

Relating to and Doing Business with Cuba: A Canadian Perspective*

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I. Introduction

The history and status of Canadian bilateral relations, business, and trade with Cuba have been a source of some controversy in the United States. Not long ago, I participated in a series of debates—at times heated—before U.S. audiences on the subject of Canadian opposition to the Helms-Burton Act of 1996.¹ Those gatherings were prompted by a comparatively rare impasse in political and international legal discourse between the United States and Canada, along with other key allies and trading partners, for which Cuba—with or without Castro—served more as a lightning rod, rather than the core focus for a more general and protracted disagreement on the subject of extraterritoriality.² In the latter context, it is useful to recall that, well before lightning struck over Cuba, Canada felt compelled to enact general blocking legislation as a tool to render business actors under Canadian jurisdiction at least as miserable complying with the purported extraterritorial reach of any U.S. laws so designated as they might otherwise have been in breaching them. Only later was this tool enlisted specifically in defence of growing trade with Cuba.³

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1. Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, Pub. L. No. 104-14, 110 Stat. 785 (codified at 22 U.S.C. §§ 6021-91 (2002)) [hereinafter Helms-Burton].

2. See, e.g., H. Scott Fairley, *Third-State Objections to the Extraterritorial Application of National Laws: A Focus on Helms-Burton*, 91 AM. SOC'Y OF INT'L LAW PROC. 339 (1997) [hereinafter *ASIL Procs.*]; H. Scott Fairley, *Why the Helms-Burton Act Violates International Law*, 23 CAN. COUNS. ON INT'L LAW BULL. 10 n.2-3 (1997); contra Brice M. Clagett, *Title III of the Helms-Burton Act is Consistent with International Law*, 90 AM. J. INT'L L. 434 (1996).

3. See Foreign Extraterritorial Measures Act, R.S.C., ch. F-29 (1984) (Can.) (as amended). For a useful commentary on the genesis of this legislation as a response to the extraterritorial reach of U.S. antitrust and securities laws as applied by U.S. courts, see William C. Graham, *The Foreign Extraterritorial Measures Act*, 11 CAN. J. BUS. L. 410 (1986). See also *infra* notes 8-12 and accompanying text.

Canadian-American policy differences over Cuba remain unresolved. However, the impasse is one our respective governments and international business communities have managed to live with, notwithstanding clearly conflicting laws between our two jurisdictions and equally antithetical positions on their appropriate reach. With profuse apologies to our third North American trading partner, the prevailing Canadian-American status quo on Cuba may be best viewed as a classic Mexican stand off.⁴

Even allowing for the current status quo, however, one can now speculate rationally on the prospect of the United States re-establishing relations with and Americans doing business in Cuba. For the most part, such discussion necessarily pre-supposes re-engagement only with a post-Castro Cuba. Yet, at that juncture, one should also seriously question whether Cuba will be a radically different country to either relate to or do business with after Fidel Castro passes into history. President Castro inevitably will, but his legacy is another matter. Eventually, history will tell us. In the meantime, we can only reason from what we presently know. From that vantage point a Canadian perspective—though in no shape or form official—may be of some value.

II. Relations with Fidel Castro's Cuba

Cuba enjoys essentially normal diplomatic and economic relations with most nations, including Canada, for which diplomatic relations have been uninterrupted since 1945. From 1899 until Castro's accession to power in 1959, Cuba had been a nominally independent protectorate of the United States following military intervention by the United States in support of a Cuban rebellion against Spain in the spring of 1898, and the formal cession of Cuba to the United States at the conclusion of the Spanish American war later that year.⁵

Fidel Castro, originally a young Cuban lawyer and political candidate for public office in the Cuban national election scheduled for June 1952, became a local social revolutionary figure following the successful *coup d'etat* of Fulgencio Batista, who seized power in March of 1952 and maintained a dictatorship thereafter. After an unsuccessful attempt to topple the Batista government the following year, a trial, conviction and imprisonment in Cuba, Castro was released and exiled to Mexico in 1955. In December 1956, Castro returned to Cuba with a new revolutionary cadre, jointly led by an Argentinean physician, Ernesto "Che" Guevara. This second guerrilla war against Batista ultimately became a successful

4. This observation is informed by the comparative rarity of substantive cases and controversies between Canada and the United States under their opposing legislation, and by my own experience in advising Canadian-based corporations on how to avoid being the source for such precedents. Two examples stand out. First, on the Canadian side, the abortive attempt by Wal-Mart (U.S.) to induce Wal-Mart (Can.) to stop selling Cuban sourced clothing in its Canadian retail outlets in the spring of 1997. See *ASIL Procs.*, *supra* note 2, at 339-40. Second, on the U.S. side, the current U.S. government criminal prosecution of Purolite, a Pennsylvania-based company, and certain of its officers for alleged violations of the Cuban embargo, *inter alia* through its Canadian office, which action went to trial in Philadelphia before the United States District Court for the Eastern District of Pennsylvania in March of 2002. *United States v. Brodie*, 174 F. Supp. 2d 294 (E.D. Pa. 2001). For a more scholarly analysis that tends to support my observation from a U.S. perspective, see Peter L. Fitzgerald, *Pierre Goes Online: Blacklisting and Secondary Boycotts in U.S. Trade Policy*, 31 *VAND. J. TRANSNAT'L L.* 1, 94-95 (1998).

