

## BACKGROUND

### CANADIAN POLICY ON EXTRATERRITORIAL MEASURES

Since 1963, the United States Cuban Assets Control Regulations (CACR) have consistently asserted an extraterritorial jurisdiction over foreign subsidiaries of U.S. corporations. For some Canadian companies, this has meant being subject to U.S. efforts to restrict trade with Cuba. Despite a number of bilateral incidents over the years involving licences for trade deals with Cuba, the practical impact of these regulations on Canada was slight. After 1975, changes in the U.S. regulatory regime led to a decline in such incidents.

In October 1990, however, the U.S. Congress passed a bill containing a provision, known as the "Mack Amendment," that would prohibit Canadian subsidiaries of U.S. companies from trading with Cuba. The application of the Mack Amendment in Canada was blocked immediately by an order of the Attorney General under the Foreign Extraterritorial Measures Act (FEMA), the first time that this remedy had been used since the FEMA was passed by Parliament in 1984. President Bush subsequently vetoed the U.S. bill and the Mack Amendment did not become law.

In February 1991, in response to renewed efforts by the U.S. Congress to enact measures that would restrict trade with Cuba by U.S.-owned subsidiaries, Canada's Attorney General and the then Secretary of State for External Affairs announced that Canada would not hesitate to take firm action again to counteract such measures.

The U.S. contends that it has jurisdiction to regulate the conduct of corporations organized in foreign states based on ownership or control of those corporations by U.S. citizens. Canada, together with almost all other Western countries, rejects this U.S. position. Thus, Canada views the provision contained in the National Defense Authorization Act, which is similar to the Mack Amendment, as an unacceptable extraterritorial extension of U.S. jurisdiction. Canada considers these corporations, by the act of incorporation in Canada, to be nationals of Canada and subject to Canadian jurisdiction. The fact that investment enabling such companies to be created came from outside Canada cannot act as a basis for U.S. laws to extend across the border.

To strengthen the ability of the Canadian government to combat this and other unacceptable U.S. assertions of extraterritorial jurisdiction, the Canadian Parliament passed the FEMA in 1984. It provides a legislative basis to counteract the extraterritorial assertion of jurisdiction by foreign law in a number of instances, in particular, for discovery of documents, anti-trust litigation and the application of foreign laws that purport to regulate conduct in Canada.