EXTRATERRITORIAL LEGISLATION - THE UK PERSPECTIVE

Legislación extraterritorial: la perspectiva del Reino Unido

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Abstract

This paper explains the effect of US extraterritorial legislation on businesses and individuals in the United Kingdom with particular reference to Cuba. It identifies the measures taken by the UK Government to counteract the effects of extraterritorial legislation, both directly and through Britain's, former, membership of the European Union. Examples are given to show the way in which extraterritorial legislation has affected Cuban citizens in the UK; British organisations with links to Cuba; and UK businesses who wish to trade with Cuba. This paper shows the means by which it was possible to counter the effects of extraterritorial legislation by using UK domestic law as well as political and popular pressure.

Keywords: Extraterritorial legislation; UK legislation; EU regulation.

Resumen

Este artículo explica el efecto de la legislación extraterritorial estadounidense sobre las empresas y los particulares en el Reino Unido, con especial referencia a Cuba. Identifica las medidas adoptadas por el gobierno del Reino Unido para contrarrestar los efectos de la legislación extraterritorial, tanto directamente como a través de la antigua pertenencia de Gran Bretaña a la Unión Europea. Se dan ejemplos para mostrar la forma en que la legislación extraterritorial ha afectado a los ciudadanos cubanos en el Reino Unido, a las organizaciones británicas con vínculos con Cuba y a las empresas británicas que desean comerciar con Cuba. Este documento muestra los medios por los que fue posible contrarrestar los efectos de la legislación extraterritorial utilizando la legislación nacional del Reino Unido, así como la presión política y popular.

Palabras claves: legislación extraterritorial; legislación del Reino Unido; regulación de la Unión Europea.

Summary

1. INTRODUCTION

Britain has a long history of opposition to extraterritorial legislation imposed by other countries, most notably the US. Successive British Governments have voted against the US blockade of Cuba at the United Nations, and Britain maintains its opposition to US extraterritorial legislation. US attempts to assert control over the activities of UK-based businesses, by legislation, litigation and sanction, have caused tension between the UK and the US since the 1950s. The US has passed legislation imposing extraterritorial jurisdiction over the activities of businesses in other countries. Originally designed to enforce US anti-trust laws, more recent extraterritorial legislation went beyond this aim by seeking to enforce US sanctions against other countries, particularly Cuba. This approach is currently encapsulated by the Helms-Burton Act 1996 (sometimes referred to by the US as LIBERTAD), and the Iran and Libya Sanctions Act 1996 (ILSA).

Sanctions imposed by the US on the activities of non-US businesses in third party countries have caused disputes between the US and some of its' allies. US claims to extraterritorial jurisdiction have impacted on UK businesses despite the close economic, social and political ties between the two countries.

Britain's opposition to US extraterritorial laws has been essentially pragmatic and driven by economic factors rather than political imperatives. As a matter of international law, the UK believes that a state may only exercise jurisdiction over events occurring within its own territory and over the conduct of its own citizens and businesses abroad. US extraterritorial legislation goes way beyond these parameters by enabling US to sanction non-US businesses trading with another country, even where there is no US involvement in the transaction.

These extraterritorial laws are seen in the UK as excessive and unfair. The British government believes that the actions of UK companies and individuals in countries outside the US should be subject to UK, and not US, laws. Since 1973, this also applied to EU legislation as well. The UK government sees extraterritorial legislation as a burden on British businesses by requiring complicity with US rules which conflict with both UK and EU legislation. This is regarded as creating uncertainty, which is bad for investment and trade, as well as causing unnecessary conflicts between countries which, otherwise, would be allies.

2. THE PROTECTION OF TRADING INTERESTS ACT 1980 (PTIA)

The PTIA[1] was passed by the UK Parliament in March 1980. This was well before the advent of the Helms – Burton Act, but was passed in response to a US threat to use its anti-trust legislation against a UK business involved in trading uranium. The main purpose of the PTIA was to protect UK businesses threatened by US laws concerning conduct in another country. The, then, British Secretary of State for Trade, John Nott, told the House of Commons that this legislation was passed *"... to reassert and reinforce the defences of the United Kingdom against attempts by other countries to enforce their commercial and economic policies unilaterally on us"*.[2]

The PTIA was directed against any foreign country that sought to impose extraterritorial restrictions upon UK businesses; and was not solely designed to protect trade between Britain and Cuba.

