

TRADE RESTRICTIONS: AN OVERVIEW

Looking at the application of US trade restrictions for Canadian companies doing business abroad and how looking at these laws could affect you

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Every day a staggering volume of goods cross international borders: World Trade Organization statistics show that in 2006, the total value of international trade in merchandise reached almost \$12 trillion. Globalization has opened the door for even the smallest company to a plethora of new, non-traditional markets.

Every entrepreneur knows that doing business in a foreign country has new and sometimes unforeseen legal implications. Indeed, companies now need to be aware not only of their own country's domestic legislation but also of foreign statutes that could affect their ability to operate abroad or, ultimately, to enter new markets. Crucially, these statutes may include US trade restrictions. This article aims to give a brief overview of these laws and sensitize the reader to some legal issues that may affect your business.

At the close of the 20th century, the *Financial Times* estimated that no less than *two-thirds* of the world's population was covered by one or another form of US trade restrictions. While this figure may have eased since, companies need to be aware of such restrictions. Even if it is based outside the United States, a company that conducts business internationally needs to be aware of the potential risks involved with doing business in violation of US trade restrictions.

How, some might ask, does this affect our business? After all, we're a Canadian company with no activities south of the border. If the answer to any of the

following questions is "yes," you should take the time to ask whether you comply with US trade restrictions. Do you do business in the Middle East or Asia? Do you export goods that may then be shipped to third parties? Do you import American goods for re-export, whether as-is or as inputs in finished items? Do you export goods with a potential military application (so-called "dual use" technology, such as certain computer hardware, telecommunications devices or manufacturing equipment)? These are just some of the activities that should raise awareness with respect to US trade laws.

Each sanctions regime has the potential to interfere with a company's ability to do business. Moreover, different regimes are crafted differently. Some simply block Americans from trading with persons in certain states (or members of certain organizations, or even specific individuals). Others promise measures against those trading with those same parties, for example by denying access to the US market. A company could thereby find itself unable to do business in the United States because of its past dealings in a given country.

The most comprehensive schemes go even further. Violations are punishable not simply by restricting trade with the United States; a company may actually find itself subject to criminal penalties inside the US for conduct that occurred entirely outside the United States. In fact, the company's managers may even find themselves *personally liable in criminal court* for what

the company did on their watch, potentially facing life imprisonment. As we will discuss below, some have learned this lesson the hard way.

Of course, not all regimes are equally restrictive. A company's risk exposure under US trade laws is primarily a function of two variables — what are you trading and with whom are you trading it? Sometimes, the answer is easy: you can probably sleep easy at night if all you do is sell furniture to Italians, but you may want to call your lawyer upon learning that your company ships missile blueprints to Tehran. The danger lies in taking it for granted that those same missile blueprints can be sent to an Italian sub-contractor.

Given the importance of the network of trade restrictions that have been enacted over time by the US government, we have decided to focus on a few key measures that should be of particular interest. More specifically, we discuss four pieces of legislation: the *Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996* (also known as “The Helms-Burton Act”); the *Trading with the Enemy Act*; the *International Emergency Economic Powers Act*; and the *Iran Sanctions Act*. Each of these laws is unique in its scope, both in terms of the restrictions it applies and territorial application — some apply only to individual sectors of the economy, while others are all-encompassing. Similarly, some do not claim to apply to non-Americans outside of the US, while others sanction certain conduct regardless of where and by whom it is committed.

Extraterritorial Jurisdiction

First, however, many might ask how someone can be subject to US restrictions without ever setting foot in the United States. The answer is in a controversial area of the law called extraterritorial jurisdiction. An example of this basis for extraterritorial jurisdiction is Canada's *Criminal Code*, which prohibits sexual offences against children regardless of where they occur. But it is unlikely that the suspect could be tried in Madrid if not so much as the victim's shoes were stitched in Spain.

Clearly, the United States government may prevent Americans from trading with certain peoples, or prevent Americans from trading with those who themselves have traded with persons under sanctions. The real controversy arises when a state attempts to try a person for acts committed entirely outside its borders. Examples include “universal jurisdiction” laws under which certain states claim the right to try

anyone for any crimes against humanity that took place anywhere in the world.