5. The U.S. intervention in Cuba in 1898 was justified principally in terms of U.S. interests, but also as a humanitarian intervention on behalf of the Cuban people. See IAN BROWNIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 290-91, 340, 346, 290 nn.1-6, 291 nn.1-10, 340 nn.1-10, 346 nn.1-6 (1963); see generally ELBERT JAY BENTON, *INTERNATIONAL LAW AND DIPLOMACY OF THE SPANISH AMERICAN WAR* (P. Smith ed., 1908).

revolution. Castro assumed power at the head of Cuba's socialist government on New Year's Day, 1959. Cuba became the first communist state in the western hemisphere. Initial recognition of the Castro government by the United States soon gave way to economic estrangement arising out of closer economic ties between Cuba and the Soviet Union, which sustained the former for the most part until the final break-up of the latter in 1991.⁶

The brief historical snapshot is instructive for present purposes, if only to note that apart from the neo-colonial attachment, which the United States readily renounced by recognizing Cuba's new government at the outset of the Castro regime, the United States, Canada, and other nations all started to deal with the new Cuba from the common vantage point of *de facto* and *de jure* recognition of a new status quo. What very quickly distinguished the U.S. position and attitude from that of other nations, however, was not merely communist verses western ideology, but a litany of unfortunate politics. From the abortive U.S. supported debacle at the Bay of Pigs, to Fidel Castro becoming an agent of Soviet efforts to tip the nuclear balance of terror in its favour at the height of a Cold War during the Cuban Missile Crisis in 1962,⁷ the prospect for future U.S. relations with Castro's Cuba was perhaps irretrievably lost.

The Castro dictatorship and Castro the person remain a visceral raw nerve in the politics and foreign policy of the United States that has persistently refused to heal, spawning a continuing—if also controversial—legacy of embargo and related economic and legal sanctions.⁸ This legacy shows no signs of dissipating so long as Castro remains in power—even though the original threats are long gone, and notwithstanding an impatient U.S. business community that has argued strongly against the utility of sanctions, citing in particular, significant opportunity costs for the U.S. economy in maintaining them.⁹ However, this article is the product of a perspective of what may be done for the business case before, as well as in anticipation of President Castro's departure from the scene.

The rest of the international community, including Canada, has never had reason to view Castro's Cuba in the same light as successive generations of U.S. legislative actors—Helms, Burton, and Torricelli.¹⁰ Yet, it should also be stated—at least from the Canadian perspective with which I am most familiar—that many of the United States' principal ongoing concerns about the laws and policies of the Castro government are widely shared. The fundamental difference that separates the United States from its major allies and trading partners is one of method in how to deal with those concerns. A public statement by Christine Stewart,

6. See THE CANADIAN TRADE COMM'N SERV., *CUBA: A GUIDE FOR CANADIAN BUSINESS* 3–6 (3d ed. 2001), available at <http://www.infoexport.gc.ca/ie-en/Office.jsp?oid=121> (providing a historical and cultural overview for Canada) (last visited Sept. 9, 2002).

7. See ABRAM CHAYES, *THE CUBAN MISSILE CRISIS* (rev. ed. 1987) (providing the international law aspects of this confrontation).

8. See MICHAEL KRINSKY & DAVID GOLOVE, *UNITED STATES ECONOMIC MEASURES AGAINST CUBA* (1993) (providing critical domestic analysis of the U.S. embargo of Cuba); see generally GARY CLYDE HUFBAUER ET AL., *ECONOMIC SANCTIONS RECONSIDERED* (2d ed., 1990); MICHAEL P. MALLOY, *UNITED STATES ECONOMIC SANCTIONS: THEORY AND PRACTICE* (2001).

9. See NATIONAL ASSOCIATION OF MANUFACTURERS, *A CATALOG OF NEW U.S. UNILATERAL ECONOMIC SANCTIONS FOR FOREIGN POLICY PURPOSES 1993–96* (1997) (critiquing U.S. sanctions policy).

10. The reference here is to the namesake Congressional sponsor of the Cuban Democracy Act of 1992. See Cuban Democracy Act of 1992, Pub. L. No. 102–484, 106 Stat. 2575 (codified at 22 U.S.C. §§ 6001–10 (2002)) (purporting to extend the sanction of the U.S. embargo of Cuba to U.S. owned and/or controlled subsidiaries operating in other jurisdictions).

