BETWEEN A ROCK AND A HARD PLACE: HOW MULTINATIONAL COMPANIES ADDRESS CONFLICTS BETWEEN U.S. SANCTIONS AND FOREIGN BLOCKING MEASURES

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This paper focuses on how multinational companies based in the United States and their foreign subsidiaries in certain countries cope with conflicting legal obligations that arise from the extraterritorial application of U.S. foreign trade controls. In particular, the paper focuses on the embargo of Cuba and blocking measures in certain foreign countries that seek to prevent the operation of these controls in these countries.

BACKGROUND

Extraterritorial (XT) applications of U.S. foreign trade controls have become particularly controversial over the last two years, but are not an entirely new phenomenon. At least one form of XT control has existed since the early days of the Cold War. The Commerce Department, broadly construing its statutory authority in the Export Control Act of 1949[1] and subsequent statutes to regulate "exports" of goods and technology, has excercised that authority to regulate "reexports" of U.S.-origin items from third countries. The Commerce Department applies this authority even if there is no transactional nexus between the reexport and the original export transaction, apart from the origin of the item itself.

Further, the Department has subsumed within the "reexport" definition exports from foreign countries of foreign products, if those products contain significant U.S.-origin content.[2] And, for selected items and destinations, the Department has regulated foreign shipments of the "direct products" of U.S.-origin technolo-

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1. Export Control Act of 1949, ch. 11, 63 Stat. 7, 7–9 (1949) (codified as amended in scattered sections of 50 U.S.C.A.).

2. *See* 15 C.F.R. § 734.3(a)(3) (1997).

gy,[3] presumably on the basis of the same statutory "export" authority.[4]

Although the ending of the Cold War has significantly reduced the spectrum of products and technologies subject to export and reexport control, these product and technology reexport controls remain with us today under the Export Administration Act of 1979.[5] There is no recognized jurisdictional basis for the exercise of such reexport authority in customary international law, and no other country exercises similar reexport control over goods and technology that have left its shores free of consensual restraint on the part of the foreign recipient. Even so, U.S. reexport controls have survived with relatively little challenge, perhaps because of limited enforcement.

One exception was the short-lived 1982 Soviet gas pipeline sanctions, which sought to prevent European companies from supplying equipment for a gas pipeline from the Soviet Union to Western Europe.[6] The reexport features of these controls, as well as their application to subsidiaries and licensees of U.S. companies, were strongly protested by European governments. The protests led then-President Reagan to rescind the sanctions after a few months.[7] In the one case that arose in the wake of the gas pipeline sanctions, a Dutch court held that the sanctions were inconsistent with Dutch private international law and could not be enforced to prevent performance of a contract.[8]

A controversial XT feature of U.S. foreign trade controls is the exercise of authority over foreign corporations operating outside the United States that are classified as "persons subject to the jurisdic-

3. *See id.* § 734.3(a)(4).

4. *See generally* Harold J. Berman & John R. Garson, *United States Export Controls — Past, Present, and Future*, 67 COLUM. L. REV. 791 (1967) (analyzing these regulatory provisions in their early stages).

5. 50 U.S.C.A. §§ 2401–2420 (West 1991 & Supp. 1997). The Export Administration Act of 1979 contains explicit statutory authority to regulate exports of goods and technology "subject to the jurisdiction of the United States," as well as exports from the United States. *Id.* The Act expired on August 20, 1994. *See id.* The President has relied upon his emergency powers under the International Emergency Economic Powers Act to maintain the provisions of the Act in force "to the extent permitted by law." Exec. Order No. 12,924, 60 Fed. Reg. 42,767 (1995).

6. 47 Fed. Reg. 27,250 (1982).

7. *See* John Ellicott, *From Pipeline to Panama — The Evolution of Extraterritorial Trade and Financial Controls*, *in* SYMPOSIUM PRIVATE INVESTORS ABROAD, S.W. LEGAL FOUND., at 7-1, 7-2, 7-3 (1988).

8. *See* Compagnie Europeenne des Petroles S.A. v. Sensor Nederland B.V., Hague Ct. Rep. (1982), *reprinted in* 22 I.L.M. 66, 73 (1982).

tion of the United States" by virtue of being "owned or controlled" by U.S. persons.[9] Such authority has long resided, or been construed to reside, in the Trading with the Enemy Act of 1917;[10] the statutory foundation for the embargoes imposed on several Asian countries after the inception of the 1950 Korean War[11] and for the 1963 embargo of Cuba, imposed following the Castro revolution and the Cuban Missile Crisis.[12] While the Trading with the Enemy Act has been relegated to future applications in time of war, the same authority is found in its non-wartime successor, the 1977 International Emergency Economic Powers Act,[13] as well as in the Export Administration Act of 1979.[14]

The application of "persons subject" to XT authority has always been controversial in foreign countries. Since this authority purports to control conduct by parties who are non-nationals of the controlling state by reason of their actions outside the territory of the controlling state, it lacks a secure foundation in the traditional "territorial" or "nationality" bases of customary international law.[15] Perhaps the most controversial element of the 1982 Soviet gas pipeline sanctions was the "persons subject" feature.[16] Moreover, in one landmark case, the minority French shareholders of a U.S. majority-owned French corporation persuaded a French court to throw the company into receivership.[17] This action prevented the U.S. government from blocking a French truck manufacturer from delivering truck bodies to China.[18]

While the Cuban embargo included a "person subject" feature from its inception, it was initially muted by a regulatory exemption permitting subsidiaries of U.S. companies to trade with Cuba under

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9. 31 C.F.R. § 515.329 (1997).