Section 1 of the PTIA confers powers on the, now, British Secretary of State for Business and Trade to prohibit UK citizens and businesses from complying with laws made by foreign countries which affect British business and damage, or threaten to damage the trading interests if the UK. This includes requiring UK businesses to report any threat of extraterritorial legislation made against them.

Under section 2, the Secretary of State can also prohibit any person in the UK from providing commercial information or documents to a foreign court, tribunal or authority. The PTIA makes it a criminal offence for a British citizen to refuse to comply with an order made by the Secretary of State under the PTIA.

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1 UK legislation, Chapter 11.

2 UK House of Commons debate, 15th November 1979.

The PTIA goes on to prevent UK Courts from ordering the production of evidence demanded by a foreign court which infringes the jurisdiction of the UK or is prejudicial to the sovereignty of the UK. It also prohibits British Courts from enforcing multiple awards of compensation imposed by foreign courts. British citizens and businesses can recover the multiple part of multiple compensation awards made against them in an overseas court by an action in the UK Courts.

The PTIA enables the UK government to make additional Orders and Directions on these issues.

The PTIA is generic. It offers a response to the use of extraterritorial measures against British citizens or businesses without naming either the country making the threat, or the third party country that is being targeted. The PTIA was designed to provide direct protection to UK individuals and businesses against the effects of extraterritorial sanctions imposed by other countries. Indirectly, it was also hoped that this legislation would deter foreign countries from attempting to use extraterritorial legislation against UK trading interests. It has also been suggested that a UK business, defending a claim in a US court, could raise a defense of foreign sovereign compulsion.[3]

Although the PTIA does not say so in terms, the main purpose of the Act is, in practice, to protect UK business from the worst effects of US extraterritorial legislation.

3. CUBA

The UK has applied the PTIA in the past, for example, in relation to the US's attempts to use its anti-trust legislation to prevent foreign companies from supplying goods for use in the construction of the Trans-Siberian pipeline. After a PTIA Order concerning the pipeline was made by the UK government, with directions given to prevent corporations from complying with the US' demands, the US withdrew their regulations in that regard.

In 1992 the UK government made an Order under the PTIA called the Protection of Trading Interests (US Cuban Assets Control Regulations) Order 1992[4] ('the

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[3] See Davidson, Nicholas, "US Secondary Sanctions: the UK and EU Response", Stetson Law *Review,* vol. XXVII, 1998.

[4] UK statutory Instruments 1992, number 2449.

1992 Order'), with Directions prohibiting anyone in the UK from complying with the extra-territorial aspects of the US blockade on Cuba, where it affected activities in the UK or trade with the UK.

The PTIA provides general protection against extraterritorial legislation irrespective of the origin or target. Although this predates Helms-Burton, the 1992 Order was specific to Cuba. It expresses the UK's opposition to the US blockade of Cuba by extending section 1 of the PTIA, which confers power on the UK Secretary of State to make Orders protecting UK businesses from the effects of extraterritorial legislation imposed by other countries.

The 1992 Order is very short. Its stated intention is to extend section 1 PTIA to Part 515 of the US Cuban Assets Control Regulations of Title 31 of the United States Code of Federal Regulations where they affect *"... trading activities carried on in the United Kingdom or the import of goods to or the export of goods from the United Kingdom"*. The 1992 Order was made following the US Congress passing section 1706 (a) (1) of the National Defense Authorization Act for the Fiscal Year 1993, known as the Cuban Democracy Act 1992 which would prohibit the granting of licenses under the US Cuban Assets Control regulations for certain transactions between US owned or controlled firms in the United Kingdom and Cuba.

