

**PRESENTATION TO  
ASSOCIATION OF CORPORATE COUNSEL ISRAEL  
ANNUAL MEETING**  
*The Long Arm of  
U.S. International Trade Law*

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# *Extraterritorial U.S. Trade Control Laws*

1. The Usual Suspects: Helms-Burton and ISA
2. The World of Extraterritorial Sanctions
3. The Foreign Corrupt Practices Act
4. The Foreign Investment and National Security Act
5. Other U.S. Trade Controls With Extraterritorial Application

## (Cuban Liberty and Democratic Solidarity Act)

- Bans foreign “traffickers” in confiscated property from entering the United States. The ban extends to the spouses, minor children, and agents of “traffickers.”
  - Sharretts (Canada) 1996
  - Grupo B.M. (Israel) 1996
- Codifies existing Cuban sanctions into statute.
- Allows private suits against “traffickers” (this right is currently suspended).

# *Helms-Burton “Understanding”*

- In a 1998 “Understanding” between the United States and the EU, the United States agreed not to apply Helms-Burton against European companies, in exchange for the EU’s decision to drop a WTO case against the Helms-Burton.
- Certain agreements were also reached with respect to the Iran Sanctions Act.

# *Trading With The Enemy Act*

TWEA Sanctions extend prohibitions to non-U.S. subsidiaries of U.S. companies, unlike other U.S. sanctions programs, which do not generally extend to subsidiaries abroad.

## 1. Foreign Assets Control Regulations (North Korea)

- Program liberalized in June 2000: U.S. persons may export most items to North Korea if they have regular export licenses from the U.S. Department of Commerce; but
- Imports from North Korea continue to require approval by OFAC; North Korean assets continue to be blocked.

## 2. Cuban Assets Control Regulations.

- Comprehensive trade embargo against Cuba, coupled with comprehensive blocking of assets.

# *U.S. v. Brodie:* *TWEA Conviction of Foreign National*

Defendant: Canadian citizen James E. Sabzali, employed by Canadian subsidiary of U.S. company (Pennsylvania-based BroTech Corp.).

Conviction:

- convicted for sales of water-purification supplies to Cuba through Mexican and Canadian intermediaries.
- Seven of the 21 charges relate to actions taken on Canadian soil.
- Note Canadian “blocking” law makes it illegal for Canadians to comply with the U.S. embargo of Cuba.

Not Guilty on Transactions Prior to Employment by Subsidiary of U.S. Company

- The jury found Sabzali not guilty on all charges up to March 1995, during his employment by an unaffiliated Canadian company providing consulting services to BroTech.
- But the United States charged those transactions, and indicates it will continue to do so in analogous circumstances.

# *Other U.S. Sanctions Programs*

- Regulator: U.S. Office of Foreign Assets Control (OFAC)
  - *Currently more than 20 U.S. sanctions programs.*
  - *Principal tool: asset freeze (inherently extraterritorial)*
- General: prohibitions do not reach foreign persons
- Exception: TWEA Sanctions govern foreign subsidiaries
- Exceptions: prohibited extraterritorial activities

## *Sudanese Sanctions Regulations*

- Prohibits, among other actions, “reexports” by non-U.S. persons abroad:
  - *with knowledge or reason to know Sudan is destination; and*
  - *The exportation from the United States to Sudan would require a license*
- Enforced? See “List-Based Trade Controls”

# *Facilitation Prohibitions: Jurisdiction Creep*

- In general, U.S. persons may not “facilitate” activities by foreign persons that would be prohibited if done by the U.S. person.
  - *Different programs have different definitions of facilitation;*
  - *provisions are often read to cross-apply to other programs.*
- Definitions include financing, approving, brokering, guaranteeing, changing policies, referring offshore.
- May affect non-U.S. companies with U.S. employees, managers, directors, parents, or affiliates, or other relationships.

# *Sanctions Pitfall Scenarios*

- Scenarios abound
  - *Joint venture with U.S. partner*
  - *Acquire a U.S. subsidiary*
  - *Be acquired by a U.S. parent*
- Pitfalls abound
  - *Management agreement may be impossible to implement*
  - *U.S. origin goods, technology to Sudan or Cuba?*
  - *No inventory exception for licensed IP*
  - *Will OFAC honor your paper corporate veil?*
  - *Successor liability*

## *Extraterritorial Money Laundering Laws*

- Section 319 provides for forfeiture of a foreign bank's correspondent account when funds subject to forfeiture for money laundering are deposited in the foreign bank.
- “Innocent Owner” defense is denied to the foreign bank.
- Other provisions include:
  - *Civil Cause of action against foreign financial institutions that convert certain property subject to money laundering forfeiture (Section 317);*
  - *Increased requirements concerning disclosure of foreign beneficial ownership of accounts;*
  - *Increased subpoena power against foreign banks that hold U.S. correspondent accounts.*

# *Other Trade Controls*

## *Designed for Extraterritorial Effect*

- Trade remedies laws designed to affect foreign corporate behavior, e.g., dumping, intellectual property infringement.
- Trade remedies designed to affect foreign government behavior, e.g., subsidies.
- Customs as Homeland Security: container security, C-TPAT, and the 24-hour rule.

# *List-Based Prohibitions*

- Or: How a U.S. Bureaucrat Can Blacklist Your Company and Ruin Your Day
- U.S. State Department Debarred List
- U.S. Commerce Department
  - *Denied Persons List*
  - *Unverified List*
  - *Entities List*
- OFAC Specially Designated Nationals List

# *Foreign Corrupt Practices Act*

## Main Provisions:

- *Anti-bribery (U.S. issuers, domestic concerns, and persons and entities in the United States)*
- *Books and Records (U.S. “issuers”)*
- Escalating enforcement environment
- Scenarios for entanglement
  - *U.S. affiliate*
  - *Acquisition by U.S. parent*
  - *New U.S. JV partner – due diligence*
  - *Third-party payments investigation*

# *Foreign Investment Review*

- Foreign Investment and National Security Act of 2007
- Amends Exon-Florio law
- Review of foreign investments for:
  - *National security threat*
  - *Foreign control of “critical infrastructure*
  - *Foreign government ownership*
- New regulations pending

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***Thank you***