10. Ch. 106, 40 Stat. 411, 411-26 (1917) (codified as amended at 50 U.S.C.A. app. §§ 1-44 (West 1990 & Supp. 1997)).

11. *See* Berman & Garson, *supra* note 4, at 793 n.6.

12. *See id.* at 793 n.8.

13. 50 U.S.C.A. §§ 1701-1706 (West 1991 & Supp. 1997).

14. Pub. L. No. 96-72, 93 Stat. 503, 503-536 (1979) (codified as amended at 50 U.S.C.A. §§ 2401-2420 (West 1991 & Supp. 1997)).

15. For a discussion of the United States analysis of international law norms as applied to "person subject" controls, see RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 402-403 (1986).

16. *See* Ellicott, *supra* note 7, at 7-8.

17. *See* William L. Craig, *Application of the Trading with the Enemy Act to Foreign Corporations Owned by Americans: Reflections on* Fruehauf v. Massardy, 83 HARV. L. REV. 579, 579-80 (1970).

18. *See id.* at 580.

certain conditions.[19] In addition, beginning in 1977, this licensing provision was liberally applied by the Treasury Department's Office of Foreign Assets Control (OFAC).

In October 1992, the situation came to an end with the passage of the Cuban Democracy Act,[20] which included a feature (known as the Mack Amendment, for its author Senator Connie Mack of Florida) rescinding OFAC's authority to license the export of goods to Cuba by "persons subject."[21] President Bush had long threatened to veto the Mack Amendment if Congress passed it,[22] but relented in the face of an impending election, after candidate Clinton endorsed the measure in a Miami speech.[23]

Passage of the Mack Amendment prompted both Canada and the United Kingdom to issue blocking orders under existing legislation in those countries that had been in effect for some years, largely out of concerns about extraterritorial applications of U.S. antitrust laws.[24] These orders directed nationals of those countries, including "persons subject" that are incorporated in Canada and the U.K., not to refuse business with Cuba by reason of the U.S. embargo constraints, thereby subjecting such companies to conflicting legal obligations.[25]

Nearly four years later, again in a presidential election year, President Clinton was compelled to change his position regarding the Helms-Burton Act[26] and endorsed the measure that became the Act after two provocative but unarmed planes were shot down off the coast of Cuba.[27] The Helms-Burton Act is best known for its controversial sub-chapters III and IV, the former authorizing lawsuits against parties that have "trafficked" in properties expropriat-

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19. *See generally* 31 C.F.R. § 515.559 (1997).

20. 22 U.S.C.A. §§ 6001–6010 (West Supp. 1997).

21. *See id.*

22. *See* Paul Anderson, *Wider Cuba Trade Embargo in Doubt: Bush Advisors Oppose Restrictions on U.S. Subsidiaries*, MIAMI HERALD, Oct. 5, 1991, at 14A.

23. *See* Lewis H. Diuguid, *U.S. Set to Tighten Cuba Embargo*, WASH. POST, Oct. 16, 1992, at A40.

24. *See* Foreign Extraterritorial Measures (United States) Order, 1992, SOR/92-584 (1992) (Can.); Protection of Trading Interests (U.S. Cuban Assets Control Regulations) Order 1992, S.I. 1992, No. 2449 (Eng.).

25. *See* Foreign Extraterritorial Measures (United States) Order, 1992, SOR/92-584 (1992) (Can.); Protection of Trading Interests (U.S. Cuban Assets Control Regulations) Order 1992, S.I. 1992, No. 2449 (Eng.).

26. *See generally* Cuban Liberty & Democratic Solidarity (LIBERTAD) Act of 1996, 22 U.S.C.A. §§ 6021–6091 (West Supp. 1997).

27. 22 U.S.C.A. § 6046(a)(10) (West Supp. 1997).

ed without compensation by the Castro government,[28] and the latter excluding officials of trafficking companies from entry into the United States.[29]

However, Helms-Burton embedded the Cuban embargo into nearly unbreakable statutory concrete, complete with the Mack Amendment, and thus aggravated the conflict problems for "persons subject" in jurisdictions with blocking measures. The European Union (E.U.) and Mexico soon joined those jurisdictions, barring companies in those countries from refusing to trade with Cuba by reason of U.S. embargo proscriptions.[30]

THE FOCUS OF THE CONFLICT

The focus of the conflict of laws that this paper addresses is the XT feature of the U.S. embargo of Cuba. This XT feature bars "persons subject" in foreign countries from dealing with Cuba or Cuban parties.

