HELMS-BURTON: CHECKMATE OR CHALLENGE FOR CANADIAN FIRMS DOING BUSINESS IN CUBA?

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This paper characterizes the situation that Cuba and foreign investors, alike, find themselves as a result of the adoption by the United States of the Helms-Burton Act. In particular, the paper focuses on dilemmas facing Canadians in maintaining stakes in Cuba and launching challenges to Helms-Burton. The paper is divided into three parts: the Canadian foreign policy framework toward Cuba, the effect of Helms-Burton on Canadian commercial interests in Cuba, and concluding remarks.

CANADA'S FOREIGN POLICY FRAMEWORK TOWARD CUBA

The Four Components of Canadian Foreign Policy Toward Cuba

Normal: Canadian policy toward Cuba is normal in the sense that it advocates similar relations with the rest of the Americas. As an expression of its independence from the United States, Canada charts a different course *vis-a-vis* Cuba. It also maintains a tradition of recognizing the "government of the day." In keeping with that tradition, the Canadian Government recognized the legitimacy of the Castro regime in 1959, and has maintained diplomatic relations with Havana to the present day.

Active: The Canadian Government preserves an active and on-going policy towards Cuba. Last year, Canada and Cuba celebrated 50 years of unbroken diplomatic relations between the two sovereign states. Prior to 1995, Canada-Cuba trade had been minimal. However, with a number of high-level visits promoting several important bilateral trade agreements, two-way trade has increased substantially.

Foreign aid was suspended in protest to Cuban involvement in the Angolan war. After a 16-year hiatus, humanitarian aid was restored in June 1994. Later that year assurances were given to resume direct bilateral assistance. In March 1995, negotiations began. As of October 1996, still there are no clear indications on the nature of aid disbursements or future flows. Where the Canadian Government goes in those negotiations are of critical importance in light of issues addressed in subsequent sections.

Canadian public and private agents provide economic advice to the Cuban Government, specifically, in areas of taxation and central banking. In the area of private sector development, the Canadian Government funds projects such as feasibility studies and training programs through the industrial arm of the Canadian International Development Agency (CIDA Inc.)

Unlike many programs worldwide that concentrate on export development, CIDA Inc. focuses on funding small cooperative projects, requiring Canadian recipients to select projects with Cuban partners, in

1. This paper draws heavily from a paper prepared by Julia Sagebien titled "Foreign Trade and Investment in Cuba After February 24, 1996: Life Between a Rock and a Hard Place," delivered in Ottawa on May 17, 1996. However, the views presented here are exclusively those of the author.

key sectors of the Cuban economy. Although the Canadian equivalent of the U.S. Agency for International Development, CIDA Inc., provides some supports for educational projects and small-scale local initiatives by NGOs, CIDA Inc.'s programs are driven by demand from the Canadian commercial sector. Indeed, the ultimate driving force behind the Canadian involvement has been Canadian commercial interests. As a result, trade between Canada and Cuba now stands at $C550 million (about $US380 million). On the investment side, 18 joint venture agreements have been signed, with 19 pending.

Balanced: The Canadian Government remains cognizant of the inherent risks of involvement with Cuba. The Export Development Corporation (EDC) credit lines are frozen, with accumulating debt which now amounts to $C96 million ($US70 million). Until Cuba finds a solution to its debt woes, EDC managers say credit lines will remain frozen.

The Department of Foreign Affairs and International Trade warns Canadians of the political and commercial risks of engaging in business with Cuba. On the one hand, the Canadian Government seeks to protect the right of its citizens to establish commercial ties with any country, including Cuba. On the other, the Government seeks to limit its liability in the extension of credit to Canadian companies for high-risk commercial ventures.

A point most often missed by American critics, Canada condemns human rights abuses and the lack of civil and political rights, while encouraging constructive initiatives to build civil society through organizations such as the Canada-Cuba Inter-Agency Project. Through NGOs and other private section concerns, the project promotes programs such as park landscaping and public works.

Dialogue and "Constructive" Engagement: Through bilateral consultations, both at ministerial and departmental levels, the Canadian Government advocates the fourth prong of its policy, in the belief that both dialogue and constructive engagement remain the best means for facilitating economic and political liberalization in Cuba. On the international level, Canada demonstrates dialogue and constructive engagement through support of U.N. resolutions for halting the United States embargo, and renewal of Cuba's membership in the Organization of American States (OAS).