Canadian Secretary of State for Latin America, made as part of Canada's official response to the perceived excesses of Helms-Burton, succinctly captures the alternative methodologies:

In the broadest sense, I believe we share many of the same goals as the United States. Our aim is a peaceful transition in Cuba to a genuinely representative government that fully respects internationally agreed human rights standards. And we look forward to Cuba's becoming an open economy. However, we differ from the United States on how to reach these objectives. We have chosen the path of engagement and dialogue; the United States has picked isolation.¹¹

The purpose of this article is not to defend Canada's chosen policy toward Cuba or critique that of the United States,¹² rather, to pursue whatever insight might be gleaned from Canada's present policy of engagement with Cuba. Putting aside current judgments on wisdom, what do the lessons of engagement tell us going forward? Presumably—and it is again the underlying assumption of this article—the United States and U.S. businesses plan to engage vigorously after Castro is gone, making every effort to make up for lost time. The substantive touchstones highlighted by Minister Stewart in the above-quoted passage are democracy, human rights, and a free-market economy. These themes also provide a useful focus for an analysis of where Canadian policies of engagement have tended to lead.

A. ENCOURAGING DEMOCRACY AND HUMAN RIGHTS IN CUBA

Dealing with an ultimately totalitarian regime always leaves those who do vulnerable to the charge that they are profiting from the misery of the oppressed. The most visible Canadian lightning rod for this kind of controversy has been the substantial mining operations of Sherritt International at Moa Bay in Cuba. Sherritt executives are to date the only Canadian pariahs designated under Title IV of Helms-Burton, but that designation relates to an administrative finding of trafficking in confiscated property, not alleged human rights abuses.¹³ The latter have been the subject of journalistic discussion, which Sherritt Chairman, Ian Delaney, stoutly rejected, defending Sherritt's contribution not only to Castro's coffers and the Cuban economy, but also to the lot of the Cuban worker.¹⁴ Such allegations and rhetoric apparently never progressed to the level of a formal complaint to or adverse findings by any international human rights tribunal or agency against either Sherritt or any other Canadian business entity. Nevertheless, political sensitivity in Canada and elsewhere prompted similar political efforts to advance human rights as well as economic agendas in Cuba.

In December of 1996, the Council of Ministers of the European Union (EU) was the first to move, with the adoption of a Common Position on Cuba,¹⁵ which emphasized the diplomatic and economic objective of EU-Cuban relations "to encourage a process of tran-

11. See Honourable Christine Stewart, Secretary of State for Latin America & Africa, Notes for an Address to the Symposium on Helms-Burton and International Business (May 16, 1996) (available from the Canada Dep't of Foreign Affairs and Int'l Trade).

12. H. Scott Fairley, *Exceeding the Limits of Territorial Bounds: The Helms-Burton Act*, 34 CAN. Y.B. INT'L L. 161 (1997) (making the argument on point) [hereinafter *Exceeding the Limits*]; see generally H. Scott Fairley & John H. Currie, *Projecting Beyond the Boundaries: A Canadian Perspective on the Double-Edged Sword of Extraterritorial Acts*, in TRILATERAL PERSPECTIVES ON INTERNATIONAL LEGAL ISSUES: RELEVANCE OF DOMESTIC LAW & POLICY 119-148 (Michael K. Young & Yuji Iwasawa eds. 1996).

13. See Helms-Burton, *supra* note 1; see also *Exceeding the Limits*, *supra* note 12, at 168-72.

14. Compare Z. Olijnyk, *Sherritt's Delaney Defends Cuban Operations*, FIN. POST, Feb. 25, 1997, at 13, with C. Lane, *Cuban Trade: Canada's Hypocrisy over Helms-Burton*, GLOBE & MAIL, July 27, 1997, at D2.

15. Council Directive 96/697/CFSP, 1996 O.J. (L322) 1, reprinted in *European Union: Council of Ministers Common Position on Cuba*, 36 I.L.M. 213 (1997).

sition to pluralist democracy and respect for human rights and fundamental freedoms," in tandem with improving the economic well-being of the Cuban people.¹⁶ That objective, however, was premised on a process of evolutionary change within Cuba that "[a] transition would most likely be peaceful if the present regime were itself to initiate or permit such a process. It is not European Union policy to try to bring about change by coercive measures with the effect of increasing the economic hardship of the Cuban people."¹⁷

The EU approach, while arguably a transparent effort to assist President Clinton in making a good political case for exercising restraint in implementing the full agenda of Helms-Burton,¹⁸ still mapped a very different course than the imposition of sanctions. The EU Common Position stresses working with rather than against the Castro government, avowedly in pursuit of a constructive, result-oriented dialogue with Cuba and closer economic cooperation as Cuban authorities make progress towards democracy.¹⁹

The Canadian strategy was essentially the same—for many of the same reasons. But Canada succeeded in going one step further in making a timely human rights initiative jointly with the Government of Cuba, instead of simply another unilateral declaration of intent. Canadian Foreign Affairs Minister Lloyd Axworthy paid a visit to Cuba in January of 1997, which concluded with a Canada-Cuba Joint Declaration on Cooperation on Political, Economic and Social Issues (Joint Declaration).²⁰ Minister Axworthy's counterpart for these negotiations was not Fidel Castro, of course, but then Foreign Affairs Minister Roberto Robaina Gonzalez. Together, they set out a non-binding agenda "to advance towards new initiatives within the framework of their bilateral relationship," including:

1. Cooperation in the area of the administration of justice and the judicial-legal system, including exchanges of judges and judicial training.
2. Support exchanges between the House of Commons and the National Assembly, focusing on the operations of both institutions.
3. Exchange of experiences between both countries relating to the Cuban intention to strengthen within the National Assembly of People's Power a Citizens' Complaints Commission.
4. Broadening and deepening cooperation on the issue of human rights, which will include the preparation of seminars on diverse matters of mutual interest, academic exchanges between officials, professionals and experts, as well as sharing experiences and positions on the work of the specialized organizations of the United Nations.
5. Supporting the activities of Canadian and Cuban non-governmental organizations within the framework of bilateral cooperation between both countries and in accordance with the laws and regulations of each country.
6. Continuation of macroeconomic cooperation, with an initial focus in the areas of taxation and central banking, while studying joint areas in which Canada might continue to support the Cuban policy of economic reform.
7. The negotiation of a Foreign Investment Protection and Promotion Agreement. . . .²¹

16. *Id.* at 214, ¶ 1.

17. *Id.*

18. President Bill Clinton, Statement on Suspending Title III of the Helms-Burton Act (Jan. 3, 1997), in 36 I.L.M. 216 (1997); see also *Exceeding the Limits*, *supra* note 12, at 204.

19. Council Directive 96/697/CFSP, *supra* note 15, ¶¶ 3-4.

20. Canadian Dep't of Foreign Affairs and Int'l Trade Media Relations Office, *Done at Havana* (Jan. 22, 1997), in 36 I.L.M. 210 (1997).

21. *Id.* at 211-212.

There were seven other areas of cooperation specifically named. The initial seven quoted above, however, are the most relevant for illustrating the point of change from within and the development of strong bilateral relationships of understanding, trust, and confidence going forward as change occurs.

This ongoing policy of engagement does not necessarily yield immediate dividends. In fact, Canada-Cuba relations have substantially deteriorated since the 1997 Joint Declaration. The failure of the Castro government to further the democratic agenda and a general hardening of its attitude to political dissidents, rather than the reverse contemplated by Minister Axworthy in 1997, lies at the root of the current frostiness. The currently posted Department of Foreign Affairs and International Trade (DFAIT) statement on Canada-Cuba Relations emphasizes:

[D]espite Canada's commitment to an engagement policy, the Canadian government has responded decisively to the deteriorating political situation in Cuba over the last two years. After a period marked by uneven progress in Cuba's commitment to economic and political reform, 1999 and 2000 have witnessed deterioration. Several problems have been particularly worrisome, namely: ideological tightening; little progress on basic rights, such as freedom of expression; increasing use of short-term detention and harassment against political activists; stalled progress towards a large-scale religious opening; continued Cuban attempts to weaken the UN human rights system; and slow application of economic reform, which has frustrated foreign businesses and prevented the nascent private sector from coming into play as a significant alternate source of growth.

In the face of these problems, Canada undertook a program review ordered by the Prime Minister. As a result of the review, any new or expanded Canadian initiatives are being examined on a case-by-case basis to ensure that programming reinforces areas of positive change in Cuba, such as civil society, good governance, economic policy reform and direct humanitarian assistance to the Cuban people. Continued emphasis is being placed on engaging non-state partners, including the Church and civil society. Established programs and commercial relations are proceeding normally.²²

The same document notes that Canada has channelled approximately \$35 million in development aid into Cuba since the mid-1990s, that academic and cultural relations between universities, municipalities, and artistic organizations are growing significantly, as is Canadian tourism,²³ but the overall message is decidedly mixed. The Prime Minister of Canada, Jean Chretien, last visited Cuba in April 1998. President Castro attended the funeral of former Prime Minister, Pierre Trudeau, in September 2000, and met with Prime Minister Chretien at that time. Yet the DFAIT commentary makes a point of noting that, notwithstanding that meeting, "there were no new breakthroughs in Canada-Cuba relations."²⁴

In short, the current state of Canada-Cuba relations is far from ideal. One product of the Prime Minister's program review with respect to Cuba is that there have been no further visits of senior Canadian public officials to Cuba since the spring of 1999.²⁵ Small wonder then that the possibility of a bilateral foreign investment protection and promotion agree-

22. CANADA DEP'T OF FOREIGN AFFAIRS AND INT'L TRADE, CANADA-CUBA RELATIONS, at [http://www.dfait-maeci.gc.ca/latinamerica/cuba relations-e.asp](http://www.dfait-maeci.gc.ca/latinamerica/cuba%20relations-e.asp) (last visited Sept. 3, 2002) (Emphasis added).

23. *Id.*

24. *Id.*

25. Telephone Interview with Dep't of Foreign Affairs and Int'l Trade, Cuba Desk (Mar. 6, 2002) [hereinafter Interview].

ment, Canada's functional equivalent of the U.S. bilateral investment treaty formula for protecting foreign investment in the host state,²⁶ has to date and five years down the road not materialized. Apart from apparently healthy academic and cultural exchanges of various kinds on the individual and institutional levels, the same may be said of the other items on the democracy and human rights agenda of the Joint Declaration. On the other hand, either signatory has specifically repudiated none of these putatively shared goals. The next question, of course, is where to from here.