However, the general focus here is not on "unilateral" U.S. sanctions, e.g., those sanctions that prohibit "U.S. persons" from doing business with or investing in Iran, Libya, Sudan, or Burma.[31] Nor is the focus here on the non-XT features of our older unilateral embargo programs that target Cuba and North Korea[32] (and formerly targeted Vietnam, Cambodia and China).[33] Unilateral sanctions have been criticized as being ineffective and detrimental to U.S. commercial interests,[34] but if they lack XT features, they generally do not give rise to conflicting legal obligations.

The focus here is not on the XT features of the Commerce Department's export control scheme. Although, as noted earlier, these reexport controls may be controversial and inconsistent with

28. *Id.* §§ 6082–6084.

29. *Id.* § 6091.

30. *See* Council Regulation 2271/96, 1996 O.J. (L 309) 1 [hereinafter E.U. Blocking Measure] (protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom); "Ley de proteccion al comercio y la inversion de normas extranjeras que contravengan el derecho internacional" [Commerce and Foreign Standards Investment Protection Law Contravening the International Law], D.O. Oct. 23, 1996 [hereinafter Mexican Blocking Measure].

31. *See, e.g.*, Exec. Order No. 13,059, 62 Fed. Reg. 44,531 (1997).

32. *See* text accompanying *supra* notes 11–12.

33. *See* 31 C.F.R. § 500.201 (1997).

34. *See generally* Christine L. Quickenden, Comment, *Helms-Burton and Canadian-American Relations at the Crossroads: The Need for an Effective, Bilateral Cuban Policy*, 12 AM. U.J. INT'L L. POL'Y 733 (1997).

international law norms.[35] It is not yet clear whether foreign blocking measures are designed to reach them and so give rise to conflicting international obligations.

Finally, the focus here is not on "retaliatory" foreign trade control measures that have gained increasing popularity in the U.S. Congress, most notably with the 1996 passage of the Iran and Libya Sanctions Act.[36] Retaliatory measures impose sanctions that may include the denial of access to U.S. exports or financing, and on foreign parties that trade or invest in a manner considered detrimental to U.S. foreign policy. While the 1996 E.U. blocking measure purports to target the Iran and Libya Sanctions Act,[37] the Helms-Burton Act,[38] and the Cuban embargo,[39] it does not appear that this measure will give rise to conflicting legal obligations in that respect.

The focus of this paper is strictly on the feature of the U.S. embargo of Cuba that prohibits "persons subject" in countries that have adopted blocking measures from doing business with Cuba or Cuban parties.[40] It should be noted, however, that this apparent conflict in legal obligations may be avoidable in a number of circumstances.

For example, unincorporated branches of U.S. companies operating in jurisdictions with blocking measures may not be subject to such measures. In the E.U. the blocking regulation purports to apply to "any legal person incorporated within the Community."[41] The 1992 Canadian blocking order purports to apply to any "corporation that is registered or incorporated under the laws of Canada

35. *See* text accompanying *supra* notes 5–9.

36. Pub. L. No. 104-172, 110 Stat. 1541, 1541–1551 (1996), 50 U.S.C.A. § 1701 Historical and Statutory Notes (West Supp. 1997).

37. *See* E.U. Blocking Measure, *supra* note 30, at art. I.

38. 22 U.S.C.A. §§ 6021–6091 (West Supp. 1997).

39. 31 C.F.R. pt. 515.

40. *See* Cuban Democracy Act of 1992, 22 U.S.C.A. §§ 6001–6010 (West Supp. 1997).

41. *See* E.U. Blocking Measure, *supra* note 30, at art. XI. The regulation also extends to natural persons resident in the Community who are nationals of a Member State or who are not present in the country of which they are nationals or who are "within" the Community. *See id.* The 1980 British Protection of Interests Act, under which the 1992 Cuban embargo blocking order was issued extends to "any person carrying on business in the United Kingdom." The Protection of Trading Interests Act, 1980, ch. 11, § 1(1) (Eng.). It is possible that the 1992 U.K. blocking measure may continue to have application in circumstances not covered by Council Regulation (EC) No. 2271/96. Protection of Trading Interest (U.S. Cuban Assets Control Regulations) Order 1992, S.I. 1992, No. 2449 (Eng.); E.U. Blocking Measure, *supra* note 30.

or of a province and that carries on business in whole or in part in Canada."[42] This definition creates the potential for conflicts in legal obligations on the part of U.S. corporations that have registered to operate in Canada. The Mexican blocking law applies to individuals or corporations "in Mexico."[43] It is unclear whether Mexican branches of U.S. corporations are intended to be covered.

Legal conflicts over U.S. embargo provisions may be mooted by the application of Commerce Department reexport controls, in circumstances when a "person subject's" proposed export to Canada involves U.S.-origin or U.S.-content products or technology. Canada has a long-standing policy of deference to U.S. trade controls in circumstances when the product to be exported is of U.S.-origin or has not undergone substantial transformation since leaving the United States.[44] Even when these policies do not apply, it is unclear whether foreign blocking measures will preclude refusal to ship, due to U.S. reexport control violations, apart from the Cuban embargo "person subject" constraints.

