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Discussion Following the Speeches of Mr. Newcomb and Mr. Joneja

Discussion

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DISCUSSION FOLLOWING THE SPEECHES OF MR. NEWCOMB
AND MR. JONEJA

MS. LUSSENBERG: Thank you, Navin. Do we have questions?

DR. KING: Yeah.

MS. LUSSENBERG: What a surprise.

DR. KING: Okay. Well, I have heard both sides, and we have a clash here, and the American company and Canadian subsidiary, the American company is a part in this clash. What do you guys propose to do about it?

Rick, I would like to get your comments and also my Canadian friend.

MR. NEWCOMB: First, let me say we do not view our sanctions as extraterritorial with the exception of Cuba.

DR. KING: That's a big exception.

MR. NEWCOMB: It is a big exception, but I should also mention Helms-Burton and ILSA as also being extra-territorial in their effect. But, in terms of IEEPA sanctions, foreign jurisdiction is applied to U.S. persons wherever in the world they are located. Foreign subsidiaries of U.S. companies are not U.S. persons, and, therefore, they are not subject to sanctions, provided there are certain criteria met; that they act independently; that they don't do something directed by the parent that would be prohibited by the parent after sanctions are applied; that they don't change their operating procedures so that they can enable the subsidiary to do something that the parent itself couldn't do, and that the parent is not facilitating in any way its foreign subsidiary or affiliate's ability to conduct business such as altering its procedures or changing how it does business so that it can continue to do this kind of activity.

The regulations of the Treasury are very clear about facilitation, and this is what facilitation really goes to. I can also say the U.S. has been very careful to make sure it does not extend its U.S. jurisdiction territorially for economic sanctions programs other than Cuba.

There is legislation pending in the Senate that would require the Executive branch, even though since Iran sanctions in 1979, which did have an extraterritorial application, which were never enforced, it would require the U.S. to extend its programs extraterritorially. It is a very important piece of legislation, and I alert all of you to it.

DR. KING: Do you have any comment?

MR. JONEJA: Yes. You are right, I mean, it is a catch-22, and Canada has a different policy towards trade with Cuba, and the U.S. has a different policy with respect to trade with Cuba, and the companies that we are talking about are Canadian incorporated companies and, therefore, under Canadian jurisdiction.

But they are also subsidiaries of the U.S. parent, and therefore, there is an economic connection to the U.S., and the U.S. asserts jurisdiction over those companies. And that's something that is difficult to resolve even at the highest levels. You can talk about international law principles. You can talk about other types of diplomatic principles and those sorts of things.

But I think what we feel as being problematic is the difference especially from the Canadian side in a public posturing of a broad blocking order that is supposed to be a very strong denial of the U.S. policy, but at the same time when it is being implemented and other types of sanction regimes are being implemented, Canada is forced to consider its economic integration with the U.S. and the benefits it must achieve with respect to that.

So that leads to a real unprincipled approach in Canada, and it leads to uncertainty in the way the laws are enforced, unpredictability, and I think that's the greater problem. I mean, if Canada decided to agree with the U.S. with respect to Cuba, that's fine. That's a political decision it can make, but let's just make it clear for businesses and make it clear when it is implemented that that's what the policy is going to be.

Richard mentioned ILSA as the other example of extraterritorial application of the U.S. laws. Canada hasn't enacted a blocking order for ILSA, but it has for Cuba, and there is really no sort of principle basis why the two would be treated differently if the guiding principle is supposed to be an objection to extraterritorial application of U.S. laws.

MS. LUSSENBERG: I just wanted to make comment on this whole concept of ILSA versus Cuba. You know that old adage of the elephant and the mouse, and of course, we poor Canadians are the mouse, and the United States, our fair friends are the elephant.

And when you look at the whole thing in the interest of – I will call it imbalance for lack of a better word – the U.S. acts unilaterally; Canada acts multilaterally. The U.S. initiative just to stir the pot tends to be perceived by the Canadians as aggressive, unilateral; Canada's approach tends to be reactive. Canada tends to limit its reaction to the maximum extent possible.