Canadian Government Response to Helms-Burton

Abroad, within hemisphere, and domestically, Canada seeks to preserve a legal and fair global trading order, allowing legal sovereign states the option of trading where and with whom they will trade, without interference from another country. Therefore, delinking trade with politics remains a concern of Canadian policy in opposing Helms-Burton. In concert with those aims, the Canadian Parliament enacted Foreign Extraterritorial Measures Act (FEMA) amendments forbidding Canadian companies and Canadian-based U.S. subsidiaries, involved with Cuba, from complying with any directive from any U.S. entity attempting to influence or harass any company operating in Canada. Enacted in 1992 in response to ratification of the Torricelli Act, the amended FEMA responded, once again, to infringements on Canadian sovereignty.

Opposition of Helms-Burton receives wide-spread support among the Canadian populace. In an Angust Reid/Southam News poll conducted one week after the ceremonial signing at the White House, an overwhelming 71 percent of respondents favored non-compliance on grounds that tighter U.S. sanctions have onerous repercussions for Canadian interests.

The Canadian Government's stance against Helms-Burton is not an easy one, considering that 80 percent of all Canadian goods are exported to the United States, and 64 percent of all companies in Canada are U.S. subsidiaries. In overall trade terms, i.e., *vis-a-vis* the whole scope of Canadian worldwide trade, trade with Cuba represents 0.11%. For Canadians, Cuba is not a trade issue. Rather, Cuba represents a matter of principle, namely, the right of a sovereign country to conduct an independent foreign policy. That includes the right of a sovereign country to follow whatever policy that country deems appropriate in bringing democracy and open markets to Cuba. Therefore, the Government's fight with the U.S. over Cuba constitutes a disagreement about means, instead of objectives. The Canadian Government dissents from U.S. policy on Helms-Burton based on the following objections:

- First, that U.S. policy diverges from Canadian policy with respect to Cuba;
- Second, that U.S. policy magnifies the U.S.-Cuba problem, instead of solving it;
- Third, that U.S. policy disrupts international trade and investment patterns; and
- Fourth, that U.S. policy violates Canadian sovereignty, and establishes dangerous precedents for unilateral measures undertaken by the United States.

Parenthetically, Canada joins the chorus of international opposition against Libyan-Iranian sanctions based on similar grounds.

Ottawa has voiced its displeasure with Helms-Burton via the World Trade Organization (WTO), the Organization for Economic Cooperation and Development (OECD), and the Organization of American States, joining lobbying efforts with other U.S. trading partners with business interests in Cuba, along with partners from Mexico and the European Union. However, the Government has raised its most vociferous objections through consultations within the framework of the North American Free Trade Agreement (NAFTA). Because Canadian lawyers have given more thought to formalized challenges than any others among the foreign legal community, the task at hand for Canadian lawyers translates into one of structuring extraterritorial challenges into trade dispute resolution settings like NAFTA.

On the home front, the Canadian Government introduced legislation in September 1966 on further FEMA amendments that would issue “blocking” orders, declaring judgments made in U.S. courts non-enforceable in Canadian courts. Second, “clawbacks” were proposed enabling Canadians to recover in Canadian courts amounts imposed by U.S. courts. And third, penalties were updated for Canadians abiding by tenets of the Helms-Burton provisions. Trade Minister Art Eggleton explained that further amendments were introduced as “antidote legislation” or preventative measures, should President Clinton implement Helms-Burton Title III provisions. The sticking point for Canada will come in making FEMA amendments enforceable, while fulfilling obligations under NAFTA.

EFFECT OF HELMS-BURTON ON CANADIAN COMMERCIAL INTERESTS IN CUBA

Issues Determining Response by Canadian Companies: Risks vs. Rewards

Responses to Helms-Burton are based on a number of factors. For those engaged in business in Cuba, responses depend on whether their strategies are short-term, or whether they are positioning themselves for the end of the U.S. embargo. Opportunities in newly liberalized sectors such as tourism offer the most advantages in the long term. For short-term traders, tourism offers the best prospects until the embargo ends, when they are likely to lose their competitive advantage to the United States.

For long-term investors, the tourism and real estate card offers the greatest opportunities. Wilton Properties and Sherritt International represent two Canadian companies that have adopted such a strategy. For Sherritt International, the foray into the field enhances its presence in Cuba already established in nickel mining. The end of the embargo presents companies such as Wilton Properties and Sherritt two options: cash in or provide American companies with stiff competition in a freely burgeoning market.

Whether long-term or short-term, Helms-Burton increases risk, uncertainty, and legal costs. For firms with little or no U.S. exposure, the longer the embargo lasts, the greater the rewards for those seeking gains either in the long or short term.

Smaller, less risk-averse companies believe that, because of their size, they can avoid scrutiny of Helms-Burton restrictions. Bear in mind that the largest number of Canadian participants in business activities associated with Cuba are exporters, companies whose combined sales total \$C1 million (\$US666,000) or less. By contrast, large Canadian companies, namely mining and pharmaceutical firms, represent the importing side.

