REGULATORY AND TRADE DEVELOPMENTS

DRAMATIC EXPANSION OF U.S. SANCTIONS AGAINST CUBA RAISES HOST OF NEW ISSUES FOR U.S. AND FOREIGN COMPANIES

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On March 12, 1996 President Clinton signed into law the highly-publicized Cuba Liberty and Democratic Solidarity ("LIBERTAD") Act of 1996. This legislation, which was introduced in early 1995 by Senator Jesse Helms (R-NC) and Rep. Dan Burton (R-IN), drew overwhelming support in Congress after Cuba's downing of two U.S. civilian planes in late February 1996. In the wake of that incident, the Clinton Administration withdrew its opposition to the bill, even though it imposes severe limitations on the President's authority to shape U.S. policy towards Cuba and its extraterritorial provisions could lead to retaliation by our trading partners.

This new law has potentially far-reaching implications for both U.S. and foreign firms. Among its many provisions, the Act:

- gives U.S. citizens a new private right of action for money damages against foreign nationals who "traffic" in property confiscated by the Castro government for which those citizens own a claim;
- bars visas to the United States to certain foreign nationals who traffic in confiscated property;
- forbids financing by U.S. banks (including their foreign branches) of transactions involving expropriated property subject to a U.S. claim;
- codifies in their current form existing U.S. sanctions against Cuba; and
- urges the President to pursue an international embargo against Cuba and sanction countries that continue their trade relationships with Cuba.

New Private Right of Action

Title III of the statute authorizes U.S. persons to sue and recover damages in U.S. courts from foreign companies that "traffic" in property subject to U.S. claims for confiscation by the Cuban government. This unprecedented civil remedy will become effective on August 1, 1996; suits will be allowed after a three-month grace period following that date unless the President exercises his waiver authority under the law (discussed below). Except for that

grace period, there is no exception for companies that are committed under existing contracts to trade with Cuba.

This right of action raises many issues of interpretation. "Trafficking" is defined to include a wide array of transactions. A company "traffics" in confiscated property if it knowingly and intentionally sells, transfers, brokers or holds an interest in, or "engages in commercial activity using or otherwise benefitting from" that property, or receives profits from trafficking by or through another person. Ownership of the property is not a prerequisite to trafficking.

Extraterritorial Reach

The potential breadth of this civil remedy is striking. If, for example, a Canadian company were to import iron ore from Cuba and a U.S. person had a claim for confiscation of the property from which the ore was mined, the Canadian company's purchase of the ore would likely constitute trafficking in property confiscated by the Cuban government. The Canadian company could then be subject to suit under Title III for such trafficking, assuming that a U.S. district court would have an adequate basis for asserting personal jurisdiction over the Canadian company.

The definition potentially applies to sales of goods as well. If a Mexican company sells materials to a Cuban factory subject to a U.S. claim, the Mexican company might be subject to a suit under the theory that, by receiving money from the sale, it has "engaged in a commercial activity benefitting from confiscated property."

Although they cannot be targeted directly by such suits, U.S. companies can also be affected to the extent that they might hold a non-controlling interest in a foreign company that is trafficking in confiscated property. The existing sanctions maintained by the Treasury Department's office of Foreign Assets Control ("OFAC") bar foreign entities that are "owned or controlled" by U.S. companies or persons from trading with Cuba. These OFAC sanctions do not apply, however, to foreign affiliates of U.S. companies that are not majority-owned or otherwise controlled by the U.S. company. This new private right of action will allow suits to be brought against non-controlled foreign affiliates of U.S. companies if they are trafficking in confiscated property.

Treble Damages

Plaintiffs may be entitled to recover damages far in excess of the value of the confiscated property. Damages in a successful suit are the greater of an amount equal to the amount of a claim certified by the U.S. Foreign Claims Settlement Commission, an amount determined by a special master for claims not certified by the Commission, or the fair market value of the property, plus interest, court costs and attorneys fees. However, since Congress considers foreign investors to be on notice regarding the almost 6,000 claims certified by the Commission, treble damages apply to any trafficking in property related to such claims. Plaintiffs with non-certified claims are eligible for treble damages if they provide a notice of the claim to a foreign trafficker and, after 30 days, the trafficker continues to traffic in the property.

On its face, the statute does not limit the damages payable to a U.S. claimant to the amount involved in the trafficking. It might be left to the courts to decide whether a foreign company trafficking in small quantities of goods will be held liable for the full amount of a claim.

