [1977] 1 S.C.R. 271; Attorney Gen. of Quebec v. Expropriation Tribunal, [1986] 1 S.C.R. 732; and Chebaro v. Chebaro, [1987] Fam. 127 (Eng. C.A.). Section

3. *Consequences of Filing a Notification*

Failure to notify a notifiable communication is a criminal offense. However, there is no criminal penalty associated with either having received a notifiable communication or having submitted a notification. Nevertheless, the filing of a notification with the Attorney General constitutes direct evidence about the communication and could possibly create an inference (if it is not rebutted in the notification itself) that the communication was complied with. For example, if there was a previous complaint to the Department of Justice concerning compliance with the CACR by the notifying corporation, the Justice Department could recommend an investigation to determine whether the corporation is in violation of the noncompliance obligation of the FEMA Order.

A senior Department of Justice lawyer assured the author that notifications made to the Attorney General are treated with extreme confidence. The official, who is closely involved with the administration of the FEMA Order, indicated that notifications are not released pursuant to an Access to Information Act[36] request and are not transmitted to other government departments (*e.g.*, the Department of Foreign Affairs and International Trade) for use in Canada's diplomatic efforts against Helms-Burton. Of course, a notification may become public if the Attorney General prosecutes a violation of the FEMA Order.

4. *Strategic Considerations*

If it is determined that a communication is notifiable, it is important to comply with the notification obligation as soon as possible, *i.e.*, forthwith, as set out in the legislation. Notifications may include supplementary information setting out the circumstances in which the notification was received. This is particularly important if:

- the communication was received some time ago;
- the communication was sent inadvertently;
- similar future communications will be amended to exclude Canada; or
- the Canadian corporation has not complied with the communication.

3(1) of the FEMA Order refers to communications "that the Canadian corporation, director or officer *has received* from a person. . . ." The legislation could more clearly restrict the notification obligation only to present and future receipt of communications if the word "receives" were used instead.

36. The Federal Access to Information Act, R.S.C. ch. A-1 (1985) (AIA) provides that any record containing information the disclosure of which is restricted by a statutory provision set out in Schedule II of the AIA cannot be disclosed. However, the notification requirements of section 5 of FEMA are not scheduled. FEMA would have to be amended to allow the notification provision in section 5 to be included in Schedule II to the AIA. There may be other grounds upon which the Department of Justice could deny access to notifications, such as the exceptions for Canada's international affairs in section 15 and third-party information in section 20. A close reading of these exceptions and the content of a typical notification suggests there is some scope for argument on the relevancy of these exceptions. Canadian subsidiaries of U.S. firms should also be sensitive to Cuba-related documents, other than notifications, that may reside in government files. Subject to the statutory exceptions, these may be released in response to an AIA request.

The notification obligation is self-enforced. The FEMA Order does not require Canadian corporations to certify on a regular basis that they received no directives over a specific period of time. Thus, it might be tempting not to notify the Attorney General of a communication that should be notified, so as to avoid possible investigation. The better strategy is to comply with the law and to explain the circumstances of the receipt of the communication. The risk in not notifying is that the government might otherwise learn of the existence of the communication and, depending on the facts, perhaps take a much less sanguine view of the failure to notify.

For example, a Canadian buying agent acting on behalf of a Cuban state entity might complain to the Department of Justice that it was unable to obtain supplies of a product from a U.S.-controlled Canadian subsidiary. In the course of investigating the matter, the Canadian authorities could search the subsidiary's premises and discover a notifiable communication. It can be expected that, in any criminal proceedings that might follow, the failure to notify will be one of the charges prosecuted. This fact may well make it more difficult to defend against a charge of complying with a U.S. extraterritorial measure.

As a practical matter, in order to avoid a notifiable communication arising in transborder discussions about the respective compliance obligations of the U.S. and Canadian corporations, it is desirable to involve outside U.S. and Canadian counsel as intermediaries. The discussions could be managed so that they are privileged and undertaken for the purpose of obtaining legal advice.