At this juncture, it appears to be President Castro's call to move things along. For this to happen, the Cuban government would have to commit to significantly increased transparency in its actions and accountability for them. Such standards of governance remain fundamentally difficult for the Castro regime to contemplate, let alone implement—all the more so for being the product of alien forces laying siege to an isolated ideology. The fact that the policy of constructive engagement has been a good deal less hostile in form and method than the U.S. alternative does not make it any less foreign in application. In that regard, Canada may be able to push the frontier of democracy in Cuba only so far.

B. ECONOMIC RELATIONS: ENCOURAGING A FREE? MARKET

Canada entered into substantial economic relations with Cuba prior to any settlement of outstanding Canadian claims with respect to confiscated property and investments, but the latter were in fact settled by agreement in 1980.²⁷ Information is scarce, however, on the issue of how "adequate, effective, and prompt"²⁸ the claims settlements of individual cases proved to be. Nevertheless, a twenty-one year wait for negotiated settlements is quite some time.

In the meantime, ongoing politics of engagement prompted treaty arrangements on the economic and financial fronts to facilitate trade and business relations with a cash-strapped country, albeit one with a sometimes unpredictable central economy. A technical cooperation agreement was concluded in 1974;²⁹ an all-important agreement extending a development line of credit followed in 1975.³⁰ Two years later, the two countries concluded a further agreement on fisheries relations.³¹

The volume of Canada-Cuba trade has fluctuated over the years, synchronized to some extent with the ebb and flow of Canada-Cuba relations. From 1996 through 2000, two way

26. The current foreign investment protection and promotion agreement (FIPA) formula is derived from the North American Free Trade Agreement (NAFTA) model and, as of this writing, Canada has bilateral FIPAs currently in force with sixteen other countries, and two other FIPAs (with South Africa and El Salvador) have been signed, but are not yet in force. See Canada Dep't of Foreign Affairs and Int'l Trade, Trade Negotiations and Agreements: Regional and Bilateral Agreements, at <http://www.dfait-maeci.gc.ca/tna-nac/fipa-e.asp> (last visited Sept. 3, 2002) [hereinafter Trade Negotiations].

27. Agreement relating to the Settlement of Canadian Claims, Nov. 7, 1980, Can.-Cuba, 1981 Can. T.S. No. 18.

28. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 532 (4th ed. 1990). This is the classic Western formulation of the manner and level of compensation required when a host government expropriates property of a foreign national. This is the formulation employed by both Canada and the United States in their respective FIPA and bilateral investment treaties. See, e.g., *id.* at 532-36; Foreign Investment Protection and Promotion Agreement, Can.-Egypt, 1997 Can. T.S. No. 31; Trade Negotiations, *supra* note 26.

29. Technical Co-operation Agreement, Feb. 8, 1974, Can.-Cuba, 1974 Can. T.S. No. 8.

30. Agreement Establishing for Cuba a Development Line of Credit, Mar. 18, 1975, Can.-Cuba, 1975 Can. T.S. No. 9 [hereinafter Line of Credit].

31. Agreement on Mutual Fishing Relations, May 12, 1977, Can.-Cuba, 1977 Can. T.S. No. 17.

trades ranged from \$690.6 million to a peak of \$815.7 million in 1998, falling to just under \$702 million the following year, and then recovering to \$736.6 million in 2000.³² Unofficial statistics, preliminary for 2001, for Canadian balance of trade figures show a modestly positive balance in Canada's favour: \$391.7 million in exports and \$361.3 million in imports, for a two way total of \$753 million.³³ The DFAIT's annual report, *Opening Doors to the World: Canada's International Market Access Priorities 2001*,³⁴ has only a brief note about Cuba, among other Caribbean countries, but does state that "Cuba is Canada's largest market in the Caribbean, and Canada is Cuba's biggest foreign investor world-wide," adding that, "[i]n spite of Canadian successes in Cuba, however, business dealings in a centrally controlled economy can be difficult, especially for the inexperienced exporter."³⁵

This cautionary note crops up with instructive frequency in DFAIT literature. The latest DFAIT statement on Canada-Cuba Trade and Investment reiterates that "Cuba is not an easy market. . . . There have been instances when Canadian small and medium-sized enterprises have encountered difficulties in trying to do business in Cuba simply because of the nature of Cuba's centrally planned economy, which is distinctly different from other Latin American economies."³⁶ The nature of this trade from the Canadian side is mostly agri-food such as cereals and meat, machinery, motor vehicles, electrical equipment, and fertilizers, while the Cuban flow is primarily metallic ores and concentrates, sugar, tobacco (those celebrated—or infamous—Cuban cigars), and seafood.³⁷

History may prove that the larger players fare better than the smaller ones, particularly when doing business on the ground in Cuba. Indeed, approximately 80 percent of Canadian imports for 2001 are metallic ores and concentrates, with most attributable to Sherritt International's nickel mining operations at Moa Bay.³⁸

III. Doing Business in Cuba: Some Contemporary Realities

My own experience in advising Canadian companies selling to, buying from, or contemplating investments in Cuba has focused on the issue of risk analysis and advice more in the context of Canadian-American relations than Cuban-Canadian relations. In those instances, clients have been at least as worried about steering between the Scylla and Charybdis of directly conflicting foreign policies and laws that affect other markets as they might be about the hazards of doing business in Cuba once they get there. Colleagues have also engaged in the latter, however, and our collective experience suggests that DFAIT's cautionary tales are well worth noting. Cuba continues to present a unique opportunity that will appeal to some, but not others.