The 1992 Order defines "trading activities" widely, as including *"... any activity carried on in the course of a business of any description".*

4. HELMS-BURTON

The Helms- Burton Act ("Helms-Burton") was passed in 1996. It is not the purpose of this paper to repeat the content of that legislation, but the effect was to extend US law and foreign policy objectives into the jurisdiction of other countries. While it could be argued that pre-1996 US extraterritorial interventions were made to stop wrongdoing, according to US standards, Helms-Burton appeared to be designed to deter third party countries from trading with, or investing in, Cuba. Reports from 1996 claim that Helms-Burton had prevented Mexican investors from raising money for a project with Cuba, which was then scrapped; the Mexican cement company CEMEX had halted operations in Cuba; and exports of Cuban sugar had been adversely affected.[5]

[5] See Hillyard, Mick & Vaughn Miller, "Cuba and the Helms-Burton Act", *Research Paper 98/114*, House of Commons Library 14th December 1998.

Two British businessmen were soon barred from the US under Helms- Burton. As directors of a Canadian company which traded with Cuba, they faced allegations of trafficking expropriated Cuban property. In 1996 the British Foreign and Commonwealth Office issued the following statement in response:

"Their business dealings with Cuba are entirely legitimate in the eyes of the British, Canadian and Cuban Governments. The idea that excluding them from the US will put pressure on the Cuban regime makes no sense whatsoever. It is simply a wrong-headed restriction on their freedom to travel and do business. We are taking this up vigorously with the US administration and pressing them to rescind their decision".[6]

The concern was that Helms-Burton forced UK businesses to break contractual obligations to Cuban businesses and, possibly, those of other countries. Also in 1996, Ian Taylor, a former minister from the UK department of Trade and Industry commented:

"It is strange that the US should seek to compensate its own citizens by permitting them to pursue claims against the rights and assets of companies from other friendly states".[7]

From its inception, Britain opposed Helms-Burton. In 1996 the UK government sent a strongly worded diplomatic note to the US government protesting at the content of the legislation. Britain was particularly concerned about Title III of Helms-Burton which conferred rights on US citizens to sue foreign companies who profited from property, allegedly, expropriated by Cuba. Welcoming President Clinton's decision to suspend Title III, albeit temporarily, the, then, UK Foreign Secretary Malcom Rifkind issued the following statement on 16th July 1996:

"I welcome the President's suspension of the right to bring action. This means that there will be no court proceedings this year. I am glad that the US Administration have pulled back from the brink in this way.

At the same time, I regret the President's decision not to waive provisions which threaten companies doing legitimate business in Cuba and which are inconsistent with a healthy world trade system".

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6 Foreign and Commonwealth Office statement, 11th July 1996.

7 Speech to the Caritag Conference on Helms-Burton legislation, 2nd May 1996.

5. EUROPEAN UNION

Britain joined the European Union (EU) in 1973 and left in 2020. During its membership of the EU, the UK was obliged to accept Directives from the EU and incorporate them into British domestic law.

The EU opposed Helms-Burton (and ILSA too). After the US passed Helms-Burton into law, there were formal consultations on the issue with the EU. The World Trade Organisation's Dispute Settlement Body agreed on 20th November 1996 to the EU's request to form a panel to consider the compatibility of Helms-Burton with the USA's WTO commitments. These Panel proceedings were suspended in April 1997 to allow bilateral negotiations aimed at resolving the EU's concerns about both Helms-Burton and ILSA. This resulted in an "Understanding" between the EU and the US government which included a renewable six-monthly waiver of Title III.

On 22nd November 1996 the EU adopted the EC [now EU] Counter-measures Regulation[8] ("the 1996 Regulations") *"protecting against the effects of the extraterritorial application of legislation adopted by a third country and actions based thereon or resulting therefrom".* These Regulations were in response to Helms-Burton, and apply to all EU member states and empower the Council of the EU and the EU Commission to add to or amend these Regulations.

The 1996 Regulations were adopted in the UK in the Extraterritorial US Legislation (Sanctions against Cuba, Iran and Libya) (Protection of Trading Interests) Order 1996[9] ("the 1996 Order"). The 1996 Order is, again, quite short. It requires EU companies affected by the laws covered by the EU Regulation to submit information to the EU Commission relevant to the Regulation. The Order blocks recognition or enforcement of decisions or judgements made under the covered laws; prohibits compliance with the requirements or provisions of the covered laws, unless authorized by the EU Commission; and confers the right to recover damages caused by application of the covered laws (not just the multiple part of damages awarded by foreign courts as provided by the PTIA).

This UK version of the 1996 Regulations make it a criminal offence to fail to provide information to the EU Commission, punishable by a fine.