Regardless of length of engagement, other elements must be factored into the mix, elements which include potential for U.S. lawsuits and sentiments among the Cuban-American community toward Cuba. When evaluating business opportunities, Canadians must remain ever mindful that civil war rages on both sides of the Florida Straits.

Protracted civil war means that those with long-term commercial interests should consider which conditions will satisfy terms for an eventual end of the embargo. The longer the embargo, the greater potential for reaping windfall profits. But a delay contains inherent risks for those with long-term interests. Under those circumstances, the challenge lies in calculating how long to hold out, and in matching the appropriate risk with the appropriate opportunity.

Balancing risk and reward remains a chief concern among Canadians with business interests in Cuba. Contrary to the belief of many Americans that Canadians are naive or nonchalant about the risk factors, many Canadians are fearful of being labeled as "traffickers." For the more risk-averse, Cuba exists as a contrarian's paradise, a place—at the risk of sounding politically incorrect—where the men are separated from the boys.

Ultimately, assessing risk depends on where a company places Cuba in relation to its trade or investment portfolio. Companies with substantial sales volume report holding steadily, attempting to conduct "business as usual" in Cuba, exercising due diligence in seeking legal advice, and searching property registries—to the extent that such registries can be searched in Cuba. The same holds true for Canada's main investor, Sherritt International. Recent developments indicate that Sherritt International's stock is on the rise, expressing long-term investor confidence.

For those with lesser stakes or plans to enter the Cuban market, the "chill" of Helms-Burton may prompt some companies to ask "why bother?" Cuba represents just another emerging market, no different than any other. The most visible Canadian public companies fulfilled or terminated contracts over the past 18 months, Redpath, Labatt, JD Irving, and Fracmaster among them. The majority of companies with plans or current operations still in Cuba maintain a low profile or silence about future activities.

The announcement of the Wilton Properties-Gran Caribe venture raises significantly Canada's profile in Cuba. Announced on July 1, Canada Day, the agreement involves plans for building hotels on 11 sites in Cuba. Other than Sherritt International's 25 percent stake in at least one hotel operation, no other Canadian company maintains an equity position in any hotel in Cuba. Whether the Wilton project actually comes to fruition remains to be seen.

Sectoral Responses to Canada-Cuba Trade: Factoring the Mix

With a 130 percent rise in 1995-1996, Canadian-Cuban trade is on an upward trend. Despite increasing trade, Canadian exporters experience difficulties in the shipment of cargo to Cuba due to limited or non-existent financing. Two major Canadian banks pledged earlier this year to supply $C22 million ($US14.5 million) in additional letters of credit. Since Helms-Burton ratification, both banks canceled earlier plans. Also on hold are additional supports from EDC to shore up credits and augment banking services to Canadian firms with operations in Cuba. Furthermore, EDC announced in 1996 $C1.5 billion ($US1 billion) in export financing for 50 high-risk emerging markets. Absent from the list was Cuba.

Advisory services face somewhat limited prospects, now that negotiations between Canada and Cuba seem at a standstill on certain initiatives aimed at key aspects of the Cuban economy. In a field that includes bankers and legal consultants, priority sector initiatives would harness a range of Canadian commercial expertise and talent under the aegis of CIDA Inc. Through CIDA, Inc., fund disbursements would support projects such as banking computerization, energy conservation, and biotechnological research, along with consultations on fiscal and monetary reform, taxation, and health care matters.

From a foreign policy standpoint, these programs are intended as leverage for Canadian pursuits toward further economic and political liberalization. The stumbling block in negotiations relates to the manner of disbursement of funds, speed of their disbursement, and conditionalities attached for disbursement estimates which could run as high as at $C14-20 million ($US9-13 million). However stumbling blocks are resolved, advisory services remains an area poised for rapid growth. While the payoff is immediate for exporters, the big bang comes for service advisors once the embargo ends, with capital from the international financial institutions and financing from other private sources roll in.

In the interim, arrears continue to compound Cuba's financial problems. Cutting back or curtailing lines of credit to clients with services or operations in Cuba, Canadian banks now play, largely, an advisory role in the functions of the National Bank of Cuba. Among Canadian banks, only the National Bank of Canada maintains a Cuban representative office. Encumbered by having U.S. operations, Canadian banks represent the most visible example of the liabilities that third parties confront under Title IV provisions of Helms-Burton.