32. See CANADA DEP'T OF FOREIGN AFFAIRS AND INT'L TRADE, CUBA FACT SHEET, OCT. 2000, at <http://www.dfait-maeci.gc.ca/cocs/82015-e.htm> (last visited Sept. 12, 2002) (noting that for the same period (1996–2000), the balance of trade was predominantly but not exclusively in Canada's favour, being substantially in Cuba's favour in 1996 (C\$401.2 million to C\$289.4 million) and again in 2000 (C\$408.5 million to C\$328.1 million)).

33. Interview, *supra* note 25 (providing preliminary statistics).

34. CANADA DEP'T OF FOREIGN AFFAIRS AND INT'L TRADE, *OPENING DOORS TO THE WORLD*, at <http://www.dfait-maeci.gc.ca/tna-nac/2001/4-e.asp> (last visited Aug. 12, 2002).

35. *Id.*

36. CANADA DEP'T OF FOREIGN AFFAIRS AND INT'L TRADE, CANADA-CUBA TRADE AND INVESTMENT, at <http://www.dfait-maeci.gc.ca/latinamerica/cubatrade-e.asp> (last visited Aug. 12, 2002).

37. *Id.*

38. Interview, *supra* note 25.

A. THE CAUTIONARY OVERVIEW

The Government of Canada has devoted considerable effort and resources through its embassy in Havana and government departments at home to give Canadian businesses and investors a good idea of what they are likely to encounter in Cuba—something the U.S. Government will undoubtedly undertake in due course, if this work has not already been done. Most of this information is freely available on Canada's government Web sites, with only some restrictions applying to selected materials, such as current market analyses, which is only accessible from Canadian electronic mail addresses.³⁹

A particularly useful document is *Cuba: A Guide for Canadian Business*,⁴⁰ a 130-page synopsis of Cuba's history, culture, and economy. The Guide includes a detailed sectoral overview, analysis of infrastructure, and pointers on investment, trade, and the regulatory environment. There is also a respectful discussion of the U.S. embargo, an analysis of the local business environment, and information about where to get help, including a comprehensive list of domestic and foreign contacts. The introduction to this treasure-trove for the uninitiated is instructive for what can only be regarded, again, as a distinctly mixed message:

Cuba is an emerging market with significant potential for Canadian exporters and investors. . . .

The attractiveness of these opportunities is mitigated by the continuing embargo of Cuba by the United States, including legislation that attempts to impose American laws on companies in other countries. Canada has enacted amendments to the Foreign Extraterritorial Measures Act (FEMA), which counteract these laws. . . . Nonetheless, Canadian companies with assets in the United States will have to consider their actions in Cuba very carefully.

While these American laws increase the risk for Canadian companies moving into the Cuban market, they also prevent American competitors from entering the market, except sporadically and through circuitous means. Partly for this reason, Cuba offers a variety of opportunities for new market entrants. Canadian companies who are used to taking on entrenched American competitors in other Latin American markets will find a much different environment in Cuba, where the principal competitors are from Latin America (especially Mexico) and Europe (especially Spain, Italy and France), as well as from Asia.

In spite of these attractions, Cuba is definitely not for the timid or the unprepared. The country has a high-risk business environment, where many foreign ventures have failed. Companies moving into Cuba today face a regulatory regime that is less than transparent even by developing country standards. Negotiations with government entities are characterized by deep distrust of capitalist motives and abrupt changes in position. Even after a deal has been reached through good faith bargaining with Cuban negotiators, senior officials may demand amendments. Some Cuban government companies can be financial unreliable and collections of even secured debts can be difficult.

Business ethics have been adversely affected as Cuba's liquidity situation deteriorates. There is a growing concern about the potential instability surrounding the inevitable succession of a new leadership and the eventual end to the American embargo. Canadian investors must balance the advantages of early entry into a dynamic market against the risks of abrupt changes in business conditions.

39. See CANADA DEP'T OF FOREIGN AFFAIRS AND INT'L TRADE, INTERNATIONAL TRADE, available at <http://www.dfait-maeci.gc.ca/trade/menu-e.asp>; see also CANADIAN TRADE COMM'N SERV., available at <http://www.infoexport.gc.ca> (last visited Sept. 12, 2002).

40. CUBA: A GUIDE FOR CANADIAN BUSINESS, *supra* note 6.

The companies that succeed are those that arrive with a solid medium-term business strategy and the resources and staying power needed to establish a high profile in the Cuban market. Officials of the Department of Foreign Affairs and International Trade suggest that the Cuban market is appropriate only for companies with annual sales in excess of \$1 million. They add that the company should be prepared to commit an executive at least halftime, with a minimum promotion budget in the order of \$100,000 per year, and it should not expect to earn a return within the first two or three years. . . .⁴¹

So, there you have it—a reasonably frank bottom-line from DFAIT, and bottom-line cut-off in terms of resources on what it considers to be the minimum commitment a business must make in the Cuban market. Both patience and caution remain distinct—and necessary—virtues to succeed.