I think most Canadians might say that the U.S. approach is broad-reaching, and I was struck in this debate that the one area where we have been reactive is Cuba, and my question is: Is this the place where we want to assert our sovereignty, or when you look at our larger asset interest – and I appreciate that we have shared operating Cuba – but we have significant oil and natural gas interests and reserves that have been affected by ILSA.

So where is the tradeoff? Where is the decision that where we Canadians or the Canadian Government has decided to assert its sovereignty with respect to Cuba? Was that the right decision?

MR. NEWCOMB: If I might, everything in foreign policy has a context, and Cuba especially has context.

MS. LUSSENBERG: Votes.

MR. NEWCOMB: Let's not forget what brought about the Cuba program. It was the events surrounding the Cuban Missile Crisis and its aftermath. There were missiles focused on the United States. There was a listening post for Soviet intelligence operating in Cuba. There is a long history of expropriation of property of now-American citizens by the Government of Fidel Castro. Fidel Castro has been hostilely, been exporting his brand of revolution throughout the entire South American/Central American subcontinent, and the list goes on and on. It is a major political issue in Florida. Miami is one of the few American cities that has a foreign policy.

(Laughter.)

MR. NEWCOMB: I was actually in Miami on a number of debates where the mayor campaigns were focused on what the various candidates' positions were on Cuba. As the principal issue, they were debating to run for mayor for the City of Miami. This is a very important foreign policy issue for the United States.

This isn't something that one U.S. president just dreamed up and decided to do. I think there are eight or nine presidents that as a centerpiece of foreign policy they would make determinations in the White House about traveling to Cuba, who plays baseball in Cuba, who does what in Cuba. So this is not an incidental matter for the United States government. I say this with a long history of someone who enforced the Cuban embargo for 18 years.

So this is not a small issue merely of the United States being overbearing for one reason or another. It is an issue that has been long debated in Congress. You know, the Mack Amendment, it took three Congressional sessions to pass this legislation. No administration wanted it; it passed anyway. Helms-Burton, the administration opposed. It passed anyway. ILSA, the administration at the time opposed. It passed anyway.

So as you can see, these are very passionate issues.

MS. LUSSENBERG: I don't doubt they are passionate, but my question still is whether Canada should have enacted legislation to block ILSA or similar legislation. Why just Cuba? And I am very cognizant having spent a lot of time on Cuba issues in the past, the emotional debate, and the votes attached to the Cuba issue. But to me, it is striking.

I think Larry is itching to –

MR. HERMAN: I think the reason there was no blocking order with respect to ILSA is because at the political level the Government of Canada didn't have any problems with the U.S. embargo of Iran and Libya. So there was no political need to pass a blocking order.

In the case of Cuba, the problem was – and may have already been mentioned – but the problem was that the Cuban assets control regulations required that – or prevented Canadian subsidiaries of U.S. corporations from trading with Cuba, even though that trade was perfectly allowable under Canadian law. And so the blocking order was passed.

Now, Navin raised the concerns for Canadian companies, but bear in mind that the blocking order applies in respect of essentially orders or instructions from U.S. companies to their Canadian subsidiaries to not trade with Cuba in accordance with the CACRs.

But nothing prevents a Canadian subsidiary from deciding not to do business with Cuba because it finds it commercially risky. So you have to understand that factor. Canadian companies, a subsidiary of a U.S. corporation is not compelled to trade with Cuba and can take business decisions to not do business with Cuba free of any constraints under the blocking order.

Second point I want to make – and I don't know if it was mentioned by Navin – Canada has on its export control list an item for U.S. origin goods. In other words, you cannot export from Canada a U.S. origin good to a foreign destination without getting a Canadian export permit.

To get a Canadian export permit for a U.S. origin good requires the Canadian Government to confirm with U.S. authorities that the port of that good is permitted under U.S. law. The rationale for that goes back to the Hyde Park agreements in 1942, which dealt with Canada-U.S. cooperation on defense matters during the Second World War, and it was agreed as part of the Hyde Park agreements that Canada would not be used as a transit for U.S. origin goods.