Some of the US trade regimes claim the same type of jurisdiction — anyone who engaged in prohibited conduct can be criminally liable, no matter where that conduct occurred. For example, the scope of

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application of some US trade restrictions extends to foreign subsidiaries of American companies or even to anyone who has done business in violation of US law. These rules post the greatest difficulty in terms of risk management — the first indication that there was a risk to manage may take the form of a subpoena from US law enforcement.

International Emergency Economic Powers Act (IEEPA)

A 1974 congressional report found that American federal law contained 470 provisions delegating emergency powers to the President. In fact, no fewer than four national emergencies had been proclaimed without ever having been rescinded, the oldest dating back to 1933. Technically, the US was in the midst of a 41-year emergency. In response, Congress enacted in 1975 the *National Emergencies Act* to regulate the emergency power.

The IEEPA was passed two years later to authorize the President to declare a national emergency and, to address that emergency, to prohibit most trade and financial transactions with the source of the threat.

The President may also seize property belonging to any country or person who aided an attack on the United States. It is under the IEEPA's authority that, for example, many of the post-September 11 banking restrictions were imposed. The law includes certain minor limits on the President's power, such as the inability to prohibit the import of "informational materials" (e.g. publications, CDs or artworks).

Violating the IEEPA can lead to a fine of up to \$10,000. However, the maximum penalty for a "wilful" violation is \$50,000 and, for individuals (including a company's directors, officers and agents who knowingly participate in the offence), up to 10 years imprisonment.

While the IEEPA does not currently apply to foreign subsidiaries of US companies, in both 2004 and 2005 Senator Frank Lautenberg (D-NJ) sought to amend the law to close what may be perceived as a loophole. Such an amendment may be reintroduced and, next time, successfully passed.

Cuban Liberty and Democratic Solidarity (Libertad) Act (The Helms-Burton Act)

In February 1996, the Cuban military shot down two civilian planes over what the US claimed were international waters. The US responded with the *Cuban Liberty and Democratic Solidarity (Libertad) Act*, commonly known as The Helms-Burton Act after its sponsors, Jesse Helms (R-NC) and Dan Burton (R-IN).

Title III of the Helms-Burton Act allows American nationals whose property was expropriated without compensation to sue anyone trafficking in those assets. The intent appears to be to allow Americans to sue foreign investors in Cuba who own, manage or otherwise do business with property confiscated from US nationals. Title IV bars a corporation's managers (along with their family members) from entering the US if their employer has so profited from expropriated assets.

To date, the Helms-Burton Act's extraterritorial impact has been less significant than was feared, as the law authorizes the President to waive the application of Title III for an unlimited number of periods of six months. Since 1996, both Presidents Clinton and Bush have repeatedly invoked this authority to prevent the law from reaching outside the United States. However, there can be no guarantee that Title III waivers will continue indefinitely as Cuba enters what may be a period of political instability and, in any case, the same waiver does not apply to Title IV.

Trading with the Enemy Act (TWEA)

The TWEA is among the oldest American sanctions instruments, having originally been passed during the Civil War and updated in 1917. It empowers the President to prohibit trade in goods belonging to a foreign country or its nationals. While the President has been unable to use the TWEA outside of wartime since the passage of the IEEPA, existing programs applicable to North Korea and Cuba remain in effect.

The maximum penalty for violating the TWEA is \$1,000,000 for a company. Individuals, including a company's directors, officers and agents, are subject to a fine of \$100,000 and up to 10 years imprisonment. The TWEA applies "persons subject to the jurisdiction of the United States" — a term that has been understood to mean foreign subsidiaries of US companies.

Iran Sanctions Act (ISA)

Originally enacted in 1996 at the behest of Senator Alfonse D'Amato (R-NY) as the *Iran-Libya Sanctions Act*, the ongoing thaw between Washington and Tripoli left Iran alone under the ISA as of 2006. The ISA applies to the energy sector, requiring the President to pick at least two out of seven possible sanctions to impose on anyone who invests over \$20 million in one year in Iran's oil or gas industries. The list of possible sanctions includes prohibiting loans to the person of over \$10 million per year and ending US government procurement from the guilty party. For purposes of the ISA, the term "investment" includes signing a contract that provides for the development of oil or gas resources, the purchase of shares in such a venture or the sharing of revenues flowing from such an undertaking.