B. NEGOTIATING THE DEAL

Be prepared for the long haul. The Guide states candidly that “[n]egotiations with Cuban government entities are characterized by a deep distrust of capitalist motives. Understandably, the government’s objective is to obtain the maximum amount of foreign capital with the minimum amount of foreign influence in the economy and the lowest possible benefit to foreign investors.”⁴² This atmosphere frequently results in negotiated terms and understandings being reopened as the deal moves up the food chain of government responsibility.

This pattern of negotiation, if not deal-breaking in scope and content, is both immensely frustrating and time-consuming when measured against typical international business practice. If the Cuban government were to publish and keep current a directory of Who’s Still Who, for all its ministries and their subsidiary government-owned corporations, the average length of the process might be abbreviated and its indeterminacy curtailed. To the best of my knowledge, no such publication is available.

In one instance where client confidentiality precludes the helpfulness of providing details and context, the negotiations were substantially upset when it became apparent that several of the officers of the corporate subsidiary responsible at first instance were utilizing the transaction as a potential vehicle for facilitating their defection to Canada. I am pleased to say that the client was saved from the brink of an international incident, but it also subsequently withdrew from its Cuban partnership. Prior to that point, a government directory of Who’s No Longer Who would have been extremely helpful, but alas, that is another good publishing idea that has not been implemented.

Canadian experience suggests that, from the presentation of the conceptual proposal of a typical joint venture until final approval, the negotiation process can take up to three years and completion in anything less than eighteen months would be rare indeed.⁴³ One starts with identifying the government ministry in charge of the economic sector applicable to the proposed investment, and then drilling down to the most appropriate subsidiary of the ministry in question to negotiate the deal at first instance. The deal is then subject to ministerial approval and finally, approval by the Executive Committee of the Council of Ministers. For all practical purposes, Executive Committee approval is required for all joint venture arrangements of any significance, and it is formally required to approve all investments exceeding ten million dollars.⁴⁴

41. *Id.* at 1–2.

42. *Id.* at 54; see generally *id.* at 49–62.

43. *Id.* at 54.

44. *Id.* at 54–57.

Descriptions of the actual legal and administrative framework through which the negotiations take place are beyond the scope of this article's mandate, and merit several articles to convey any kind of detailed understanding. It is understandable, however, and of comparatively recent vintage, postdating Cuba's loss of the Soviet umbrella in the early 1990s. Negotiations between foreign investors and Cuban government entities are all overseen by the Bureau of Negotiations of the Ministerio para la Inversion Extranjera y la Colaboracion Economica—that is, the Ministry for Foreign Investment and Economic Cooperation—pursuant to the current foreign investment law, Decree Law 77 that dates from 1995.⁴⁵ The laws and institutions are not the issue; these are modern, flexible and, for the most part, on their face, reasonable. Uncertainty and concomitant risk arise primarily with the layered bureaucracy that applies them.

C. SELLING INTO CUBA: COLLECTING ON THE DEAL

Your customer in Cuba is still, one way or another, the government. Increasingly, the Castro government is permitting its various ministries to do business with foreign sellers through semi-autonomous government-owned corporations, the more familiar Sociedad Anonima, or S.A. Nothing, however, can be sold in Cuba except through a government-approved entity. Commodities fall within defined economic sectors for which a particular ministry is responsible, its designated S.A., or, in some sectors, conglomerates of government-owned production companies, *uniones*, which have been formed to coordinate production and distribution of commodities such as paper, plastics, and agri-food.⁴⁶

Goods can only be imported by government entities and joint ventures in Cuba holding permits for specific commodities. Joint venture vehicles may also entail duty-free status or reduced duties in relation to the designated products of the proposed joint venture, an item that is typically on the table in negotiating the joint venture agreement.⁴⁷ However, the prospect of securing tariff exemptions or reductions, if considered essential to the viability of the business proposal, brings us back full circle to the vagaries of that protracted process. Clearly, if a large volume of trade is to be contemplated and actively sought, the platform of a joint venture or economic association established in Cuba, which then becomes the entity you trade with, is a virtual necessity. Once again, there is no escaping direct government involvement. Ultimately, there is no one else.

In the absence of negotiated exemptions, tariffs range from a simple average of 10.7 percent for most commodities from most favoured nation (MFN) countries to a maximum MFN rate of 30 percent.⁴⁸ Canada enjoys the MFN rates, along with other countries with which Cuba has bilateral agreements. From 2000, as a result of a special trade deal on petroleum imports, Venezuela became Cuba's largest trading partner, followed by Spain, Canada, the Netherlands (including the Netherlands Antilles), China, and Russia, essentially in that order.⁴⁹

Winning the contracts one wants appears just as problematic as the process of creating the joint venture apparatus that effectively becomes one's buyer of record. The government

45. *See id.* at 49, 51, & 58.