So U.S. origin goods coming out of Canada are controlled under U.S. export and control laws and sanctions. The difficulty arises in determining what is a U.S. origin good, and there is uncertainty and lack of transparency on that issue.

MS. LUSSENBERG: Other questions, comments? Navin.

MR. JONEJA: No.

MS. LUSSENBERG: Michael, what a surprise?

MR. ROBINSON: Everybody will be surprised that I wanted to intervene to agree heartily with Larry on something, namely –

MR. HERMAN: The first time.

MS. LUSSENBERG: Hark, the record.

MR. ROBINSON: And just to talk a bit about actions by Canada, which show that we really do cooperate with the U.S. sanctions regimes. And, as Larry said and we in practice know, you must be very careful before assisting a client to export, to make sure that that client's goods don't contain something that originated in the U.S. that hasn't been substantially transformed. Larry, I think that additional point should be made.

I remember we had a client who was selling crop duster aircraft to Nicaragua, and we were quite happy to do it. I said, "wait a minute, where did you get that engine?" And the engine came from the U.S., and we advised that there was no substantial transformation at all because the engine was just stuck in the aircraft, and we said you can't export that.

The other thing worth noting is that Canada really cooperates in the Helms-Burton sanctions in practice, and I know this from my practice and that of other lawyers in Canada because, as Navin mentioned, there had been no prosecutions, and there had been little, if any, follow-up on the notices.

So what we advised our clients to do, when they get the standard memos from the general counsel of whatever it is, they say that certainly is an intimation of policy, and this is particularly true with Canadian subsidiaries of U.S. banks, which, of course, are forbidden from financing Canadian companies that export to Cuba. Send in the notice because nothing is going to happen. There will not be any follow-up, and the notices have piled up in external affairs.

I haven't had an opportunity to check recently, but some years ago there were over a hundred, and there had been no follow-up. So, in fact, in practice, Canada says okay. If people will give us the notices, thereby comply with FEMA, we are not going to push you any farther than that.

So we will not follow up and say – and did you, therefore, turn down a customer who had a line of credit, part of which was used to build a hotel in Cuba? Then don't ask. It is not transparent, but we really cooperate, in fact.

MR. HERMAN: I'm sorry, can I just say one thing?

In respect to this Cuba issue, as Navin and as Mike Robinson have mentioned, the Canadian blocking order requires a Canadian company to notify the federal Justice Department if they receive an instruction or communication requiring them to comply with the U.S. embargo of Cuba. The problem often comes up for Canadian lawyers where a Canadian subsidiary gets an instruction manual from its U.S. parent.

This is where the issue usually arises. A subsidiary of a U.S. corporation in Canada gets the corporation's instruction manual, and in that manual, there is usually or often a section on trade embargo sanctions, et cetera, and in that are the instructions to the corporate community, to all of the global subsidiaries to not trade with Cuba. That's where the problem arises because technically there is a communication that has to be notified to the Canadian Government.

And the practical issue to avoid that is to take out that chapter from the instruction manual that is given to the Canadian authorities. But it is more complex than that because sometimes the general counsel's office in the United States has problems with changing the instruction manual just for a Canadian corporation, but the Brits and the Spaniards and some other European countries also have blocking orders. So it becomes a bit of a global issue.

MR. NEWCOMB: Could I jump in here for a second? This whole question of blocking orders has become much more of a theoretical issue than a real life issue. When the Mack Amendment passed, the ABA had a meeting in Washington where the Canadian representative participated and I partici-

pated, and he said, "We are going to block this from going into effect," and I said, "We are going to enforce this." And so there was a real standoff; same thing happened with the UK and EU and others.

As a practical matter, I could probably count on my hands the number of times that there were actually real live standoff cases where this came about, and in both of those instances, as long as we maintained those postures that we said in that ABA conference in 1993 that we are going to enforce this law, things have developed in such a way that it has been interpreted, that it applies to goods. It doesn't apply to services.