In some circumstances, the U.S. parent may be anxious to issue a directive to the Canadian subsidiary, knowing that this directive creates a notification obligation on the part of the Canadian subsidiary. This might occur when the U.S. parent is under investigation by OFAC for failing to control the Cuban business activities of its foreign subsidiaries. The fact of the notification is used by the U.S. parent as evidence of compliance with U.S. law. In this situation, Canadian counsel for the Canadian subsidiary has to tread carefully to ensure that the Canadian subsidiary is fully conversant with Canadian law and that counsel's professional duty to the Canadian client is served. At the same time, U.S. and Canadian counsel should strive for an overall positive outcome for both the U.S. and the Canadian corporations, consistent with the two sets of laws.

B. Noncompliance Obligation

1. *Noncompliance Obligation Contrasted with Notification Obligation*

Section 5 of the FEMA Order prohibits compliance with extraterritorial measures of the United States, as defined, or with any directive relating to such a measure. As noted above, the noncompliance obligation is broader than the notification obligation in at least two ways.

First, the persons obliged to take section 5 into account include managers and employees in authority, in addition to directors and officers of the Canadian

corporation. All four categories of individuals are prohibited by section 5 from complying with a notifiable communication, while only directors and officers are obliged to notify under section 3 of the FEMA Order. Thus, it is important to bear in mind that managers and employees in a position of authority who receive a notifiable communication cannot act upon the communication even if technically they do not seem to be obliged to notify it under section 3. Second, the noncompliance obligation applies even if there was no notifiable communication.

2. *Extended Definition of Compliance*

Most controversially, section 6 of the FEMA Order prohibits compliance with an extraterritorial measure of the United States when compliance with such measure is but one consideration among several in a corporation's decision not to engage in Cuban business. Section 6 reads as follows:

> Section 5 applies in respect of any act or omission constituting compliance, in respect of any trade or commerce between Canada and Cuba, with an extraterritorial measure of the United States or a communication referred to in that section, whether or not compliance with that measure or communication is the only purpose of the act or omission.

For example, a Canadian corporation might be tempted to decline some Cuban business because it is encountering difficulty in establishing the Cuban customer's creditworthiness and believes it may encounter some difficulties servicing equipment that is the subject of the business proposal. At the same time, because the Canadian corporation is a subsidiary of a U.S. corporation, the corporation factors into its thinking the restrictions on trading with Cuba set out in the CACR. Although all of these factors enter into the decision by the Canadian corporation not to pursue the proposal, section 6 of the FEMA Order in effect downgrades the importance of the other factors and seems to ascribe criminal liability to the Canadian corporation for compliance with U.S. embargo law.

The limits of the compliance obligation are difficult to define. Does a corporation really comply with U.S. law if it can demonstrate there are several objective, obvious, and reasonable business reasons for not pursuing a Cuban business opportunity or relationship, and concern for the U.S. embargo law is merely incidental? Taken to an extreme level, does the noncompliance obligation apply to all Canadian subsidiaries of U.S. corporations that, because of the CACR, have never developed business opportunities they know exist in Cuba? Section 6 seems to go too far in implying that Canadian corporations are almost under a legal duty to trade with Cuba under any circumstances.

The definition of "trade or commerce between Canada and Cuba" in the FEMA Order raises the question of indirect relationships. This definition refers to trade between (1) Canada and its nationals, corporations, or other legal entities, and (2) Cuba or its nationals, corporations, or other legal entities and Canadian nationals or corporations designated as Cuban nationals or corporations under extraterritorial U.S. law. For example, does a Canadian corporation's decision

to terminate a contractual relationship with a third-country (*e.g.*, Mexican) corporation engaged in trade with Cuba fall within the noncompliance obligation? Is this too remote a relationship?

3. *Definition of "Extraterritorial Measure of the United States"*

A threshold and apparently straightforward consideration in complying with the FEMA Order is knowing what constitutes an "extraterritorial measure of the United States." While the FEMA Order includes a definition of this phrase, the definition raises a number of very difficult questions of interpretation, and therefore questions about the application of the FEMA Order.

