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# Canadian Speaker Session 2: Canada and U.S Approaches to Trade Sanctions - Canadian Speaker

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## CANADIAN SPEAKER

*Navin Joneja*<sup>†</sup>

Thanks. I think hopefully we will get a chance to talk about the foreign application of U.S. law to the foreign subsidiaries.

Well, first of all, let me just pass along the very serious regrets from Cliff Sosnow who was scheduled to be at the conference and couldn't attend. I know he was quite disappointed he couldn't attend the conference and particularly talk about the topic of trade sanctions.

It is something that he really does enjoy talking about and knows quite a bit as well, but he is not the only one that enjoys discussing these issues, and he asked me to fill in for him, and I was more than happy to do so, so it is an honor to be here, especially with Richard who has such a wealth of experience in this area.

From a Canadian perspective, and having worked in both Canada and in the U.S. in this area, the common theme that Canadian policy makers keep coming back to is how to balance the economic interest in ensuring close cooperation and integration in the United States with the Canadian sovereign interest in maintaining Canadian social values, Canadian policies, and maintaining a distinct identity from the United States.

And that I think applies not just to trade sanctions but to basically all trade related areas, whether you are talking about trade in pharmaceuticals, immigration policy, or border security. This is sort of the defining balance that

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Canadian policies are trying to reach, and as I go through the discussion of Canada's policy on trade sanctions, you will see how that plays into how the laws are made and how the decisions are made by Canadian policy makers.

So getting to the area of trade sanctions it is in Canada somewhat common place for Canadians to take the high road and to claim the U.S. is enforcing its laws extraterritorially really, and Canada is enforcing its laws only based on UN Security Council resolutions, and that there is a violation of international law.

But what often gets overlooked is an examination and a critique of Canadian sanctions policy in itself. So what I'd like to do just for a few minutes is present some thoughts and commentaries that we put in the paper on Canada's trade sanctions policy and have that discussion, and we will get into discussions of extraterritorially measures and how that works for countries like Canada.

Let me start with just a brief overview of the trade sanctions regimes in Canada, the various instruments that make up Canada's trade sanctions policy. In Canada, there are basically three principal legislative regimes that operate: One is the United Nations Act.<sup>1</sup> The second is the Special Economic Measures Act.<sup>2</sup> And the third is the Export and Import Permits Act,<sup>3</sup> and the Minister responsible for these three statutes is the Minister of Foreign Affairs. There is also, of course, the Foreign Extraterritorial Measures Act,<sup>4</sup> FEMA, which is not a sanctions regime in itself in that it doesn't impose sanctions for business overseas, but it is still a very important aspect of Canada's sanctions policy, and we will get to that in a few minutes as well.

Canada's United Nations Act allows the Government to legislate decisions passed by the UN Security Council pursuant to Article 41 of the UN charter,<sup>5</sup> which basically says that the UN Security Council may decide on measures necessary to maintain or restore international peace and security.<sup>6</sup> So under Canadian law, a Security Council Article 41 decision creates legal impetus for Canada to give effect to the decision domestically. In fact, Section 2 of the Canadian United Nations Act provides "when in pursuant of Article 41 of the charter of the United Nations" – so it refers to Article 41 explicitly – the Security Council decides on a measure to be employed to give effect to any of its decisions and calls on Canada to apply the measure.<sup>7</sup>

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<sup>1</sup> United Nations Act, R.S.C., ch. U-2 (1985).

<sup>2</sup> Special Economic Measures Act, S.C., ch. 17 (1992) (Can.).

<sup>3</sup> Export and Import Permits Act, R.S.C., ch. E-19 (1985).

<sup>4</sup> Foreign Extraterritorial Measures Act, R.S.C., ch. F-19 (1985).

<sup>5</sup> United Nations Act, *supra* note 1, at § 2.

<sup>6</sup> U.N. Charter at Art. 41.

<sup>7</sup> United Nations Act, *supra* note 1, at § 2.

The Governor-In-Council may make such orders as necessary or as expedient for enabling the measure to be effectively applied.<sup>8</sup> So it is very much an implementation of Security Council resolutions in the multilateral context, and this is done through regulations under the United Nations Act in Canada.

Regulations have been promulgated in the context of Afghanistan, Angola, Ethiopia, Iraq, of course, and several other countries, but basically, they track the UN Security Council resolutions,<sup>9</sup> and if the Security Council resolutions are amended by the UN – the regulations under the United Nations Act would subsequently be amended as well.<sup>10</sup>

In theory, Canada also has the opportunity to impose sanctions where there is no Security Council resolution under the Special Economic Measures Act.<sup>11</sup> This statute authorizes the Governor-In-Council to impose orders or regulations, including sanctions, regarding foreign nations in two specific situations.