And the example was from over here about the financial institution. As a practical matter, most financial institutions are incorporated abroad as branches. So jurisdiction would extend in any case. I don't know about the ones you are speaking of.

MR. ROBINSON: In Canada, that only changed in 1999.

MR. NEWCOMB: Well, throughout Europe, it is mostly through branches.

When these things occurred, it usually happened in a very informal process where people would call one another, and we would say, "We have this situation. How do we deal with it?" We don't want the company put in that situation. I do want to comment very specifically on that manual that you were speaking of.

That manual in and of itself, where the parent company is instructing its sub of what it could do or what it couldn't do goes to the exact test that I was talking about; about whether they are independent in terms of decision-making or risk taking. By sending that manual, that would be very good evidence that they are not independent. They can't make their own decisions. Therefore, it is subject to U.S. jurisdiction.

MR. JONEJA: I just had one comment on the posturing that Richard was talking about. To me, that posturing, no matter when it originated, is actually part of the problem; part of the big problem because that means there is a gap between what the law is on the books and what the public pronouncements of the law are and how it is actually implemented in practice.

Michael talked about sending in the notification, and they don't do anything. There is also an issue as to whether companies have actually been served with a blocking order. Under FEMA, there is a requirement that companies be served before an offense is actually committed and there is dispute.

It is debatable as to whether publication of the blocking order and newspaper articles and things like that constitute effective service. So if it actually came down to litigation, I don't know if the law would actually be applied in that same manner.

But the important thing for business is that it creates an impression that it is very broadly enforced and the words are broadly written, so it does have a

kind of a sweeping effect and what most lawyers tend to call a chilling effect on business activity.

MS. LUSSENBERG: Chi, you have been waiting patiently.

MR. CARMODY: I have. Thank you very much, Selma.

Question to both of our speakers today: A lot of international trade today is in the realm of invisibility. We don't see it. It takes place in terms of services and the sale of intellectual property, for example. Licensing is a big, big area, and something I have been curious about is how does sanction regimes in both countries actually address this issue because, as Richard pointed out, there are a lot of services that are sold today. There is a lot of intellectual property that is sold today, and I am wondering how are these sanctions now being crafted to take advantage and catch those things within the net that could well swim outside?

MR. JONEJA: I think that – I mean, that's a very good point, and it is a real challenge for sanctions regimes because usually the laws are drafted, you know, either they have been on the books for a while in some form or another or the language is taken from historic legislation when you didn't have sort of transfers of intellectual property and technology and those types of invisibility that you talked about to the greater degree.

So it is a challenge to sort of make the words and the statute more compatible, and then you get into issues of jurisdiction: Where did the transaction actually take place and those types of things? So that's a good point.

MR. NEWCOMB: I would answer that by, "it depends." You have raised several examples; talked about services. You've talked about licensing agreements and so forth. I always said when I was director of OFAC – and I think it still applies – if we can assert jurisdiction, we will assert jurisdiction, and we do assert jurisdiction.

That's a very broad statement, but when these executive orders are written, they are not just something that we dream up one evening and go through. It is usually an awful lot of work where the full national security apparatus of the United States is involved, the State Department, the Justice Department, the Treasury, Commerce, and others are putting together these orders, and the idea is to assert jurisdiction where we have this possibility.

Now, we find the companies as they are. The critical question is, have things changed, or has there been an evasion? Was there a licensing agreement in place before or not? Were goods licensed to a company who then were able to sell into the territory, a Third Country company able to sell into the embargoed country?

Services are not covered by the Mack Amendment, but services are covered by the embargo, so they would be prohibited not just subject to the Mack Amendment. So each of these are very fact intensive where you look at what the intent and purpose was of the executive order, whether it was broad, narrow, what it does.

As I mentioned in my presentation, they are all different. Different people wanted to have different foreign policy goals so everything was crafted very carefully. If you look at the history of how executive orders were promulgated, you can really sort of see the evolution of how we got better and better at it.