The first branch of the definition defines "extraterritorial measure of the United States" as the CACR. This is specific and readily ascertainable. The second branch of the definition is expansive and more murky. It refers to any kind of "legislative, executive, administrative, regulatory, judicial or quasi-judicial" instrument emanating from the federal, state, or local level "having a purpose similar to that of the Cuban Assets Control Regulations." The second branch of the definition covers legislation such as local and state procurement laws that discriminate against foreign businesses with a Cuban relationship. Because the FEMA Order pre-dates Helms-Burton by almost two months, the second branch of the definition does not refer directly to Helms-Burton. Although it may seem obvious, still the question should be asked: does the second branch of the definition capture Helms-Burton?

To answer this question, a Canadian corporation is forced to undertake a rather strange exercise involving the interpretation of foreign laws. It must first determine the purpose of the CACR. Assuming the Canadian corporation concludes that the purpose of these regulations is to create a comprehensive sanctions system regarding Cuba, it then needs to determine whether the second branch of the definition captures Helms-Burton. To do this, the Canadian corporation must understand the purpose of the Helms-Burton law.[37] The Canadian corporation must then compare the purposes of Helms-Burton and the CACR and determine whether the purpose set out in Helms-Burton is similar to that of the CACR.

Assuming the Canadian corporation determines that the purposes of the CACR and Helms-Burton are similar, the Canadian corporation must then determine whether it is complying with the CACR or the Helms-Burton law. Consider the situation of a Canadian-controlled corporation that declines a Cuban opportunity

37. Section 3 of the Helms-Burton law sets out six purposes, including: assisting the Cuban people in regaining their freedom and prosperity; strengthening international sanctions against the Castro government; providing for the continued national security of the United States; encouraging the holding of free and fair democratic elections in Cuba; providing a policy framework for U.S. support to the Cuban people in response to the formation of a transition government or a democratically elected government in Cuba; and protecting U.S. nationals against confiscatory takings and the wrongful trafficking in property confiscated by the Castro regime.

because it fears that pursuit of the opportunity might expose its U.S. subsidiary's assets to a lawsuit under Title III of the Helms-Burton law. Does failure to pursue the Cuban opportunity constitute compliance with Helms-Burton? Some observers might argue this behavior constitutes compliance since it results in the denial of economic benefits to the Castro regime and achieves the same purpose as the CACR. Others might argue, on a more narrow reading of the FEMA Order, that it is difficult to characterize such behavior as compliance because taking that decision does not bring the Canadian corporation into conformity with any positive obligations established under Title III of Helms-Burton.

Do the recent amendments to FEMA assist in resolving this problem? Although the government scheduled Helms-Burton as a "foreign trade law" that is "contrary to international law or international comity," this fact does not directly answer the question as to whether Helms-Burton has a purpose similar to that of the CACR. Indeed, the fact Helms-Burton is so scheduled might suggest the government decided to address concerns regarding Helms-Burton under FEMA rather than the FEMA Order. Two points may be made in this regard. First, although FEMA was amended to deal with Helms-Burton, the government has not amended the FEMA Order to specifically refer to Helms-Burton. Second, the government did not schedule the CACR as an objectionable foreign trade law when it amended FEMA.

One may also resort to general principles of statutory interpretation in understanding the noncompliance obligation under the FEMA Order. On the one hand, there is the general principle that criminal legislation is strictly interpreted in favor of the accused and any doubt or ambiguity is resolved in favor of the accused.[38] On the other hand, the federal Interpretation Act requires the court to give all laws of Canada, including criminal laws, a "fair, large and liberal construction and interpretation as best ensures the attainment of its objects."[39] Is it appropriate to give Canadian corporations the benefit of the doubt on this question? Or should Canadian foreign policy prevail?

The interpretation issues suggest that the FEMA Order may be vulnerable on constitutional grounds. The troublesome areas are the vagueness of the second branch of the definition of "extraterritorial measure of the United States" and the expansive reach of section 6 in capturing any acts or omissions, no matter how minor.

