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EXTRATERRITORIAL SANCTIONS IN THE CANADA/U.S. CONTEXT – A U.S. PERSPECTIVE

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The United States is the Olympic champion of unilateral economic sanctions. Our Canadian friends have their own economic sanctions programs, some of which are stricter or more onerous than some of the U.S. sanctions. One side or the other might, from time to time, finds the approach of the other government to be short-sighted or ineffective. But, when the issue of extraterritoriality arises within the context of a U.S. sanction program, it is always a hot-button issue on the Canadian side.

Aside from often being inconsistent with international law, extraterritoriality is an unwanted intrusion into a country's sovereignty, and Canada sometimes suffers nightmares about the firmness and durability of its own sovereignty. It naturally bristles when the ugly head of extraterritoriality appears, especially if it is an American head. When it appears in the antitrust context or a technical legal jurisdictional issue, it is relatively obscure and somewhat less red-hot. But, when extraterritoriality arises in the context of politically driven U.S. economic sanctions, the heat gets turned up to the maximum because the perceived threat runs to the heart of sovereignty. Emotions rise, and pride is engaged.

Note that I referred to "politically driven" sanctions, as opposed to those based on serious and genuine national security concerns. National security-related sanctions have traditionally been accommodated even if they contained extraterritorial aspects. For example, the U.S. economic sanctions against North Korea have long operated in a way that causes the United States to reach Canadian companies owned or controlled by the United States, but Canada, as a practical matter, has acquiesced. The U.S./Canadian defense relationship is deep and long-standing; both countries fought together in Korea almost half a century ago, and there is virtually no trade by either country with North Korea. These factors have made a practical accommodation relatively easy.

The early U.S. sanctions against Cuba had a colorable – though not overwhelming – claim to have national security implications. Their extrater-

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ritorial aspects were properly observed as abusive in Ottawa, but the two governments showed some flexibility by 1975, and a practical accommodation was worked out.

In the early 1980s, the U.S. concern over the Soviet Siberian gas pipeline, which had national security elements, produced U.S. unilateral economic sanctions with clear extraterritorial problems that angered not only British Prime Minister Margaret Thatcher, but also our friends in Ottawa. After some trans-Atlantic fuss, the United States finally found a way to save face politically and let go of that tiger's tail when George Schultz became Secretary of State.

Those days seem like ancient history in relation to the current spasm of unilateral economic sanctions generated in Washington. In a study done eighteen months ago at Georgetown University Law Center, it was discovered that, during the four-year period 1993-1996, no less than sixty-one enactments authorized unilateral economic sanctions for broadly defined political purposes (i.e., not as a tool in trade disputes). Thirty-five countries were targeted by the United States, representing forty-two percent of the world's population. These figures have been widely publicized in the United States and elsewhere, and they certainly are ugly – suggesting a country whose foreign policy is wildly out of control. But, these figures are also misleading in that most of them refer to actions other than a genuine economic sanction in the sense of interdicting trade and investment. One of the sixty-one sanctions, for example, was a law that directed that, in international financial institutions, the United States vote against all loans to countries practicing female genital mutilation.

Let us be more specific and more current. In the last three years, the United States has taken eight steps:

1995 (March) Executive Order banned U.S. investment in Iranian petroleum development;[1]
(May) Executive Order prohibited all trade and investment between the United States and Iran.[2]

1996 (March) Legislation enhanced the Cuban embargo, the dreaded Helms-Burton Act;[3]
(August) Legislation sanctioned non-U.S. companies that invest in Iran and Libya's petroleum sector, the Iran-Libya

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[1] Exec. Order No. 12,957, 60 Fed. Reg. 14,615 (1995).

[2] Exec. Order No. 12, 959, 60 Fed. Reg. 24,755 (1995).

[3] Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 (Helms-Burton Act), 22 U.S.C.A. §§ 6021-6091 (West Supp. 1997) [hereinafter Helms-Burton].

Sanctions Act (ILSA);[4]
(September) Legislation authorized new investment sanctions against Burma/Myanmar.[5]

1997 (May) Executive Order prohibited new investment in Burma/Myanmar;[6]
(August) Executive Order expanded Iran sanctions relating to third country sales;[7]
(November) Executive Order imposed an embargo on U.S. transactions with Sudan.[8]

This year, we may see unilateral economic sanctions against countries that persecute certain religions, as well as sanctions against Nigeria, Syria, or Indonesia. Quite apart from these U.S. sanctions at the federal level, recent years have seen a flood of unilateral economic sanctions imposed by states and localities. Should the City of Oakland or the Commonwealth of Massachusetts conduct their own foreign policy? Do they have a right to set their own procurement policy that takes into account the overseas business plans of their suppliers?