I just had occasion recently to go over the trade ban on Serbia as it related to Kosovo, and there it was just abundantly clear that everything that was desired to be prohibited was, in fact, laid out chapter and verse in the executive order. So I come back to my answer. It depends.

MS. LUSSENBERG: Thank you. Don't?

MR. CAMERON: It seems to me that – I mean, it is one thing to justify in 2005 a Cuban sanctions policy based upon a Miami government city foreign policy. It seems to me quite another to justify it based upon the Cuban sanctions, I mean, the Cuban Missile Crisis. The Cuban Missile Crisis was, granted, a function of the Cold War, but in that intervening time period, we also had the Vietnam War, which also was an outgrowth of the Cold War.

We now have an antidumping case that the United States has just concluded against shrimp from Vietnam. Now, as we have heard on the previous panel, antidumping cases are not exactly a declaration of peace in trade, and yet, it is striking to me that we had a very real war. And we actually had very real trade relations with Vietnam. And yet, we still in 2005 are in the situation in which we had the sanctions regime with Cuba.

MS. LUSSENBERG: Thank you. That leads me to ask this question of Richard.

When Castro dies, will the Cuba sanctions be lifted?

MR. NEWCOMB: You know, this is interesting. I was once asked in a hearing by a Senator what my opinion was on some aspect, and I don't recall the aspect, and my answer to the Senator in the hearing – I think there were reporters there and televised – my opinion doesn't matter. My job is to enforce the sanctions. I am going to do them fairly, even handedly, and as forcefully as I possibly can.

As far as your question, Selma, about what happens when Fidel Castro dies, I always thought when I started administering the Cuba program that it was the toughest program we had. It couldn't get any tougher, and my preconceived notion kept letting me down because it kept getting tougher and tougher and tougher.

And finally, Congress came up with Helms-Burton, and now, there are even new requirements, the Trade Sanctions Reform Act (TSRA). Even though TSRA allowed Ag-Med sales to Iran, Libya, Sudan, and Cuba, it also took away or codified certain aspects of how trade and travel could be conducted with Cuba.

The embargo is a centerpiece of U.S. foreign policy toward Cuba. It has been since the early 1960's. It is not just the Executive branch that fosters it.

It is the Congress as well. The Cuban embargo is now codified into law, so the President has lost his ability to even conduct the principal aspect of foreign affairs vis-à-vis Cuba that Congress has to determine if we are going to lift this embargo.

So, yes, I have heard all the comparisons. I heard it compared to China, North Korea, Vietnam. Compare it to wherever you want to compare it. It is the centerpiece of foreign policy with regard to Cuba; it just is. And we can sit and debate, and you can hear the most colorful anecdotes about how Castro, the horrible ways he treats his people – and I think it is all true. Now, in this regard of lifting the embargo on Cuba, the Cuban American National Foundation is very active in Miami.

They sponsored blue ribbon committees, blue ribbon panels. There were studies groups, the governor's commission for a post-Castro Cuba. I think the recent president in October of 2003 commissioned a new study group to look at the steps to be taken, to tighten the sanctions on Cuba.

They were tightened again in May of 2004 where family members can now only visit relatives once every three years. My point here is, it gets studied and restudied and restudied. I think the answer to this is free and fair elections in Cuba as laid out in the Cuban Democracy Act.

I think with Fidel Castro's passing, there will be a big movement for civil society and other things in Cuba to be developed and promulgated so that elections can take place. That currently is the mandate under the Cuban Democracy Act, and I believe that's where it will go.

MS. LUSSENBERG: I am getting the high sign from Henry, so let me close. We all know what to do then. We have all been well schooled.

Let me close by thanking our speakers, both Richard and Navin, for their time. Navin has a paper, which will become available later on today or tomorrow. I don't want to speak for those that have the burden of reproducing it, but it will become available, and Henry, again, it is a pleasure. Thanks so much for including us all in the program.

DR. KING: Yes. Thank you.

(Applause.)

(Session concluded.)