Some comfort on these issues might be drawn from some statements made at the CBA Meeting. A Foreign Affairs official indicated during the meeting that there is currently no political will to clear up any ambiguity in the FEMA Order. If ambiguity were to become an issue, the official indicated the order might very

38. *See* Marcotte v. Canada (Deputy A.G.), [1976] 1 S.C.R. 108, 115; R. v. McLaughlin, [1980] 2 S.C.R. 331, 335.

39. Interpretation Act, R.S.C. ch. I-21, sec. 12 (1985).

well be amended so that Helms-Burton is clearly defined as an "extraterritorial measure of the United States." It was explained that exempting Helms-Burton from the coverage of the FEMA Order, despite the practical problems alluded to above, would not be politically attractive to the government. This view suggests it may be appropriate at the present time to construe the current ambiguity in favor of the Canadian corporation.

4. *Enforcement of the FEMA Order*

At the time of writing, the Canadian Government had not prosecuted any Canadian corporation for a violation of the FEMA Order. However, one case in particular was the subject of official comment. In March 1997 it was reported that Wal-Mart Canada removed Cuban-made pajamas from its Canadian store shelves until it obtained a legal opinion on whether its U.S. parent company might be in violation of the CACR.[40] As a result of the decision, Canada's International Trade Minister, Art Eggleton, announced the Department of Justice was studying whether Wal-Mart Canada's decision violated the FEMA Order.[41] Shortly afterwards, the U.S. Treasury Department announced it was reviewing Wal-Mart Canada's decision to restock the Cuban-made pajamas at its Canadian stores.[42]

The *Wal-Mart* case demonstrates the intergovernmental tensions that can arise when the Canadian subsidiary of a U.S. corporation encounters the conflicting requirements of U.S. and Canadian law. If the case does not result in a prosecution on either side of the border, such lack of prosecution will be a tacit recognition of the diplomatic problems associated with enforcing the CACR and the FEMA Order in such circumstances.

5. *Canadian Controls on Exports of U.S.-Origin Goods to Cuba*

The Regulatory Impact Analysis Statement accompanying the FEMA Order explains that the order did not revoke or diminish Canadian controls on the export of U.S.-origin goods to Cuba. In effect, compliance with Canadian export control law regarding Cuba does not constitute compliance with U.S. law regarding Cuba contrary to FEMA. The two systems co-exist.

There is a long history of economic cooperation between Canada and the United States on export controls. This history dates back to World War II and pre-dates

40. David Roberts, *Wal-Mart Pulls Cuban Pajamas from Stores*, THE GLOBE & MAIL, Mar. 1, 1997. The article reports that Canadian customers brought to the attention of Wal-Mart Canada the apparent inconsistency of the Canadian company selling the pajamas when the U.S. company could not.

41. *Canada Studying Wal-Mart Actions for Anti-Helms-Burton Law Violations*, 14 INT'L TRADE REP. No. 11, 481 (1997).

42. *See Treasury Reviewing Wal-Mart Canada Decision to Sell Cuban-Made Pajamas*, 14 INT'L TRADE REP. No. 12, 522 (1997). The re-stocking decision seems to have been motivated by Wal-Mart Canada's desire to comply with the FEMA Order rather than the CACR.

the Cuban revolution. Item 5400 of Canada's Export Control List established under the Export and Import Permits Act[43] implements Canada's obligations to the United States for U.S.-origin goods. In exchange for U.S.-origin goods entering Canada without the necessity of a U.S. export license, the export of U.S.-origin goods requires a Canadian export permit. There is an exception in Item 5400 for "goods that have been further processed or manufactured outside the United States so as to result in a substantial change of value, form or use of the goods or in the production of new goods." Item 5400 therefore ensures that U.S.-origin goods are subject to Canadian export permit requirements.

For ease of administration, General Export Permit (GEP) No. Ex 12—United States Origin Goods (GEP 12)[44] permits goods that are not otherwise controlled by the Export Control List to be exported without the necessity of obtaining an individual export permit. However, GEP 12 does not authorize the exportation of goods to Cuba. As a result, it is necessary to apply for an individual export permit to export any U.S.-origin goods from Canada to Cuba.

