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The *Helms-Burton Act* and its implications for Canadian investors: where do we stand at the dawn of warmer relations between the U.S. and Cuba?

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CANADIAN INVESTMENTS IN CUBA

The *Helms-Burton Act* and its risks for Canadian investors in Cuba
Recommandations for investors
Prospects in the face of the thaw in U.S. and Cuba relations

Following the announcement of the restoration of diplomatic relations between the United States and Cuba, many Canadian business stakeholders have been solicited by promoters so that they may consider various investment projects in Cuba[1]. However, Canadian nationals who are evaluating whether to invest in Cuba must be aware that the thawing of diplomatic relations between U.S. and Cuban authorities has not (as of yet) been followed by the withdrawal of one of the main obstacles to the completion of Canadian investments in Cuba, that is, the *Helms-Burton Act*. Here is some background on the subject.

In March 1996, the United States (U.S.) adopted the *Cuban Liberty and Democratic Solidarity Act*, better known as the *Helms-Burton Act*.[2] This statute was enacted following an incident which occurred in the same year, where two U.S. civil planes belonging to an antiCastro organization were shot down by Cuba. The purpose of the Act was to reinforce and codify the economic embargo against Cuba in order to weaken and eventually remove the Castro regime in favour of a democracy.

This Act has been vigorously contested by the international community since its enactment, particularly in respect of its Titles III and IV, its two most important sections, as violating international law and being at odds with the concept of national sovereignty.

TITLE III – “TRAFFICKING” IN CONFISCAT ED PROPERTY

Title III of the Act confers on U.S. businesses and nationals the right to sue on U.S. soil anyone who, since November 1, 1996, traffics or has trafficked in property confiscated from them by the Cuban State.

The definition of “traffic” is very broad. A person “traffics” in confiscated property if, among other

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things, that person knowingly and intentionally sells, transfers, distributes, conducts financial operations or disposes in any other manner of confiscated property or purchases, receives, holds, controls, manages or holds an interest in confiscated property and engages in a commercial activity using or otherwise benefiting from confiscated property[3].

The Act provides that the U.S. President may suspend Title III for any 6month period. Until now, the implementation of Title III has always been suspended.

There remains some risk for Canadian investors despite this suspension, especially if they hold property or have subsidiaries in the U.S. This is why we recommend to Canadian investors contemplating operations on Cuban soil to conduct precautionary due diligence to ascertain that their commercial activities and the Cuban corporations with whom they do business, if any, involve no operations which could be considered as constituting trafficking in confiscated property.

TITLE IV – EXCLUSION OF ALIENS FROM THE U.S. TERRITORY

Title IV of the Act excludes some aliens from the U.S. territory and provides for the refusal of entry visas to officers and directors of businesses who are involved in the trafficking of confiscated property and their family members. Title IV of the Act currently applies to any alien, Canadian or otherwise.

CANADA'S RESPONSE

In October 1996, to counter the Helms- Burton Act, Canada amended the *Foreign Extraterritorial Measures Act*.[4] Section 7.1 of this Act provides that: "Any judgment given under the law of the United States entitled *Cuban Liberty and Democratic Solidarity (LIBERTAD) Act* of 1996 shall not be recognized or enforceable in any manner in Canada." The Act prohibits Canadian nationals from communicating information in the context of the enforcement of the *Helms-Burton Act* (Section 3(1)). Moreover, under the Act, Canadian nationals against whom a judgment ordering to pay an amount has been rendered in the U.S. pursuant to the *Helms-Burton Act* are entitled to sue the plaintiff in Canada in order to recover amounts paid in the U.S., including all solicitor-client costs (Section 9).

These two contradictory statutes continue to create confusion and uncertainty for Canadian businesses that conduct activities or have subsidiaries in the U.S. as they are faced with the dilemma of having to comply with only one of these statutes.

TOWARD NORMALIZATION OF THE RELATIONS BETWEEN CUBA AND THE U.S.

On July 20, 2015, Cuba and the U.S. restored their diplomatic relations with the reopening of their respective embassies. This recent warming of relations between the two countries paves the way towards the normalization of their economic relations. Lifting the economic sanctions will require that the *Helms-Burton Act* be repealed by the U.S. Congress since the U.S. President only can temporarily suspend the application of Title III of the Act.

CONCLUSION

Canadian investors have had to deal with the *Helms-Burton Act* for 20 years. They have had to manage the risks resulting from such Act as part of their investment in Cuba. Mining corporations have had to renounce conducting any commercial activity with U.S. businesses while their officers continue to be prohibited from entering the U.S.

Although the thawing of relations between the U.S. and Cuba has not yet resulted in the repeal of the repeal of the *Helms-Burton Act*, it augurs well for a progressive lifting of the embargo. If such is the case, Canadian businesses will be able to continue, even increase their activities in Cuba while developing their commercial relations with the U.S. American investors will also be able to invest in

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Canadian businesses which are active in Cuba. That being said, new competition from the U.S. should provide Canadian businesses with incentives to maintain their competitiveness if they wish to retain their leading role as economic partners of Cuba.

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[1] See as an example: http://www.tradecommissioner.gc.ca/eng/document.jsp?did=159128.
[2] Available online: http://www.treasury.gov/resource-center/sanctions/Documents/libertad.pdf.
[3] Section 4(13) of the Helms-Burton Act.
[4] R.S.C. 1985, c. F-29.

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