Dealings of a foreign "person subject" with Cuba or Cuban parties also may be independently barred by contractual obligations. This includes limitations imposed on patent and other intellectual property licenses, as well as territorial selling constraints designed to preserve markets for other affiliates of the U.S. parent company. While blocking measures may be construed as voiding contractual limitations based predominantly on embargo compliance motivations, it seems unlikely that they would be deemed to invalidate other legitimate contractual limitations.[45]

It also seems unlikely that blocking measures would be construed to compel a "person subject" to proceed with a Cuban transaction that is unattractive from a commercial standpoint. Specific instances are when there is an undue credit risk, unsatisfactory

42. Foreign Extraterritorial Measures (United States) Order, SOR/92-584 § 2, (1992) (Can.).

43. Mexican Blocking Measure, *supra* note 30.

44. *See* Canadian Export Control List, SOR/89-202 (1996).

45. The Author was consulted some time ago by a client regarding the enforceability in Canada of a long-standing requirement that any affiliate of the author's client that received an order for a product not manufactured by it or in its inventory forward the order to the U.S. parent company. Canadian counsel advised that the Canadian affiliate would not contravene the Canadian blocking order by complying with this requirement, notwithstanding its knowledge that the order would be acceptable by an affiliate in a third country and that the U.S. parent would not fill or assign the order by reason of U.S. embargo constraints.

price or other terms, or an insufficient supply of necessary ingredients. This includes parts and components unavailable from U.S. suppliers by reason of U.S. embargo constraints.

On the other hand, it should be noted that the conflict of legal obligations is not confined to "person subject" dealings with Cuba and Cuban parties. The U.S. embargo is construed to apply to any dealings in property in which the government or a national of Cuba has any "interest."[46] OFAC construes this language to mean that a Cuban interest exists in any property that the supplier knows or has reason to believe will be exported to that country by a third party.

Thus, for example, if a "person subject" in Canada supplies electric motors to a Canadian company that it knows or has reason to believe will reexport those motors to Cuba, or incorporate those motors into machines for delivery to Cuba, OFAC considers that the "person subject" has violated the embargo. Canada has recently amended its blocking order to make it clear that it likewise applies in such circumstances,[47] and it is likely the E.U. blocking measure will be given a similar construction.

THE U.S. PARENT COMPANY'S PERSPECTIVE

It is useful to examine the conflict between the U.S. embargo of Cuba and foreign blocking measures separately, from the standpoint of the U.S. parent company and from the standpoint of the subsidiary "person subject" in a blocking jurisdiction.

The parent company's greatest concern, needless to say, will be to ensure that it does not violate U.S. law, including the Cuban embargo constraints. The U.S. parent is subject to judicial process in the United States. Additionally, willful violations would expose the parent company to criminal prosecution, with fines of up to one million dollars; moreover, individuals may receive jail terms.[48] Violations also may result in civil penalties, which may be as much as $55,000 for each infraction.[49]

The fact that XT features of the embargo may be inconsistent with international law norms is not a defense to U.S. law enforcement. With rare exceptions, the doctrine of foreign state compulsion

46. *See* 22 U.S.C.A. §§ 6001–6010.

47. *See* Amending Act, R.S.C. 1996, ch. 28 § 3(1) (1998) (Can.).

48. *See* 50 U.S.C.A. app. § 16.

49. *See id.*

will not be available to the U.S. parent company. Such a defense might be available in the context of Canadian blocking order enforcement against a U.S. company registered in Canada.

The parent company will also be concerned that U.S. citizens or permanent residents are "persons subject" and do not violate U.S. embargo constraints. Generally, these individuals will be subject to the U.S. judicial process regardless of where they reside or where they are employed. These individuals may also include persons who serve as directors, officers, or key employees of a subsidiary in a jurisdiction with blocking laws. In some cases, these individuals may also be subject to the blocking measures.

Concern that the subsidiary "person subject" will not violate a foreign blocking measure to which it is subject, and to the judicial process of which it also is subject, must be a secondary consideration from the parent company's perspective. The amended Canadian Foreign Extraterritorial Measures Act and the Mexican blocking measures include criminal penalties for violations.[50] The E.U. blocking measure is not self-enforcing, requiring member countries to adopt implementing laws.[51]

Presumably, the countries that have blocking laws will not accept as a defense that the conduct of the "person subject" would violate U.S. embargo proscriptions.[52] However, as previously noted, if the products supplied to Cuba are of U.S.-origin or have significant U.S. origin content, a "reexport" shipment without a Commerce Department license would also violate U.S. export controls.[53] It is also possible that such circumstances would be a defense to non-performance.

Relegated to the third position of the U.S. parent company's concerns is that the subsidiary "person subject" does not violate U.S. law. Sometimes laypersons (and some lawyers) equate subsidiary conduct with parent company conduct. However, careful preservation of corporate separation should effectively shield the U.S. parent company from direct responsibility for its subsidiary's

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50. *See* Amending Act, R.S.C. 1996, ch. 28, § 7(1) (1998) (Can.); Mexican Blocking Measure, *supra* note 30.