The ISA authorizes the President to waive its application if it is in the US national interest to do so. As of December 2007, none of the many foreign investments made in violation of the ISA had been sanctioned, but the possibility remains that continuing tensions over Iran's nuclear program may lead to the end of this era of non-enforcement.

A Lesson Learned too Late

The sticks available to prosecutors under these sanctions regime are fearsome indeed. More importantly, they are no idle threat, as some unfortunate companies and employees have discovered. First is the tale of James Sabzali, who ran afoul of the TWEA restrictions on trading with Cuba.

Between 1992 and 1996, Sabzali sold American-made water purification equipment, making a

number of business trips to Cuba. After moving to Philadelphia in 1996 as managing director of Bro-Tech Corporation, the native of Trinidad found himself (along with some American colleagues and Bro-Tech) facing 76 counts of violating the TWEA. The maximum sentences for each count amounted to

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potential life imprisonment. In 2002, the jury handed Sabzali a pyrrhic victory by finding him guilty of 21 of those counts.

After years of legal machinations, Sabzali escaped prison and, after a plea bargain, was ultimately sentenced to one year of probation and a \$10,000 fine. The final sentence was not pronounced until February 2004 — a full seven years after the government first started investigating Sabzali's activities. Notably, the charge to which Sabzali pled guilty was based on a sale made while he was self-employed and living in Ontario. The prosecution maintained that the plea demonstrated that living outside the United States did not shield a person from being convicted under US law.

Barred from the United States

As mentioned earlier, the President may waive the application of certain provisions of the Helms-Burton Act. Title IV, which prevents executives from entering the US if their employers violate that law, is, however, in effect. Sherritt International Corporation, a Toronto-based mining company, has owned and operated properties in Cuba since 1994. Its

website even boasts that it is Cuba's "largest foreign investor." The passage of the Helms-Burton Act presented Sherritt with a dilemma: Either divest itself of its Cuban operations or face penalties under US law. The company chose the latter, and as a result certain of its executives and their families may not set foot on American soil.

In addition, although the Title III waivers have thus far made the point moot, Sherritt has received letters from US nationals claiming that the company is trafficking in illicitly expropriated assets, which would presumably lead to legal action if Washington's policy of continuous waivers came to an end. As if to rub additional salt in its wounds, as a publicly-traded company Sherritt must disclose any risk factors related to its business. Sherritt counts its legal exposure under the Helms-Burton Act among them, as the company's public disclosure documents review in some detail the difficulties and potential liability it faces as a result of doing business in Cuba.

Canadian Anti-Boycott Legislation

Many in the international community, including some of America's closest allies, have sought to combat the extraterritorial effect of US laws. Canada is no exception, with Ottawa responding to the passage of the Helms-Burton Act with amendments to the *Foreign Extraterritorial Measures Act* (FEMA). FEMA was originally enacted to counteract a US energy company's antitrust suit against a foreign uranium cartel (a cartel that included Canada).

The Canadian government later invoked it in 1992 to forbid Canadian companies from complying with US embargo against Cuba. Four years later, when President Clinton signed the Helms-Burton Act, FEMA offered Parliament an existing legal framework on which to build as it sought to blunt the law's effect.

In its post-1996 amendment form, FEMA includes four key countermeasures. First, it empowers the Canadian government to prohibit disclosure of evidence from Canada to a foreign tribunal if that tribunal is deemed to be infringing Canadian sovereignty or commerce. Second, it authorizes the government to issue orders prohibiting compliance with any foreign law that similarly harms Canadian sovereignty or commerce. Third, it provides that no judgement under the Helms-Burton Act is enforceable in Canada. Finally, if a Canadian resident or corporation is forced to pay damages to a plaintiff due to a lawsuit filed under Helms-Burton Act, FEMA allows the Canadian to then turn around and

recover that same amount from the American who collected under the US judgement.

FEMA's requirements are backed by penalties ranging up to \$1,500,000 in fines for corporations and, for individuals, a fine of \$150,000 — and up to five years imprisonment. While our searches have uncovered no prosecutions under FEMA, these are not the kind of consequences to be dismissed casually.

