THE FOREIGN EXTRATERRITORIAL MEASURES ACT AND THE MACK AMENDMENT

On October 31, 1991, the Attorney General for Canada, with the concurrence of the SSEA, issued the first ever blocking order under the Foreign Extraterritorial Measures Act (FEMA) to counteract the provisions of the Mack Amendment that formed part of the U.S. Export Administration Re-authorization Bill of 1990. In the end, President Bush vetoed the measure containing the Mack Amendment. Nevertheless, the Mack Amendment provides a useful example of the different approaches to jurisdictional issues adopted by the U.S. compared with Canada. Since the Mack Amendment has been subsequently attached to two further Senate bills, it also promises to remain a significant issue of the Canada/U.S. bilateral agenda for the foreseeable future.

By way of background, since 1963 the U.S. Cuban Assets Control Regulations (CACR) have consistently asserted an extraterritorial jurisdiction over foreign subsidiaries of U.S. corporations. From 1963-1975, this jurisdiction was exercised primarily over U.S. citizens who were directors of these foreign subsidiaries. Canadian and other foreign corporations were also regulated, but the practical impact of this was slight since all transactions by the subsidiary were authorized by a general permit. A number of bilateral incidents took place when U.S. authorities would not licence a U.S. citizen who was a director of a Canadian subsidiary to enable him to vote for a particular trade deal by that subsidiary with Cuba.

From 1975 to passage of the Mack Amendment by the U.S. Congress in 1990, U.S. law focused directly on the subsidiary itself, although regulatory language provided a clear signal that licenses would be granted if transactions fell within particular categories. In fact, serious incidents arising from the extraterritorial application of the CACRs declined during this period.

The Mack Amendment represented an aggravation of the impact of the post-1975 U.S. rule, although not literally an extension of its jurisdictional reach. By prohibiting the issuance of licenses while at the same time requiring them, the Mack Amendment prevented the case by case negotiation of incidents which enabled licenses to be issued even though the Canadian and U.S. government continued to disagree over the principles that underlay each country's exercise of jurisdiction over subsidiaries.

The U.S. bases its legal position on the relatively uncontroversial international law principles for exerting jurisdiction in which it is recognized that states may exercise control over persons on the basis of territory and nationality. However, the provisions of the post-1975 U.S. CACRs and the Mack Amendment