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Discussion after the Speeches of John L. Ellicott and Selma M. Lussenburg

Discussion

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Discussion After the Speeches of John L. Ellicott and Selma M. Lussenburg

COMMENT: *Mr. Ellicott*: I just want to clarify a point that Selma Lussenburg raised about consulting with the Attorney General of Canada. Number one, whether to consult with the Attorney General of Canada should be decided by Canadian counsel. Number two, the one situation that I can see where a U.S.-owned Canadian company might want to do so, would be where the Canadian subsidiary has concluded that it is almost certainly going to be prosecuted in Canada if it does not go through with a Cuban transaction, and therefore to protect itself, it must go through with it, despite the U.S. legal risk.

In that situation, from a U.S. standpoint, it is helpful if it can be demonstrated to the U.S. authorities that the Canadian company acted under foreign state compulsion, confirmed either by an action of the court, or by advice from the Attorney General, or advice from reputable counsel. So there might be a situation where the company would conclude, basically, that the jig is up, but it wants to be sure that the United States government knows the gun was pointed at its head before it went ahead with this transaction. One might speculate what the United States would do if that were to occur.

Let us say that we get a very clear case and the Canadian company is told by the Attorney General that it is going to be prosecuted, and I think the penalties that Selma described would be adequate for purposes of satisfying the doctrine of foreign state compulsion. What will the U.S. Treasury Department do? I think the first thing it is going to do is investigate the heck out of what the parent company did. And the second thing it is going to look for is any other U.S. person it can lay its hands on, namely U.S. citizens who are in the management or on the board of that Canadian company. That is why they are so exposed. They might wish they were not there when this happens.

But if the Treasury cannot succeed in implicating either of those, if it cannot establish culpability on the part of the U.S. parent, and it cannot find any other U.S. person who is involved, my guess is Treasury will do nothing. Treasury cannot prosecute the Canadian company effectively, because it is presumably not subject to U.S. jurisdiction. Treasury could go through an administrative penalty proceeding, but they do not have the power to enforce sanctions. They could decree a penalty under their regulations by going to an administrative law judge, and even if the Canadian company declined to appear, the judge could impose the penalty, which is, by the way, up to \$50,000 for each transaction. But then, the only way the U.S. government can collect the penalty is to sue in a federal court. If the Canadian company has no

presence in the U.S., that suit will fail for lack of personal jurisdiction.

I once was on a program with the Director of the Office of Foreign Assets Control, Richard Newcomb, and I made this point, in his presence, and he hinted that maybe what he would do in those circumstances would be at least to consider putting the Canadian subsidiary on his list of specially designated nationals of Cuba, which would mean that the company would be embargoed. I frankly think that that would not be a legitimate exercise of Treasury authority, and could successfully be challenged, because the criteria for embargoing an entity, although not written down anywhere, are implicitly in the regulations, *i.e.*, acting as an agent of the Cuban government. To say that a Canadian company is acting as an agent of the Cuban government when it exports to Cuba, whereas nobody else is when they export to Cuba, does not make any sense at all to me. So I take Mr. Newcomb's remarks as a somewhat hollow threat. However, it did come from the guy who makes the enforcement decisions, so you can decide for yourselves what to make of it.

QUESTION: *Mr. O'Grady*: I thought I read somewhere recently that the administration was tired of this Cuban policy and was thinking in terms of bringing Cuba back into the western trading mechanism on the thought that these embargo programs are very hard on the people rather than the regime, and they almost never have the effect of bringing down the regimes anyway, except possibly in the very long run. So I was just wondering if that is what the administration is thinking, and whether they might be reluctant to enforce this *Cuban Democracy Act* in any event?

ANSWER: *Mr. Ellicott*: I think that is what the *New York Times* said, and I think many people would agree, including myself, that it is time to reassess the U.S. policy toward Cuba. I think there are people within the U.S. government who think that way, and I would not be surprised if most of the people in the State Department did think that way, but they can never say so, for attributions, as long as the official U.S. policy remains as it is.

The political situation in which we find ourselves in the United States is such that, given the influence that the Cuban American National Foundation exercises, it is difficult to see how we are going to get out of this policy. I do not see the end of it until something occurs in Cuba that gives us an opportunity to change course, but I do not see that on the horizon yet.