First, it is for the purpose of implementing a decision, resolution or recommendation of an international organization of states or association of states of which Canada is a member that calls on its members to take economic measures against a foreign state.<sup>12</sup>

The second scenario is where the Governor-In-Council is of the opinion that a grave breach of international peace and security has occurred that has resulted or is likely to result in a serious international crisis.<sup>13</sup> So I say this legislation is available in theory because there are no countries subject to the Special Economic Measures Act,<sup>14</sup> but just from the wording of the legislation, you can see how this is very much still in the international multilateral context.

The two situations in which such sanctions regimes could be imposed are where organizations, presumably other than the UN, have given the go ahead or where there is in the opinion of the Governor-In-Council a grave breach of international peace and security that leads to serious international crisis. So it is still very much tied to the multilateral context.

The third sanctions regime piece of legislation in Canada is the Export and Import Permits Act<sup>15</sup> and the related regulations, which are used for a

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<sup>8</sup> U.N. Charter at Art. 41.

<sup>9</sup> United Nations Suppression of Terrorism Regulations (United Nations Act) SOR/2001-360, § 1 (Can.).

<sup>10</sup> *Id.*

<sup>11</sup> Special Economic Measures Act, 1992 S.C., ch. 17 (Can.).

<sup>12</sup> *Id.* at § 4.

<sup>13</sup> *Id.*

<sup>14</sup> Since this symposium, Canada has imposed sanctions on Burma. See Shareef Korah, *Canada Toughens Stand on Burma*, TORONTO STAR, May 25, 2005, at A17.

<sup>15</sup> Export and Import Permits Act, R.S.C., ch. E-19 (1985) [hereinafter Export and Import Permits Act].

variety of purposes but include the authority to impose trade sanctions. And this is done primarily through two areas: one is what's called the "area control list,"<sup>16</sup> which is basically a list of countries that the Governor-in-Council decide is necessary to control the export of any goods, and the only country currently listed on the ACL is Myanmar.<sup>17</sup> And other area is the "export control list,"<sup>18</sup> which includes goods that the Governor-In-Council deems crucial to control for a variety of reasons.

But what's different about the ECL is that it is not directed at specific countries; it is directed at specific types of goods. So it is more in line with the EAR and the U.S., although it is still used in Canada as a vehicle to impose trade sanctions.

So if you have a good on the ECL, then you need a permit to export the good to the given designation, and the minister of foreign affairs has very broad discretion as to whether or not issue the permit and also may consider foreign policy in reaching a decision. So that's basically, the trio of the sanctions legislation in Canada.

Now, the last aspect of sanctions policy that I want to discuss is FEMA, the Foreign Extraterritorial Measures Act, which as I said is not a sanctions regime in the same sense, but it still is an important piece of legislation and in many ways is the defining piece of legislation as far as Canada's attitude towards sanction policy is concerned. FEMA is basically Canada's statutory response to the U.S. sanctions regimes that Canada considers having an extraterritorially application, and as a practical matter, the only foreign measure at issue is the U.S. embargo against Cuba,<sup>19</sup> which Richard alluded to.

Now U.S. trade sanctions against Cuba have existed in some form or another for many decades, since about 1960, and then, as Richard mentioned, in 1992, the U.S. substituted a more robust set of trade sanctions against Cuba, which effectively banned any trade between Canadian subsidiaries of U.S. companies and Cuba.<sup>20</sup>

And this is what Canada considered most objectionable about the U.S. embargo; that companies incorporated in Canada – these are companies incorporated in Canada and presumably under the Canadian jurisdiction – would be subject to U.S. laws and penalties. Canada's response was to enact the blocking order in 1992 under the authority of FEMA.<sup>21</sup>

So as a result of this blocking order and the subsequent amendments to it, there were two main obligations placed on Canadian corporations. These

<sup>16</sup> *Id.* at Article 4.

<sup>17</sup> <http://laws.justice.gc.ca/en/E-19/SOR-81-543/100049.html>

<sup>18</sup> Export and Import Permits Act, *supra* note 15, at Article 3.

<sup>19</sup> <http://www.natlaw.com/pubs/spcacu1.htm>.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

would be Canadian subs of U.S. parents. First of all, FEMA requires Canadian corporations to give notice to the Attorney General of Canada of any directive, instruction, intimation of policy, or other communication relating to the embargo that the corporation has received from a person who is in a position to direct or influence the policies of the Canadian corporation.<sup>22</sup> So that means in plain language, if a U.S. parent communicates a policy regarding an embargo through its Canadian subsidiary, in theory, the Canadian subsidiary ought to notify that to the Attorney General of Canada.

The second obligation is that any Canadian corporation is prohibited from complying with the Cuban embargo Cuban or with any directive, instruction, intimation of policy, or other communication relating to the embargo that the corporation has received, again, from a person who is in a position to direct or influence the policies of the Canadian corporation.<sup>23</sup> So that means that not only must the Canadian subsidiary notify the Attorney General of Canada, it is also prohibited from complying with the U.S. parent's direction or instruction or policy regarding the U.S. embargo if it would reduce trade or commerce between Canada and Cuba.