Canadian export control officials question the proposed export to Cuba of goods or major components marked "Made in U.S.A.." Generally, marks of origin, such as "Made in Canada," are accepted for export control purposes, even though the U.S.-origin content of the goods may exceed the U.S. content thresholds.

In the case of goods manufactured in Canada or outside Canada and the United States, which incorporate U.S.-origin materials in the manufacturing process, Canadian export control officials judge, according to the test in Item 5400, the extent to which the U.S.-origin materials were substantially changed "in value, form or use . . . in the production of new goods." If the percentage of U.S. content remains substantial, *i.e.*, at least 50 percent of the value of the goods, the goods generally are treated as being of U.S. origin.[45] The Canadian threshold for U.S.-origin content is higher than the U.S. threshold and may cause difficulties in complying with both systems.

Prior to the amendment of the CACR by the Cuban Democracy Act, U.S. export control officials determined that if the cost of U.S.-origin content was not in excess of 20 percent of the export selling price, a license would be issued. Since the amendments, however, licenses are not issued on this basis. Now, when the cost of the U.S.-origin goods to the Canadian manufacturer is not in excess of 10 percent of the export selling price of the end product, a U.S. export license generally is not required under U.S. export control laws.[46]

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43. Export and Import Permits Act, R.S.C. ch. E-19 (1985).
44. SOR/97—107 (Jan. 29, 1997) ("GEP 12")
45. The 50% figure is an unwritten administrative guideline only, with no statutory or regulatory force.
46. John Ellicott, "Conflicting Positions of the United States and Canada Regarding Trade with Cuba and Cuban Parties by Canadian Subsidiaries of U.S. Corporations," paper presented to the Annual Spring Meeting of the American Bar Association Section of International Law and Practice held April 24-27, 1996, at 19-20.

A somewhat inconsistent result occurs in the case of Canadian goods produced using 100 percent U.S.-origin technology. In this case, the goods consist of Canadian materials and do not themselves constitute the technology. Such goods may be eligible for export to Cuba without an individual export permit, unless they are otherwise listed on the Export Control List. U.S. law may conflict with Canadian law in this situation. In contrast, if U.S.-origin technology itself was reduced to a material form, such as a blueprint, it is considered a good and its export is controlled. The technology in a material form is considered U.S.-origin goods, and could not be exported to Cuba from Canada.[47]

The practical effect of the implementation of Item 5400 of the Export Control List is that a sale to Cuba of U.S.-origin goods (or goods with at least 50 percent U.S. content) is prohibited both by Canadian and by U.S. law. There is no conflict between the two legal systems so long as the goods contain at least 50 percent U.S. content.

In addition to goods within Item 5400, there are goods otherwise controlled by Canada on the Export Control List (*e.g.*, goods with dual civil/military applications, munitions, and nuclear goods) that are independently controlled even if they are not of U.S. origin. As a result, exports of such goods to Cuba are subject to Canadian export controls that may deny their export.

6. *Navigating Between the Cuban Assets Control Regulations and the FEMA Order*

There may be situations when Canadian corporations face the apparently conflicting demands of the CACR and the FEMA Order. For example, a Canadian subsidiary of a U.S. corporation may receive an order from a buying agent for a Cuban entity. Suppose the goods ordered do not qualify as U.S.-origin goods. Should the Canadian subsidiary sell the goods? In this context, it may be useful to consider whether there may be contractual restrictions between the U.S. parent corporation and its Canadian subsidiary concerning the territories in which the Canadian subsidiary may sell the non-U.S. origin goods. For example, consider the case of goods manufactured in Canada by a Canadian subsidiary of a U.S. parent corporation. By virtue of contractual restrictions and territorial limitations on intellectual property rights, the goods may be sold by the Canadian subsidiary only to Canadian customers. In this case, the Canadian subsidiary simply may not have the right to sell the goods to foreign territories, including Cuba. This situation may pre-date the FEMA Order and may have been determined completely independently of any considerations of trade with Cuba. The paramount consideration may simply have been the territorial integrity of the parent company's distribution system. In this case, a decision not to sell to Cuba should be consistent with the legal obligations of the Canadian subsidiary. Refusing to sell

47. Jonathan T. Fried, *The Impact of U.S. Export Controls on Trade Between Canada and the United States*, 11 CANADA-UNITED STATES L.J. 185, 191-2 (1986).

to a Cuban customer in this situation should not be considered a violation of the FEMA Order.