46. *Id.* at 69–70, *see generally id.* at 63–79.

47. *Id.* at 73.

48. *Id.*

49. *Id.* at 63.

is always there and particularly vigilant concerning all hard currency transactions, which are—it should be fair to say—the only ones of interest to foreign commercial actors. Here again, Canada's Guide to business is perhaps un-Canadian in its frankness:

The procurement process can be complex, since hard currency spending is often under the control of the supervising ministry and the Council of Ministers, rather than the purchasing entity.

The procurement process lacks transparency, even by third-world standards. Potential corruption is controlled by close observation of both Cuban and foreign negotiators and by members of the security apparatus, rather than by exposing the overall procurement process to public scrutiny, as is the case in Canada. The process is shrouded in secrecy and there are no formal competitive bids. Moreover, the details of contract awards are not released.⁵⁰

A crucial element in all this is ensuring that one is paid after the deal is done and as promptly as possible once the goods are delivered. When it comes to the money from the Cuban side, credit to facilitate the transaction remains a must, because Cuba is always cash-strapped for hard currency. Otherwise the likelihood of any deal is exceedingly remote; from the vendor's point of view, insurance against payment becomes similarly indispensable. In this regard, a Canadian governmental credit facility with Cuba probably ranks as a *sine qua non* for most Canadian businesses to even approach the Cuban market, with the Export Development Corporation (EDC), a Canadian federal Crown corporation, providing needed insurance, financing, or both.⁵¹ In this regard, Canada, through the EDC, holds approximately \$114 million of the Government of Cuba's external debt.⁵² This may not be a particularly alarming figure, but nonetheless furnishes another illuminating indicator of the real cost of doing business in Cuba.

IV. Concluding Observations

Canada continues to value and pursue its economic relationship with Cuba. Canadian business also values the opportunity it has been given, particularly given the current self-induced exclusion of U.S. competition. At the same time, Canada remains committed to securing progress on the diplomatic and political aspects of its relationship, notably in the advancement of individual human rights and democratic institutions within Cuba.

The common denominator for Canada's efforts can be summed up under the rubric of constructive engagement. That process is currently stalled at the highest political levels, due to recent reversals of previous Cuban trends toward, and commitments to, increased political tolerance and more democratic institutions. However, Canada shows no signs of retreating from its chosen path, nor—in this writer's view—should it. On balance, the policy has worked to the mutual benefit and betterment of Cubans and Canadians, not merely to profit certain Canadian businesses or enhance Canadian trade statistics. Nevertheless, one must also acknowledge that the Canadian policy—shared with other democratic free market economies—has yet to succeed on its fundamentals.

50. *Id.* at 69.

51. Export Development Act, R.S.C., ch. E-20, (1985) (Can.) (as amended) (governing the Export Development Corporation's mandate as a Crown Corporation), available at <http://laws.justice.gc.ca/en/e-20/51623.html> (last visited Sept. 12, 2002); see Export Development Canada, available at <http://www.edc.ca> (last visited Sept. 12, 2002); see also Line of Credit, *supra* note 30, and accompanying text.

52. CUBA FACT SHEET, *supra* note 32.

Canadian frustration with an apparently deteriorating status quo on fundamental issues of democratic governance and human rights in Cuba can be attributed to the twin failures—or twin refusals—of the Cuban government to embrace transparency in its actions and, at the same time, render itself accountable for them. Acceptable accountability from any external standpoint—not just the Canadian one—entails measurement against internationally accepted norms. On this score, the institutional foundations necessary to secure such acceptance in Cuba are still lacking. Without these, Canada and Canadian businesses have found that the politics of the Cuban central economy places severe and consequential limitations on the business economics of dealing with it.

For Canadian business at the practical level, Cuba remains a difficult, demanding, but still worthwhile customer. Demanding customers are nothing new to any business and are more than to be expected in competitive international markets. Nevertheless, the nature and scope of the demands posed by Cuban governmental and business entities—and the officialdom of senior politics to which they are inextricably tied and subordinated—makes for unfamiliar, disturbingly opaque business risks being the ongoing order of the day. Canadian experience suggests that these have been, and can be, successfully handled, provided one is patient, flexible and does not have excessive business expectations.

Canadian experience with Cuban politics and Cuban business over time may further suggest that many lessons learned could still apply even after the passing of Fidel Castro. The future Cuba with which the United States will ultimately re-engage, will conceivably retain many of the same characteristics and methods, at least in the short and medium term, that are part and parcel of Castro's Cuba, notwithstanding that the person will be gone.

The Castro government continues to govern, enjoying close to a half-century of uninterrupted power. Whether or not President Castro will retain office to celebrate his fiftieth anniversary in January 2009 remains to be seen. Whatever the case, several generations of Cubans have grown up with the values and practices that currently inform the experience of Canada and that of Cuba's other major trading partners. That legacy will be neither lightly nor rapidly transcended. History can instruct not only those otherwise doomed to repeat the mistakes they have made, but also previous non-participants. Withal, the foregoing message is only one Canadian observer's view of what Canadians have learned. But, I am pleased to share it.