Remaining Hurdles for Claimants

The private right of action is subject to several procedural limitations. A U.S. court must have personal jurisdiction over a foreign trafficker before an action can be brought. Only claims exceeding $50,000 are eligible for relief under the statute. Only trafficking conducted after the effective date of Title III will be subject to lawsuits. There is also a two-year statute of limitations that runs from the time of occurrence of trafficking.

Finally, the President has authority to suspend the right to sue if he determines and reports to Congress that suspension is necessary to the U.S. national interest and will expedite a transition to democracy in Cuba. Congress has clearly stated its belief that these conditions cannot be met at this time, and during an election year it may be difficult for the President to insist otherwise.

Tightening the Embargo's Noose

The statute adds several measures designed to strengthen the existing embargo against Cuba. First, it codifies all provisions of the economic embargo in place as of March 1, 1996, including the regulations administered by OFAC. (OFAC officials have indicated that the existing prohibitions and exceptions under current law will not be amended.) The statutory enshrinement of the sanctions effectively eliminates the President's discretion to administer the embargo or modify its implementing regulations. He may suspend the embargo only after certifying to Congress that a post-Castro transitional government is in power and making steps toward democracy.

The new law also prohibits U.S. banks and their foreign branches from knowingly extending any form of credit to any foreign person for transactions involving any property confiscated by the Cuban government if a U.S. person has a claim to the property. Finally, the statute subjects persons violating certain travel restrictions to new civil penalties (up to $50,000) and forfeiture of property.

THE FIRST WTO DISPUTE PANEL REPORT: U.S. EPA RULES FOR IMPORTED GASOLINE

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During the debates over the U.S. implementing legislation of the Uruguay Round Multilateral Trade Agreement, one of the most contentious issues was the newly agreed upon Dispute Settlement Understanding (the "DSU") under the World Trade Organization (the "WTO") and its effect upon U.S. sovereignty. Under the old dispute settlement system of the General Agreement on Tariffs and Trade (the "GATT"), each member country of the GATT could block (i.e., veto) the adoption of adverse GATT panel decisions. As a result, panel reports were treated effectively as non-binding in some instances.

After years of frustration with this dispute settlement process, the U.S. Congress mandated U.S. negotiators through the 1988 Omnibus Trade Act to negotiate for "more effective and expeditious dispute settlement mechanisms and procedures" that "enable better enforcement of U.S. rights" in the Uruguay Round Agreement. Therefore, a main goal for the U.S. in the Uruguay Round trade negotiations was to replace the original GATT dispute settlement system with

CANADIAN COMPETITION RECORD

a binding and automatic dispute settlement process within the new WTO.

The WTO went into effect on January 1, 1995. The major changes under the DSU provide for the automatic adoption of WTO panel decisions and binding resolutions. If a WTO member refuses to adhere to a panel report, member countries can retaliate through sanctions.

The debate in the U.S. during the vote to implement the Uruguay Round agreement centered on the issue of the DSU and its possible effects upon U.S. sovereignty. Under the WTO, the U.S. must ensure that its state and federal laws are in conformity with the Uruguay Round Agreement. Criticism was related directly to the operation of the dispute settlement decision and panel reports. Concern was expressed by Senate Majority Leader Robert Dole (R-Kansas) and Republican Presidential Candidate that the WTO "would allow foreign judges to rule on the validity of U.S. environmental and labor laws."

On January 17, 1996, a WTO dispute resolution panel issued its first panel report on a challenge by Venezuela and Brazil to a December 1993 U.S. Environmental Protection Agency ("EPA") regulation on imported gasoline. Many WTO critics in the U.S. have used the decision as evidence that the WTO will infringe on America's environmental protection rules. The report is the first one subject to the new dispute settlement rules negotiated in the Uruguay Round and is an important test of the WTO's ability to enforce compliance.

The WTO panel report addresses EPA regulations which implement 1990 amendments to the Clean Air Act. In order to prevent and control air pollution in the U.S., the Clean Air Act was passed in 1963. In 1990 the Act was amended. All gasoline sold in heavily populated urban areas in the U.S. was now required to contain reduced levels of toxic air pollutants and smog-causing contaminants.

On December 15, 1993, the EPA promulgated regulations implementing the portions of the 1990 Clean Air Act amendments concerning reformulated gas and conventional gasoline. The rules require that by 1995, gasoline sold in the U.S. must be cleaner than in 1990. In order to determine compliance, the agency needed a starting point. Thus, EPA rules require that U.S. refiners must maintain gasoline parameters at least at their individual 1990 historical quality levels.