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8 EC Council Regulation 2271/96.

9 UK Statutory Instruments 1996, number 3171.

The 1996 EU Regulations were designed to protect EU based businesses from the effects of Helms-Burton and ILSA. These Regulations were designed to deter the passage of similar legislation in the USA and elsewhere, by providing a mechanism for a swift response from the EU.

In 1998, Tony Lloyd, then a British Foreign Office Minister told the UK House of Commons:

"We have normal diplomatic relations with Cuba and support normal trade relations in civil goods and services. The EU's Common Position on Cuba, binding on all Member States, enshrines the principle that constructive dialogue and cooperation, not isolation, is the best way to promote change to a pluralist democracy, and to encourage respect for human rights, in Cuba. UK firms are encouraged to exploit the growing civil market opportunities which arise as Cuba undergoes a process of economic liberalization".[10]

This summed up Britain's approach at the time. The UK wanted to develop trade with Cuba but also felt able to raise allegations concerning human rights as well. This two stranded approach continues to the present day.

Now that the USA brought Title III into force, in 2019, the strength of the EU's response will be tested. The position for UK businesses may be further complicated by Britain's departure from the EU in 2022. The British government continues to review all legislation that emanated from the EU. Even if Britain were to repeal the 1996 Order, leaving UK businesses without the protection of the 1996 EU Regulation they would not be deprived of all protection against extraterritorial legislation. In that case, UK citizens and businesses could still rely on the PTIA and the 1992 UK Order (see above).

6. SOME EXAMPLES OF EXTRA-TERRITORIAL LEGISLATION IMPACTING ON THE UK

6.1. HILTON HOTELS

In 2007, under questioning, the US owned Hilton Hotel group stated that they had a policy of not allowing Cuban guests to stay in their hotels. That year, a spokesperson for Hilton told the, British, Guardian newspaper:

[10] UK House of Commons debate 5th May 1978.

"We are a US company. The dilemma we face is that [if we took a booking from a Cuban delegation] we would be subject to fines or prison and if anyone [from the Company] tried to enter the US, they would be arrested".[11]

This ignited protests coordinated by the UK-based Cuba Solidarity Campaign, involving members of the UK Parliament, the media, and trades unions. The official British Commission for Racial Equality stated:

"The Hilton would be acting unlawfully under the Race Relations Act by refusing to provide services to Cuban people".[12]

Following a concerted campaign in the UK, Hilton Hotels dropped their refusal to allow Cuban citizens in their hotels in the UK.

6.2. UK BANKS

In 2015, the Co-Operative Bank which had, for many years, provided banking facilities for British progressive organisations and charities, abruptly closed the account of the Cuba Solidarity Campaign (CSC) in the UK. The Co-Operative Bank had recently been taken over by a US hedge fund.

The Bank initially denied that the account was closed due to US extraterritorial legislation. Initially the Bank claimed that the account was closed due to concerns about money-laundering and risk management. However, in 2016, the British Daily Mirror newspaper reported a '*secret international blacklist*'. One example that they quoted was the closure of the Cuba Solidarity Campaign's bank account. Cuba Solidarity Campaign Director Rob Miller commented:

"The Co-Operative Bank has finally admitted that the closure of the Cuba Solidarity Campaign's bank accounts is a direct result of the United States blockade policies against Cuba".[13]

Despite this, Cubans and Cuban organisations continue to experience difficulties with carrying out even the most routine transactions through the British banking system.

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11 See Cuba Solidarity Campaign website, https://cuba-solidarity.org.uk/news

12 *Ibidem.*

13 *Idem.*

6.3. THE OPEN UNIVERSITY

The British based Open University provides open access courses, based on distance learning, to students worldwide. In 2017 the Open University refused to enrol a Cuban student. When challenged about this the Open University issued a statement which included the following:

"The US has comprehensive sanctions in place against a number of countries, including Cuba, meaning that it is not lawful for organisations subject to US jurisdiction to supply educational services to those countries without a licence".[14]

The statement went on to say that the Open University had applied to the US Treasury Department's Office for Foreign Assets Control for licences which, they said, would enable the University to enrol Cuban students.