51. As of April 1, 1998, Austria, Germany, Ireland, Sweden, and the United Kingdom had enacted implementing laws and such legislation was pending in a number of other E.U. member states.

52. *See, e.g.*, Foreign Extraterritorial Measures (United States) Order, SOR/92-584 § 2(b) (1992) (Can.). To accept the argument that a "person subject" was violating the U.S. embargo provision as a defense would effectively vitiate the blocking measures.

53. *See supra* notes 2–5 and accompanying text.

conduct. Needless to say, it is important for the parent company to not create circumstances under which it may be vulnerable to aiding and abetting any unlawful conduct by its subsidiary or, worse yet, conspiracy to violate embargo constraints.

If the U.S. parent company is careful, embargo enforcement authorities will have recourse only against the "person subject." However, if the United States cannot exercise jurisdiction over the "person subject," embargo enforcement authorities may not have a vulnerable target for purposes of criminal prosecution or civil litigation. If the export activities of a foreign subsidiary violates the Commerce Department's export control regime, the subsidiary runs the risk of a denial of its U.S. export privileges.[54]

These practical limitations on the capability of U.S. authorities to police violations of XT foreign trade control provisions may partly explain the lack of enforcement actions taken against subsidiaries of U.S. companies when U.S. sanctions were imposed against Panama in 1988 during the Noriega regime.[55] The sanctions ordered the U.S. subsidiaries to not pay taxes and other Panamanian government fees; charges to which these subsidiaries were clearly subject.[56] Although many subsidiaries failed to comply with the sanctions, no record exists of enforcement actions taken either against the subsidiaries or the U.S. parent companies.[57]

The remaining motives of the U.S. parent company should be subordinated to the compliance concerns discussed.[58] These concerns may include relationships with customers and other business contacts, a desire to develop future business, avoiding troublesome investigations, fear of adverse publicity, and even excessive legal fees.

THE FOREIGN SUBSIDIARY'S PERSPECTIVE

The first concern of a foreign subsidiary must be compliance with the laws of the country in which it is incorporated and in which it operates.[59] The subsidiary will be subject to judicial pro-

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54. Denial of U.S. export privileges is a sanction that may also be used to compel payment of a civil penalty.

55. *See* Exec. Order No. 12,635, 53 Fed. Reg. 12,134 (1988).

56. *See id.*

57. Some enforcement cases may have been settled by agreed payments, presumably by U.S. parent companies, notwithstanding jurisdictional limitations.

58. *See supra* notes 48–49, 52–54, and accompanying text.

59. If the subsidiary is incorporated in a first foreign country but operates in a

cess in that country, and failure to comply with a blocking law may impose criminal liability.[60]

The prospect that the conduct of a subsidiary will cause a violation of U.S. embargo constraints is a secondary, but not unimportant, concern for two reasons. First, the subsidiary may have a valid foreign state compulsion defense to any charge that it has violated U.S. sanctions.[61] Second, unless the subsidiary has property or operations in the United States, it will likely be beyond the reach of U.S. judicial process.

The subsidiary should be seriously concerned with any conduct that would expose it to liability for violations of the Export Administration Regulations in the context of an export to Cuba.[62] A violation of the Export Administration Regulations could expose the subsidiary to the loss of its U.S. export privileges, thereby restricting access to any U.S.-origin products or technology.[63] As stated previously, foreign blocking measures should arguably be construed not to compel exports in violation of Commerce Department licensing requirements.[64]

The foreign subsidiary will also be concerned that its conduct will not implicate its U.S. parent or any individuals who, as U.S. citizens or residents, are subject to U.S. embargo proscriptions. Accordingly, a level of care should be observed during subsidiary-parent communications to avoid the appearance of parental direction disregarding U.S. law or any conspiracy to that effect. In some situations, communications between outside counsel and the foreign

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second foreign country, different considerations will apply. Blocking measures may not reach corporations operating in, but not incorporated in (or domesticated in) the blocking jurisdiction. *See* text accompanying *supra* notes 41–43. The blocking measures purport to apply by their terms to corporations organized under the laws of a blocking jurisdiction, regardless of the locus of corporate operations. *See, e.g.*, Foreign Extraterritorial Measures (United States) Order, SOR/92-584 § 3(1) (1992) (Can.). Whether such measures would be enforced in circumstances where the subsidiary does not operate in its place of incorporation may be open to question.

60. *See* Amending Act, R.S.C. 1996, ch. 28 § (1) (1998) (Can.). *See* text accompanying *supra* note 52.

61. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 441 (1986). The subsidiary may assert the defense of foreign state compulsion if it can establish that its conduct was driven by a genuine and realistic concern for exposure to prosecution in the subsidiary's home country. *See id.*

62. For example, this occurs if the subsidiary has re-exported a U.S.-origin product or a product with significant U.S.-origin content to Cuba without the requisite export license from the Commerce Department. *See* text accompanying *supra* notes 2–4.

63. *See* 50 U.S.C.A. app. § 2405 (West 1991 & Supp. 1997).

64. *See* text accompanying *supra* note 44.

subsidiary may be preferable to direct parent-subsidiary communications. Individuals who might have dual exposure should be counseled to recuse themselves.