So what this means, is that Canadian subs of U.S. companies that wish to carry on business in Cuba are basically in a catch-22. If they don't comply with the U.S. parent's instructions regarding the U.S. embargo, they run afoul of the U.S. laws and would be subject to enforcement by OFAC. And if they do comply, then they run afoul of the Canadian blocking statute. So it really is quite a predicament for Canadian companies to be in.

So that is an overview of the instruments affecting Canada's policy, but where does that leave us in trying to define what Canada's sanctions policy is? I think, as we discussed in the paper, Canada's sanctions policy is really guided by two core principles. First of all, Canada's policy on trade sanctions has been to deal with primarily sanctions at the international level in a multi-lateral context,<sup>24</sup> and a list of Canadian trade sanctions and their UN origin sustains this view, as does the language that I was talking about in the Special Economic Measures Act. The second principle Canada adheres to is, that Canada generally seeks to avoid and, indeed, protests the application of laws extraterritorially, and it is these two principles that really make up Canada's sanctions policy.<sup>25</sup>

But the practical implementation of these policies doesn't always stick to that line, and it seems to get clouded by this continuing challenge that Cana-

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<sup>22</sup> Foreign Extraterritorial Measures Act, R.S. 1985, c. F-29, Art. 5-6.

<sup>23</sup> *Id.* at Art. 7.1.

<sup>24</sup> See Colin B. Picker, *Reputational Fallacies in International Law: A Comparative Review of United States and Canadian Trade Actions*, 30 BROOK. J. INT'L L. 67, at 106.

<sup>25</sup> See Barry R. Campbell, *Extraterritorial Sanctions in the Canada/U.S. Context – A Canadian Perspective*, 24 CAN.-U.S. L. J. 209, at 211-212.

dian policymakers face, which I mentioned at the beginning; the tension between Canada's economic interest in keeping the U.S. happy and its sovereign interest in sticking to Canadian values.<sup>26</sup> And this, as we discuss again in the paper, leads to Canada's sanctions regimes being unsatisfactory for businesses in many respects.

For example, in the area of export permits under the Export Import Permits Act, regardless of what Canada's public says on its public stance on U.S. sanctions, the degree of economic integration between Canada and the U.S., particularly in industries such as defense industries, technology industries, together with the significant ministerial discretion in Canada's export permit process, means that, in practice, much of U.S. foreign policy is informally incorporated into Canada's export control process.<sup>27</sup> And that includes U.S. sanctions policy.

In fact, Canada specifically amended its export control list. It added items and began a special Controlled Goods Program at the insistence of the United States to ensure that Canada would not become the back door through which U.S. goods would reach countries against which U.S. had imposed stricter sanctions.<sup>28</sup>

So in these instances, Canada basically incorporates U.S. sanctions law into its own export control system, regardless of the posture adopted publicly towards the U.S. sanctions regimes.

But more importantly, the role of the U.S. policy in the Canadian approval process in the export permit approval process is never really known publicly or scrutinized. So whether or not you agree with the substance of the U.S. sanctions – for instance, sanctions against Iran or Syria – the resulting process for Canadian companies leaves much to be desired in terms of transparency and predictability in terms of the companies involved.

Similarly Canada's response to the U.S. in the form of FEMA and the blocking order under it regarding trade with Cuba is also unsatisfactory in a lot of ways. Many of the terms used in the blocking order are overly broad. For instance, companies are constantly struggling to determine what exactly constitutes a "communication" or the definition of a person who could influence policies of a Canadian corporation.

This is language that is intended to be very broad and to have sort of a wide reaching effect, but what it really does is create uncertainty for businesses in Canada. So in addition, although it may be clear when a company receives a directive or instruction from a U.S. parent, the term "intimation of policy or other communication" is much more ambiguous.

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<sup>26</sup> *See id.*

<sup>27</sup> *See generally id.*

<sup>28</sup> *See* <http://www.uottawa.ca/services/ehss/ctrlgoods.htm>.

The FEMA and its broad wording have never been tested in Canada, although there have been several companies that have been investigated under its provisions. And this lack of formal investigation or formal charges under FEMA even compounds the problem.

The threat of punishment for noncompliance exists, but there is no clarity or transparency nor predictability as to the enforcement process. So although Canada's position is that the extraterritorial application of U.S. laws is not to be tolerated, the terms of the FEMA and the blocking order are so vague and the enforcement policy is so uncertain that there is little practical guidance to the companies involved to give the blocking order any real effectiveness.

So to summarize, Canadian sanctions are enacted pursuant mostly to multilateral action, but in practice, Canadian application of its export control process, importing foreign policy considerations often incorporates by reference U.S. sanctions law.

This process is neither transparent nor explanatory to would-be licensed applicants, and this is very unsatisfactory. Similarly, the Canadian Government is opposed to the extraterritorial application of trade sanctions by other countries when they conflict with Canada's policy and laws because of the lack of clarity in the application of the Canadian law designed to block the extraterritorial effects of the trade sanctions. Canadian lawmakers have only compounded the problem by increasing the uncertainty and risk of sanction.

Thanks very much.

(Applause.)