However, importers must ensure that their gasoline satisfies an across-the-board requirement based on an estimate of an average of the 1990 levels in the U.S. market as a whole. The importers rule was based on EPA's conclusion that provisions governing U.S. refiners could not be applied to imports without raising concerns regarding the availability of foreign data.

The rule is scheduled to expire in 1998. After that date, imported and domestic reformulated gasoline will be treated identically.

In January 1994, the Venezuelan government requested formal GATT consultations with the U.S. concerning the EPA regulations. The country claimed that the EPA rules discriminated against imports because foreign refiners were not allowed the option of using there own 1990 baseline as U.S. domestic refiners were required under the rules. Venezuela asserted that the rules obliged foreign refiners to meet a stiffer test than many U.S. suppliers which would hurt exports. Venezuela

contended that the laws violated WTO rules requiring equal treatment for domestic and foreign companies. The national treatment rule under the WTO requires that imports not be treated less favorably than domestic products.

In February 1994 the U.S. held formal consultations with Venezuela. Meanwhile, the EPA sought to equalize the treatment of imported and domestic fuel in April 1994. The Agency published a rule that would permit foreign refiners to use their individual baselines for reformulated gasoline if they were verifiable. However, environmentalists and U.S. refiners succeeded in reversing the change through a spending bill which passed in Congress which would have prevented funding to the EPA to implement that change in the rules.

Venezuela decided to pursue its claims under the WTO. After holding another round of failed bilateral consultations, a WTO Dispute Settlement Body approved Venezuela's request for establishment of a dispute settlement panel in April 1995. Brazil joined the proceeding as a complainant (although with a different factual pattern) shortly thereafter.

In pursuing their claims, Venezuela and Brazil were not questioning the right of the U.S. to enact stringent environmental standards and regulations in order to improve air quality provided that these standards and regulations treated imported products no less favorably than domestic like products. Since the rules require that imported gasoline conform with the more stringent statutory baseline when U.S. gasoline had to comply only with a U.S. refiner's individual baseline, Venezuela and Brazil argued that the EPA rules adversely affect the conditions of competition for imported gasoline and afforded protection to domestic production.

The U.S. argued that the EPA regulations qualify for exceptions spelled out in the WTO agreement aimed at protecting health and safety and conserving natural resources. The U.S. asserted that the rules were necessary to enforce the Clean Air Act and there was no alternative method for protecting human health or conserving clean air.

The WTO panel rejected the U.S. position. It found that the treatment of gasoline imports by the EPA rules were inconsistent with WTO rules. The panel concluded that the EPA regulations establish different requirements for imports. It found that the rules treat Venezuelan and Brazilian gasoline less favorably than U.S. gasoline since imported gasoline which failed to meet the statutory baseline would be banned, while domestic gasoline with identical chemicals could be sold if it satisfied its refiner's individual baseline.

The panel also rejected U.S. claims that the EPA rules qualify for three provisions under the WTO which provide exceptions for health, conservation and enforcement measures. Although WTO members are free to set their own environmental objectives, the ruling stressed that they must ensure that the implementation of these objectives are consistent with WTO rules.

In response to the WTO panel decision, U.S. Trade Representative Mickey Kantor announced that the U.S. would carefully review the legal options available, including an appeal, and would consider congressional, public and industry views before making a final decision. The U.S. Administration stated that it was disappointed, but emphasized its commitment to the strong and effective implementation of U.S. environmental laws. The ruling also angered environmentalists and other

interest groups which view it as an attack on high U.S. environmental standards and against U.S. sovereignty.

Under WTO rules, the U.S. has the right to appeal a report to a WTO Appellate Body after the report is distributed to all WTO members. The report was circulated on January 29, 1996. The U.S. had sixty days to appeal the decision. Otherwise the report would have been automatically adopted by the Dispute Settlement Body.

On February 21, 1996, the U.S. filed its formal request for an appeal of the WTO ruling. The U.S. intends to challenge the panel's legal interpretation of those WTO conditions under which countries may use measures that otherwise violate WTO rules.

An Appellate Body now has ninety days to give a verdict which is binding unless overturned by consensus. The case is being watched with interest since it is the first brought under the WTO's stronger rules. Under WTO rules, if the appeal is rejected, the U.S. must comply with the dispute panel ruling or face trade penalties.