Another case of apparent conflict may involve consignment goods in Canada to which the U.S. parent corporation retained title. In this case, the U.S. corporation may be within its rights, under the applicable law of the consignment agreement and its relationship with its Canadian subsidiary, to exercise control over these goods and to deny their purported sale by the Canadian subsidiary to a Cuban customer. A variation of this situation is a refusal by the U.S. parent to sell non-U.S.-origin parts to its Canadian subsidiary, which the subsidiary has ordered for a Cuban customer. In these cases, the Canadian corporation does not have the right to interfere with its parent's decision. Again, it is difficult to imagine how the Canadian subsidiary violates the FEMA Order by failing to complete the sale in these situations.

IV. Navigating Between Title III of Helms-Burton and the FEMA Order

The broad definition of traffic in the Helms-Burton law draws in Canadian businesses that are not principally involved in dealing with confiscated property claimed by a U.S. person. For example, suppliers to those who are trafficking in confiscated property might be considered to be profiting from this relationship. Customers of traffickers might be considered to be profiting because they are engaged in sales and distribution of confiscated property. Financial institutions with security interests in inventories of materials derived from confiscated property might be considered to hold an interest in that property. What are the Canadian legal consequences when these firms desire to extricate themselves from these relationships in order to minimize their exposure to lawsuits under Title III of Helms-Burton?

While the Helms-Burton law frowns on these contractual relationships, it does not speak to their enforceability under the law governing these relationships (which may not be U.S. law). The alleged trafficker may sue for breach of contract if its partner purports to terminate the contract. Moreover, ceasing to do business with the alleged trafficker might expose a Canadian company to criminal liability under the FEMA Order. How does the Canadian supplier or customer:

- avoid Helms-Burton liability by extricating itself from the relationship;
- avoid civil liability under its contractual obligations; and
- avoid criminal liability under the FEMA Order?

As a preliminary matter, the Canadian corporation could conduct due diligence by searching the FCSC records of certified claims and by conducting title searches in Cuba. It could obtain a U.S. legal opinion to ascertain its risk of being sued under Title III of Helms-Burton.[48] If there is a reasonable basis to conclude the

48. *See* Marcus, *supra* note 5.

corporation is not trafficking, it would be unnecessary for the corporation to extricate itself from the relationship. Simply conducting due diligence should not be considered a violation of the FEMA Order. To hold otherwise would be to compel Canadian corporations to recklessly incur potential Helms-Burton liabilities. This result cannot be the intent of the FEMA Order.

In terms of civil liability, it seems the most prudent course for a firm desiring to exit its Cuban relationship is to try to reach some kind of mutually acceptable termination rather than simply breaching the contract. Apart from minimizing damages, private settlement of any differences avoids the publicity associated with a lawsuit that could draw attention to the relationship. Avoidance of publicity could in turn minimize the chances of the exiting firm becoming known to a possible plaintiff under Title III. If the proposed extrication is likely to become known to the Canadian Government, the Canadian corporation may wish to make submissions to the Department of Justice. The corporation could argue its proposed course of action will not violate the FEMA Order in the circumstances presented, and moreover that prosecution under the FEMA Order is not in the public interest.