Denying services to a person on the basis of nationality is a breach of the race relations provisions in the UK's Equality Act of 2010. The student, with support and legal advice provided by the CSC, started a legal claim against the Open University, alleging race discrimination. In addition, once again, the Cuba Solidarity Campaign organised protests from teachers, academics, trades unions and even the Open University's own staff. Over 200 Members of the British Parliament took up the case with the UK Government. In response, the UK Government stated that it was *"… a matter for the university itself …"*. The Open University initially refused to lift its ban. As a result, the student, supported by CSC, took a legal case against the Open University on the grounds of discrimination under the UK Equality Act of 2010. The Open University eventually settled the student's case before it reached a court hearing and allowed the student to enrol with them one year later. Due to the legal case and campaign, the Open University was forced to lift the ban on Cuban students.

These are just a few of the many examples available.

7. UK, THE CURRENT POSITION

The UK has voted against the blockade at the United Nations, and continues to do so. In a letter to the Cuba Solidarity Campaign dated 29th November 2018 the British Foreign and Commonwealth Office stated:

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[14] *Idem.*

"We believe that the US sanctions and other unilateral administrative and judicial measures have a damaging impact on the economic situation of Cuba...".[15]

The letter went on to say:

"The extraterritorial impact of these measures on the UK, in violation of commonly accepted rules of international trade, negatively affect British economic interests, which is why both the EU and UK have passed legislation to counteract the effects of the embargo".

In 2022, the UK government made amendments to the EU inspired Extraterritorial US Legislation (Sanctions against Cuba, Iran and Libya) (Protection of Trading Interests) Order 1996, to remove references to EU law and member states. This was to enable the 1996 Regulations to remain in force now that the UK has left the EU. In answer to questions in the UK Parliament, Viscount Younger, a government representative remarked that the UK government:

"... continues to consider the activation of Titles 111 and 1V of the Helms-Burton Act, which strengthen and continued the embargo against Cuba, to be contrary to international law".[16]

The British government's Department for Business and Trade offers advice to businesses which want to trade with Cuba. While warning that US extraterritorial legislation can cause uncertainty, and conflicting legal requirements, it points out that the UK's Protection of Trading Interests legislation makes it illegal for UK-based businesses to comply with extraterritorial legislation. It advises against transactions in US dollars and recommends trading in Sterling or Euros. It also suggests that businesses should take legal advice when trading with Cuba.[17]

8. CONCLUSION

In theory, businesses in the UK can claim legal protection from the worst effects of US extraterritorial legislation like Helms-Burton. In practice, despite the UK government's claim that compliance with the US blockade is unlawful, many

[15] *Idem.*

[16] *Idem.*

[17] https://www.gov.uk/government/publications/overseas-business-risk-cuba/overseas-business-risk-cuba

UK businesses do comply with extraterritorial legislation, or threats to use it, as they do not want the inconvenience of dealing with litigation but do want to trade with US businesses.

It is not easy to find cases under the PTIA, the 1992 Order and the 1996 EU Regulations. In any event this legislation has not, so far, ameliorated the effects of Helms-Burton on British businesses, particularly those who want to trade with Cuba. Evidence of the UK authorities sanctioning any person or business which has complied with US extraterritorial legislation is hard to find. Recent developments concerning Titles 111 and 1V have drawn a response to the USA from the EU and may well require action by the UK government.

British businesses have been, and continue to be, sanctioned by the US authorities under their extraterritorial legislation. Beyond the coercive effect of this legislation lies the psychological effect. The very existence of US extraterritorial legislation is sufficient to deter UK entities from investing in and trading with Cuba. The British government advice (see above) does not provide the type of assurance that would reassure a UK business or commercial investor.

The lessons that we have learned in Britain are that any legal response to US extraterritorial legislation, though welcome, only provides a partial solution. The effect of US extraterritorial legislation has been successfully countered in the UK, for example in the Open University case (see above), by a combination of legal action (under anti-discrimination law); public protest and adverse publicity which have proved to be successful.

With this in mind, the Cuba Solidarity Campaign in the UK will be collecting examples of the effects of US extra territorial legislation in various countries as part of a campaign to highlight the negative effects of this legislation on an international scale; and the wider effects of the blockade against Cuba.

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