The business concerns of a subsidiary should be secondary when circumstances leading to serious legal exposure may exist. For example, it would hardly be prudent for a subsidiary in a blocking jurisdiction to engage in promotional or other activities, beyond what is required to protect it under local law or to generate business with Cuban parties, either directly or indirectly.

PREPARING FOR A POSSIBLE CONFLICT

Multi-national U.S. companies may take a number of steps to reduce the risk of legal exposure resulting from potential conflicts between the Cuban embargo and foreign blocking measures. One step is to exercise care when granting contractual authority to subsidiaries. For example, the U.S. parent company may exclude Cuba from a list of territories that have the right to use patents, trademarks, or other intangible property made available by the U.S. parent company.[65] If territorial limitations do not already exist in license agreements, it may be possible to include them in renewals or amendments.

It is not yet clear how blocking jurisdictions will react to the contractual limitations. On one hand, pushing blocking measures to the point that they invalidate contractual limitations imposed by a party outside the blocking jurisdiction would be a far reach. Further, a U.S. licensor may have valid business reasons to not grant authority for the use of its intangible rights in a socialist country where it may be difficult to protect those rights effectively.[66] On the other hand, in some circumstances contractual limitations could become an easy way around blocking order constraints.

It may be prudent to avoid linking the restriction to embargo

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65. Including Cuba in a list granting rights to use intellectual property would probably be regarded as a violation of the Treasury Department Cuban Embargo Provisions. *See* 31 C.F.R. § 515.201(b)(2) (1997); *see also* 31 C.F.R. § 515.311 (1997) (defining "property" to include patents, copyrights, and trademarks). However, worldwide or regional grants without a specific exclusion probably would not be deemed to violate the Cuban embargo provisions.

66. *See* 31 C.F.R. § 515.528(a) (1997) (discussing transactions relating to blocked foreign intellectual property). The Treasury Department U.S. Embargo Provisions permit "persons subject" to register and protect patents, trademarks, and other intellectual property in Cuba, however, practical and legal difficulties may arise. *See id.*

concerns to lessen the risk that a contractual restriction on the use of intangible property in Cuba might be invalidated in a blocking jurisdiction. For example, a subsidiary's authorized selling territory may be described in geographic terms that do not include Cuba, rather than attempting to exclude Cuba by name. A second preparatory step is to impose explicit limitations on subsidiary exports to conform with the Commerce Department's licensing requirements, on the premise that these requirements are consistent with the foreign blocking measures. Here again, it is not clear how the authorities enforcing the blocking measures will respond to limitations on subsidiary exports. It may be preferable to express the restrictions in generic terms rather than to make explicit references to Cuba.

Longstanding governmental arrangements between the United States and Canada ensure deference to U.S. restrictions on the Canadian export of U.S.-origin goods that are not substantially altered in Canada.[67] However, the Commerce Department asserts reexport authority with respect to technology reexports from Canada and exports of Canadian products with more than ten percent U.S.-content by value.[68] Although the Canadian deference policy may not apply in all circumstances, it is at least arguable that the Canadian blocking measure does not invalidate constraints, contractual or otherwise, imposed to ensure compliance with Commerce Department reexport controls.

To date, no policies exist in the E.U. or in Mexico that acknowledge deference to U.S. Commerce Department reexport controls. Nonetheless, the E.U. blocking measure is specifically couched to negate the Treasury Department's Cuba embargo program.[69] Additionally, the E.U. Blocking Order does not reference the Commerce Department's licensing requirements.[70] Thus, one could argue that the imposition of reexport controls by a parent company on its foreign subsidiary should not be viewed as inconsistent with the E.U. blocking measure. Due to the general nature of the Mexican blocking measure, the argument for achieving a similar result in Mexico may be less persuasive.[71]

67. *See* Berman & Garson, *supra* note 4, at 820 n.135.

68. *See* 15 C.F.R. § 734.4(c)(1) (1997).

69. *See* E.U. Blocking Measure, *supra* note 30.

70. *See id.* The E.U. blocking measure also purports to nullify the trafficking lawsuit and entry exclusion provisions of the Helms-Burton Act as well as the retaliatory sanctions of the Iran and Libya Sanctions Act. *See id.*

71. *See* Mexican Blocking Measure, *supra* note 30. The Mexican blocking law tar-

Specific direction to comply with U.S. embargo directives issued by a U.S. parent company to its foreign subsidiary in a blocking country may give rise to an obligation on the part of the subsidiary to notify local authorities.[72] Scrutiny over the subsidiary would increase and provide a basis for local authorities to presume embargo concerns were the cause of the directions issued by the U.S. parent company; especially if a business opportunity with Cuba or a Cuban party is rejected. Thus, the subsidiary would be implicated.

