THE FOREIGN EXTRATERRITORIAL MEASURES ACT AND U.S. LEGISLATION RESTRICTING TRADE WITH CUBA

On October 9, 1992, the Attorney General for Canada, with the concurrence of the SSEA, issued the second blocking order under the *Foreign Extraterritorial Measures Act* (FEMA). The *Foreign Extraterritorial Measures (United States) Order,* 1992, was issued to counteract the provisions of the *Cuban Democracy Act* of 1992, ("the Torricelli Bill"), which formed part of the *National Defence Authorization Act for Fiscal Year* 1993. The Torricelli Bill purports to prohibit subsidiaries of U.S. companies (including those in Canada) from trading with Cuba. The FEMA order has two basic provisions: a) companies receiving any instructions relating to the extraterritorial measures in the Cuba Democracy Act are required to give notice of such instructions to the Attorney General and b) companies are prohibited, under penalty of fine or imprisonment, from complying with such instructions.

The first blocking order had been issued on October 31, 1990 and was directed the provisions of the "Mack Amendment" which had formed part of the *Export Administration Re-authorization Bill* of 1990. In the end the first blocking order was never tested, as President Bush vetoed the measure containing the Mack Amendment, and was revoked when the second order was issued.

The issuance of the blocking order, together with protests at the American action made at the diplomatic level, is the latest instance of a clash on the extraterritorial application of American law. Since 1963, the U.S. *Cuban Asset Control Regulations* (CACR) have asserted an extraterritorial jurisdiction over foreign subsidiaries of U.S. corporations. Until 1975, this primary exercise of this jurisdiction was over the activities of U.S. citizens who were directors of these foreign subsidiaries. While foreign corporations (including Canadian) were subject to regulation, there was little practical impact as all transactions by the subsidiary were authorized by a general permit. There were instances when U.S. authorities would not licence a U.S. citizen who was a director of a Canadian subsidiary to vote for a particular trade deal proposed by that subsidiary.

From 1975 until 1990, with the passage by Congress of the Mack Amendment, the focus of U.S. law was on the subsidiary itself, not the directors. However, the CACR regulatory language provided a signal that licences would