A schedule to FEMA identifies foreign laws that the Canadian government considers “contrary to international law or international comity.” The lone entry thus far? The Helms-Burton Act. What began as an “anti-antitrust” statute appears to have morphed over time into an anti-embargo tool, and a politically charged one at that. Needless to say, a Canadian company with Cuban involvement could easily find itself caught in the middle of a tug-of-war between FEMA and the Helms-Burton Act (not to mention other US embargo laws). In such situations, good legal advice is invaluable.

Trade Restrictions: A Moving Target

No less challenging than identifying and evaluating the risks as they exist today is the monitoring of proposed changes to the law. A politically sensitive domain, trade laws are liable to change for domestic reasons (e.g., the congressional review that led to the TWEA) or due to sudden shocks to the international system (e.g., the outcry over Cuba's downing of civilian pilots that led to the Helms-Burton Act). Several amendments to a variety of instruments are before Congress even now, and whether all or none become law before the November election, others are liable to be introduced in the 111th Congress when it convenes in 2009. What follows is a brief survey of a few bills whose progress merit scrutiny.

Iran Counter-Proliferation Act of 2007 (ICPA)

The ICPA, originally introduced in the House of Representatives by the late Tom Lantos (D-CA), is aimed at halting Iran's nuclear program. It would penalize any “entity” that violates sanctions imposed on Iran under the IEEPA, as well as any parent company that created a subsidiary for the purpose of engaging in such conduct — in other words, US companies that set up subsidiaries in order to get around the IEEPA. The ICPA would also remove the President's authority to waive the application of certain provisions of the ISA to foreign nationals. It would also require the President to report twice a year on any investments made in Iran's oil resources, potentially increasing the risk of negative publicity or congressional scrutiny

for any such investor. The bill has been approved in the House and is now before the Senate Committee on Banking, Housing, and Urban Affairs.

A Second Iran Counter-Proliferation Act of 2007 (ICPA II)

An attempt by Senator Gordon Smith (R-OR) to extend sanctions against Iran, the ICPA II would expand the ISA's definition of Iran's energy sector to include, for example, oil, gas or liquefied natural gas tankers and equipment to construct or maintain pipelines. It would also extend the IEEPA's application to foreign subsidiaries in the same manner as its namesake. The ICPA II authorizes the President to waive any of its provisions and has been referred to the Senate Committee on Finance.

A Third Iran Counter-Proliferation Act of 2007 (ICPA III)

This bill — third in a series — was introduced in the House by Darrell Issa (R-CA) and is almost identical to the ICPA II. It would require the Secretary of the Treasury to make regular reports identifying persons operating or conducting business in the US that have invested in Iran. As with the ICPA, the potential ramifications would include negative publicity and a risk of congressional intervention. Unlike the ICPA, however, the ICPA III would require a report on *any* business activity, not merely investments in the oil sector. The bill is currently before the House Committee on Foreign Affairs.

Stop Doing Business with Terrorists Act of 2007 (SDBT)

This short bill, co-sponsored by Senators Lautenberg and Hillary Clinton (D-NY), has a single substantive provision: sanctioning foreign subsidiaries of US companies if they violate IEEPA measures against Iran. The SDBT is under review by the Senate Committee on Banking, Housing, and Urban Affairs.

Amendment to the ISA

Introduced in the House by Ileana Ros-Lehtinen (R-FL), this unnamed bill would also expand the ISA's definition of “energy sector” and extend its application to foreign subsidiaries of US companies. Like the ICPA, this bill has been approved in the House and is now before the Senate Committee on Banking, Housing, and Urban Affairs.

Conclusion

This article has only scratched the surface of the intricate network of US laws that may apply to foreign companies. The Treasury Department's Office of

Foreign Assets Control alone administers about 30 different sanctions programs, covering areas that range from the Balkans and Liberia to Burma and Zimbabwe. It is important to continuously monitor developments in this field, particularly, given the nature of the legislative proposals described above, with respect to doing business with Iran.

As always, the business decision ultimately lies with the client. Some companies – Sherritt being an example – will elect to pursue a project despite the weighty consequences that will follow. However, in this area of the law like few others, quality legal advice is an absolute must before an informed decision can be made.

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