This may have been the strategy selected by Redpath Sugar. Redpath reportedly decided in 1996 not to renew its contract to purchase Cuban sugar, citing its desire to sell to Canadian industrial sugar users who sell their products to the United States. Since Cuban sugar cannot enter the United States, these users can be supplied only with non-Cuban sugar. The company claimed that maintaining two separate inventories of Cuban and non-Cuban sugar is costly and impractical. The company also cited the unreliability of Cuban supplies and the competitiveness of other sources of sugar.[49]

Arguments of this nature may be easier to make if the corporation puts in place an alternative arrangement that will be considered appropriate in light of the purpose of the FEMA Order. The wording of the FEMA Order suggests that the Canadian Government's principal concern is the reach of U.S. extraterritorial measures to Canadian corporations that in turn feel compelled to curtail trade with Cuba. The definition in the order of "extraterritorial measures of the United States" includes the qualification "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" (emphasis added). If the actions taken by the Canadian corporation do not have such negative trade effects, and are based upon good business reasons (including a desire to insulate the Canadian corporation from possible liability under Title III), then from a policy perspective should restructuring the relationship be permitted? Is careful planning to preserve the corporation's financial and legal health inconsistent with the FEMA Order?

49. *See* John Geddes, *Redpath's Bar on Cuban Sugar May Break Canadian Law*, THE FINANCIAL POST, May 23, 1996, at 1.

For example, a supply agreement between a Canadian supplier and a Cuban customer might be rearranged so that the Canadian supplier with U.S. assets exposed to a Title III action assigns its supply obligation to another Canadian corporation that does not have a similar concern about liability under Title III. If the alternative supplier is acceptable to the Cuban customer, and the terms and conditions of supply essentially remain unchanged, it would seem no prosecution is warranted. Canada's policy of continuing trade with Cuba is not frustrated.

However, under a broad interpretation of the noncompliance prohibition, it could be argued this restructured arrangement runs afoul of the noncompliance obligation in the FEMA Order. The ambiguity that exists in the FEMA Order potentially means that Canadian corporations are at risk of being prosecuted under Canadian law if they take defensive measures to avoid liability under Title III of Helms-Burton.

This result seems contrary to the Canadian Government's policy of protecting Canadian corporations from exposure to such lawsuits. By amending FEMA, by declaring that Title III judgments will not be enforced or recognized in Canada, and by allowing Canadian corporations to recover claw-back damages in Canadian courts, the government attempted to provide some protection for Canadian corporations facing Helms-Burton liabilities. It would be ironic indeed if Canadian law is interpreted by the Canadian Government so as to prohibit Canadian corporations from restructuring their Cuban relationships to minimize their exposure to Title III actions in the first place. A broad view of the FEMA Order also places a Canadian corporation's board of directors in an impossible position, by forcing its members to choose between their fiduciary obligations to preserve the corporation's assets from Title III lawsuits and their obligations to avoid criminal liability under the FEMA Order.

Certainly, from the perspective of U.S. law, a settlement between an alleged trafficker and a U.S. national holding a claim to confiscated U.S. property is an acceptable resolution under both Titles III and IV of Helms-Burton. It was announced in July 1997 that ITT Corporation informed the Department of State that it and STET International (STET) (an Italian telecommunications company now known as Telecom Italia) reached an agreement for ten years regarding ITT's confiscated property in Cuba consisting of the Cuban Telephone System.[50] As a result of the settlement, the State Department terminated the ongoing investigation relating to STET's use of ITT's confiscated Cuban property, and STET thus avoided possible exclusion of its executives from the United States under Title IV. Subsequent reports stated the European Commission had no intention of recommending prosecution of STET for its apparent compliance with Helms-

50. See U.S. Department of State statement by Nicholas Burns, July 23, 1997. The State Department noted that ITT's claim was certified by the FCSC in June 1970 in the amount of US$130 million, plus interest.

Burton. Yet, the European Union, like Canada, adopted blocking legislation that prohibits compliance with U.S. extraterritorial law regarding Cuba.[51]

V. Conclusion

The extraterritorial impact on Canadian corporations of U.S. laws concerning trade with Cuba is dissipated to some extent by Canada's blocking legislation. The Canadian law creates notification and noncompliance obligations that raise difficult interpretation questions. In certain circumstances, it may be possible to comply with both U.S. and Canadian law concerning trade with Cuba.

51. *EU Clears Cuban Deal Struck by Telecom Italia*, THE GLOBE & MAIL, July 25, 1997, at B-8. Telecom Italia owns a minority interest in the Cuban Telephone Company, ETECSA.