On the other hand, a U.S. parent company's failure to give directions to its subsidiary or, worse, to withdraw an outstanding directive not to trade with Cuba, runs the risk of implicating the U.S. parent company. The risk is more probable if some trade opportunity with Cuba or a Cuban party is undertaken. Given this dilemma, the best approach for the U.S. parent company may be to provide the subsidiary with information regarding the scope and application of the U.S. embargo. At the same time, the U.S. parent company should acknowledge the existence of the relevant blocking measure and note the need for advice from counsel should an apparent conflict arise. Obviously, some care is required in the wording of the guideline issued by the U.S. parent company.

Finally, the U.S. parent company, in consultation with appropriate counsel, including counsel from the applicable foreign blocking order jurisdictions, should draft a procedure to address various situations that may produce conflicts between U.S. embargo obligations and obligations under foreign blocking measures. The procedure should identify potential conflict situations early in the transaction process, identify key personnel (e.g., outside counsel) to advise on conduct, and establish lines of communication among the key personnel.

QUESTIONS FOR THE U.S. PARENT WHEN CONFLICT LOOMS

The U.S. parent company may ask itself several questions if it learns of a potential transaction by a subsidiary in a blocking jurisdiction that would either be inconsistent with U.S. embargo prohi-

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gets any foreign extraterritorial measure that "intends to impose an economic blockade or even to limit investments in a country." *Id.*

72. *See, e.g.*, Foreign Extraterritorial Measures Act, R.S.C., ch. F-29, § 5(1) (1984) (requiring people in Canada to notify the Canadian Minister of Foreign Affairs of communications trying to influence policies in Canada).

bitions or would implicate the subsidiary under the blocking law of its country.

First, should the parent company direct its subsidiary to comply with the U.S. embargo? If no direction is given, the U.S. parent company risks being viewed as having authorized or condoned the transaction. The U.S. parent company may then be exposed to a charge of unlawful aiding and abetting or conspiracy.[73] On the other hand, unequivocal direction by the U.S. parent company to comply with the embargo exposes the subsidiary to enforcement action in its local jurisdiction. Prudence suggests that the optimal course to follow is to spell out the embargo proscriptions for the subsidiary, including the noncompliance consequences, and suggest that the subsidiary consult with local counsel regarding its local obligations. The U.S. parent company should leave the ultimate decision to the subsidiary's management.

Second, what should the U.S. parent company do about U.S. citizens or permanent residents serving as directors, officers, or employees of the subsidiary? The U.S. citizens or permanent residents may be held accountable in the United States for any of their actions taken to further any subsidiary transaction with Cuba or a Cuban party.[74] If the U.S. citizens or permanent residents reside in a blocking jurisdiction, they may also have conflicting obligations under the laws of the blocking jurisdiction.[75] Clearly, these individuals should not place themselves in jeopardy of prosecution in either jurisdiction. Exposure to conflicting obligations suggests that the individuals should either recuse themselves or, if necessary, resign their positions. In some situations, it may be prudent for these individuals to seek their own independent counsel.

Third, should the U.S. parent company approach the U.S. government for assistance with finding a solution to the conflict? To begin with, the Cuba embargo provisions, in current form, do not require consultation with the U.S. government.[76] Further, the withdrawal of agency discretion to issue licenses for exports to Cuba limited the flexibility of the U.S. government to find a solu-

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73. *See* 18 U.S.C.A. §§ 2, 371, 3571.

74. *See* 22 U.S.C.A. § 6091(a)(3)-(4) (West Supp. 1997) (denying entry into the United States to corporate executives and their immediate families if their respective companies engage in trafficking confiscated property).

75. *See supra* notes 59, 72 and accompanying text.

76. See 31 C.F.R. § 515.203 (voluntary disclosure of past violations) and 31 C.F.R. § 515.804 (recordkeeping and authority to require reports).

tion.

Finally, disclosure to the U.S. government will place the fate of the parent company, and perhaps the fate of its subsidiary, in the hands of the governmental agency charged with the enforcement of the Cuban embargo. Even so, there may yet be good reasons to seek the help of the Treasury Department. Notwithstanding the Mack Amendment, the Treasury Department retains some licensing authority to permit "persons subject" to deal with Cuban parties (e.g., to authorize dealings with Cuban parties outside Cuba and imports from Cuba).[77] Even in situations when no licensing is possible, the Treasury Department has discretion to bring an enforcement action.[78] Its decision in that respect may be affected by the level of cooperation, or the lack thereof by the affected parties. Treasury officials have stated informally they will work with foreign governments to defuse potential conflict decisions. The absence of public conflicts suggests this may be more than mere soothing talk.

In sum, before making a decision to put the matter before the Treasury Department, all possible implications should be explored with the advice of experienced counsel.

QUESTIONS FOR THE FOREIGN SUBSIDIARY WHEN CONFLICT LOOMS

A U.S. company subsidiary incorporated in a blocking jurisdiction also may ask itself several questions when presented with a potential transaction with Cuba or a Cuban party. The threshold question for the subsidiary is whether to inform its U.S. parent company of the potential transaction and cooperate with the parent company by devising a strategy to deal with the problem. The subsidiary's first instinct might be to go it alone and abide by the applicable blocking measure. A subsidiary company may shelter itself from U.S. enforcement action by avoiding contacts that could subject it to judicial process in the United States. The subsidiary may thereby rely upon the defense of foreign state compulsion should all else fail. Moreover, the subsidiary might reason that, by avoiding communication and cooperation with its U.S. parent, the parent will be less vulnerable to U.S. enforcement action due to the conduct of the subsidiary.