In tourism, Canadian auxiliaries and intermediaries participate in an industry subject to seasonal fluctuation. Due to over booking problems last season, it is difficult to gauge how many of the 170,000 Canadians that visited Cuba will return for next season. Canadians comprise the second largest contingent of foreign tourists visiting the Caribbean island each year, obviously a boon for Canadian travel agents. On the equity side, the numbers reflect a different picture. With Canadian hoteliers confined largely to service management contracts, none own stakes in any Cuban hotel operation, apart from Wilton Properties or Sherritt International. Although several development projects are under consideration, none have gone forth to date. Based on the figures, the effects of the "chill" remain inconclusive.

Equally inconclusive are the effects of Canadian participation in Cuban biotechnology. Because Canadian pharmaceutical firms and agents "broker" for commercializing Cuban products, it is doubtful that "trafficking"charges involving intellectual property are enforceable under Title IV provisions, given that the sector was non-existent prior to 1959. However, fortunes of those in this industry will vary depending on how broadly definitions are applied. The same applies for all industry sectors where auxiliaries or intermediaries act as third parties. As scrutiny intensifies in coming months, watch for the creation of new alliances between third parties and principals, as some exit and others move to the sidelines.

In sectors where the shake-out has already occurred, none have felt the impact of Helms-Burton more than the sugar industry. Traditionally, a third of all Canadian sugar imports have come from Cuba, another factor making the Canadian foreign policy stance toward Helms-Burton difficult. Under threat of possible retaliatory actions by Canada, American sugar lobbyists fought for changes in U.S. certification procedures for sugar products from third country origins. Despite the amendments, certification issues linger, which forced Canadian refiner Redpath to end a lucrative and long-standing arrangement with the Cuban Government. As a result, Canadians now pay a few cents more for sugar imported into Canada from other Latin American countries.

Concerns in mining relate to whether leases awarded to Canadian companies prospecting or extracting mineral are located on expropriated lands belonging to the Cuban Government. Generally speaking, world commodity prices dictate outcomes of Canadian and foreign operations more than political risks associated with Cuba.

For the Canadian company with the greatest stake, Sherritt International's well-being depends, partly on U.S. policy, but more importantly, on intrinsic factors, elements related to scarcity and cyclical fluctuation of the commodity, continued stock performance, sectorial competition within the industry including the impact of the Inco acquisition, as well as new and potential alliances between third parties. Whichever way it weathers the storm, Sherritt International's forays in Cuba will attest to the long-term impact of Canadian companies on the island.

The Business Climate in Cuba: Clash Between Business and Political Decisions

As the Castro regime maintains control by closing ranks, externalizing risks, and tightening ideological reigns, foreigners with business interests in Cuba find themselves caught in a civil war which encompasses both sides of the Florida Straits. While vitriol by the most hardline of Cuban exiles colors a Presidential Election season on the mainland, Fidel sends conflicting messages to hard liners, centrists, and reformers on the island. In a CNN world, messages designed for internal consumption receive global exposure. Often times, mixed signals result, leaving foreigners wondering whether Cuba is truly open for business. Gauging from the Canadian responses, the answer still appears to be "yes," but in limited ways.

Frequently, Canadians complain about lengthy delays in negotiations on joint ventures, constant changes in documentation for clearing cargo out of Cuban customs, and lack of cooperation in conducting accurate and timely title searches. For Canadians and other foreigners alike, Cuba remains plagued with problems related to miscommunication or lack of information. In Cuba, two kinds of communication problems exists relative to business decisions *versus* political decisions.

Where foreigners may consult with partners and associates—conferring or reporting to directors, in the case of large companies, and shareholders in the case of public companies—Cubans take directions from political entities ranging from government bureaucrats, other governmental officials, and ministers. No wonder that often times, clashes occur when the foreign partner and the Cuban counterpart interpret each other's bottom line.

At another level, clashes may occur due to different expectations. For foreign investors or traders, Cuba represents just another investment deal or transaction driven by short-term or long-term financial considerations. For Cuban partners and the Cuban Government, deals involve matters related to politics, sovereignty, and economic development. The differences in expectations or priorities imply cognitive dissonance between the bottom line of the foreign investor or trader and the party line.

CONCLUDING REMARKS

Canadian investors and traders are caught in a civil war between Miami and Havana, exposing them to risks and uncertainty. Cuba remains open for business to Canadian entrepreneurs, but partially, and only within certain conditions. Although the conditions are getting increasingly difficult, Canadians stand committed to pursing opportunities, fostering normalized relations, balanced trade, and dialog and constructive engagement.

Furthermore, Canada stands resolute with international allies in opposition to Helms-Burton, and supports initiatives continuing Cuban economic liberalization and advancements toward a democratic civil society. From the Canadian perspective, Helms-Burton has not provided a checkmate to business prospects, only a formidable challenge. Given Canada's long-standing and vital commercial relationship with the United States, Canadians believe with regard to Helms-Burton, that this too shall pass.