There is some logic to this avoidance reasoning. However, the

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77. *See* 31 C.F.R. § 515.559 (1997).

78. *See* 31 C.F.R. §§ 515.502–.503 (1997).

disadvantage of a "go it alone" approach is that it forecloses consultation and cooperative efforts between the subsidiary and U.S. parent company that might avoid a potential conflict. Additionally, cooperation between officials of the two involved governments is effectively squelched. Action by the subsidiary may also give rise to an otherwise avoidable enforcement action.[79] For example, the failure to secure authorization from the U.S. government to permit the subsidiary to proceed with the transaction.[80]

The subsidiary must also consider whether it has a legal obligation to inform its government of the potential conflict problem or whether it would be prudent for the subsidiary to do so. All three of the blocking measures include notification requirements.[81] However, the blocking measures differ in their respective approaches.[82] The Canadian measure requires notification of any "directive, instruction, intimation of policy or other communication relating to" compliance with the U.S. embargo of Cuba.[83] The Canadian obligation does not appear to be invoked by the receipt of a Cuban business opportunity.[84] In contrast, the E.U. blocking measure requires companies that are "affected, directly or indirectly," by the U.S. Cuba embargo constraints to notify the European Commission.[85] The Mexican blocking measure requires notification to the Ministry of Foreign Affairs and the Ministry of Commerce and Industrial Production by any party affected by an extraterritorial measure or that has been notified to comply with such a measure.[86]

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79. *See, e.g.*, 31 C.F.R. § 515.559(b) (1997).

80. Under the 1992 U.K. blocking measure that preceded adoption of the E.U. regulation, the Department of Trade and Industry took the position that permission for a U.K. firm to seek a license from the U.S. Treasury Department to perform a transaction with a Cuban party was required. *See* Protection of Trading Interest (U.S. Cuban Assets Control Regulations) Order 1992, S.I. 1992, No. 2449 (Eng.). It is unclear whether the E.U. regulation will be so construed, but this problem presumably can be avoided if the U.S. parent company seeks a license to authorize the subsidiary transaction without purporting to act for the subsidiary. *See* E.U. Blocking Measure, *supra* note 30.

81. *See* Foreign Extraterritorial Measures (United States) Order, SOR/92-584 § 3(1) (1992) (Can.); E.U. Blocking Measure, *supra* note 30; Mexican Blocking Measure, *supra* note 30.

82. *See* text accompanying *infra* notes 84–87.

83. Foreign Extraterritorial Measures (United States) Order, SOR/92-584 § 3(1) (1992) (Can.).

84. *Cf. id.* (requiring notification only upon actions received from outside of the blocking jurisdiction).

85. E.U. Blocking Measure, *supra* note 30; *see also supra* note 51 (regarding implementation).

86. *See* Mexican Blocking Order, *supra* note 30.

Apart from mandatory notification, consultation with appropriate authorities may be prudent. Especially if there is some reason to believe that the authorities will make efforts to avoid the potential conflict. Prudence would require any foreign subsidiary contemplating informing its government of a potential conflict situation to be informed of the response such a contact is likely to produce. That response may depend, in significant part, on how the foreign government perceives the economic, political, and diplomatic consequences of advancing with the potential transaction. If the potential transaction becomes public, the government may have less flexibility in how it addresses the situation.

In the E.U., the European Commission has authority to exempt persons in the Community from the blocking measure "to the extent that non-compliance would seriously damage their interests or those of the Community."[87] It remains to be seen how this provision will be applied. No similar discretionary licensing or exemption provision exists in the Canadian or Mexican blocking measures.[88] However, enforcement agencies presumably have discretion to prosecute in a particular situation.

CONCLUSION

It is remarkable that virtually no case has publically presented a head-on collision between the U.S. embargo of Cuba and the various foreign blocking measures. However, this conflict has existed, on paper, for five years in Canada and the United Kingdom. Several factors may account for the absence of visible conflict.

First, and probably foremost, is the weakness of the Cuban economy and its currency. The state of the Cuban economy makes it difficult for the Cuban government to seek products and services from abroad. Second, subsidiaries of U.S. companies in blocking jurisdictions have not pursued business opportunities that create conflicting legal obligations. Third, authorities in the United States and in blocking jurisdictions actively seek to defuse potential conflict situations without undermining fundamental policy objectives.

Nonetheless, if U.S. extraterritorial measures persist and continue to be viewed as unacceptable by foreign trading partners, the conflicts between the U.S. Cuban embargo and the blocking mea-

87. *See* E.U. Blocking Measure, *supra* note 30.

88. *See* Foreign Extraterritorial Measures Act, R.S.C., ch. F-29 (1985) (Can.); Mexican Blocking Order, *supra* note 30.

sures will eventually find expression in governmental enforcement actions. In that circumstance, U.S. parent companies and their foreign subsidiaries will need to act with considerable care.