What has risen up, or broken down, in our body politic that permits or demands these actions? I believe it is important, especially for our Canadian friends, to understand what has happened and why. Understanding why this has happened will not make the results less dumb as U.S. foreign policy, nor will it make the extraterritorial aspects less neuralgic for Ottawa. But, it might soften the anger and moderate the frustration.

The best analysis of what has provoked this unhappy trend was made by Jim Schlesinger in an article published last year in *National Interest.*[9] Schlesinger, you recall, was Secretary of Defense and of Energy, and he headed the CIA in the 1970s. I will draw shamelessly from his analysis. He argues that, despite the fact that America is the leading world power, the conclusion of the Cold War has now revealed more clearly some of the inherent weaknesses of the American system. These include three general elements.

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[4] Iran-Libya Sanctions Act of 1996, Pub. L. No. 104-172, 110 Stat. 1541 (1996) [hereinafter ILSA].

[5] Foreign Operations, Export Financing, and Related Programs Act of 1996 § 567, Pub. L. No. 104-107, 110 Stat. 704, 708 (1996).

[6] Exec. Order No. 13,047, 62 Fed. Reg. 28,299 (1997).

[7] Exec. Order No. 13,059, 62 Fed. Reg. 44,531 (1997).

[8] Exec. Order No. 13,067, 62 Fed. Reg. 59,987 (1997).

[9] *See generally* James Schlesinger, *Fragmentation and Hubris: A Shaky Basis for American Leadership*, NAT'L. INTEREST 3, Sept. 22, 1997.

The first of these is the sharp decline in the public's concern about foreign policy which has left the field open to domestic special interest groups that have their own special axes to grind, unhindered by any commonly accepted vision of the national interest. Thus, domestic constituencies (ethnic groups, mostly, but this also includes human rights groups, environmentalists, and other single-issue groups) have acquired an excessive influence over our foreign policy. Our policies are created by hyphenated Americans: the Armenian-Americans sanction Azerbaijan; Greek-Americans prevent transfers to Turkey; the Cuban-Americans dominate our Cuban policy; and the supporters of Israel totally determine our Middle East policy. More recently, we have seen foreigners come to the United States as students or in other capacities, and enlist the United States in their continued struggle against conditions back home. The Internet has provided them with an effective communication tool.

From the politician's viewpoint, foreign policy is simply another way of building domestic political support and acquiring funds. Ethnic politics used to be confined to urban areas, but now it has spilled over into foreign policy. The high priests of "multiculturalism," who encourage ethnic consciousness-raising serve to legitimize the demands of their constituencies by having America's foreign policy back their special agendas

A second element is *hubris*. Being The Superpower has gone to our collective heads. We are not bad – we do not have territorial ambitions – we just want to instruct others how to behave. We have become something of an international nag. The United States becomes offended and angry if others do not join in our sanctions, and then we are tempted to reach extraterritorially or with secondary boycotts which we used to repudiate as a matter of law. In the process, we gratuitously antagonize others, especially our friends. This is not the way to conduct foreign policy or to be the world's leader. We seem to be able to punish, but not to prevail.

A third element of our weakness is our constitutional structure, especially the primacy of the President in foreign affairs and the primacy of the Congress in foreign trade matters. Lord Carrington observed to some friends at the State Department during his last visit to the United States as NATO Secretary General, "Of course, no one in Europe understands how your government operates."[10]

Once again, the end of the Cold War has revealed the weakness in this internal governance structure; there is less willingness on the part of Congress to yield to the President, and more willingness on the President's part to accept bad economic sanctions legislation – or to act preemptively by Ex-

[10] *Id.* at 3.

ecutive Order – to forestall worse legislation. Perhaps this is more pronounced since the shift of congressional control to the opposition party. This newly appreciated power of Congress has drawn the attention of ethnic and special interest political organizations, and they seem more successful in getting Congress to sign on to their foreign interest agenda.

One reason Congress and the President find that economic sanctions are very appealing is that they seem to be without cost. Why risk a pilot's life in a military response to a Cuban attack on unarmed U.S. planes when a seemingly tougher embargo will do the trick without cost? Schlesinger says: "Imposing economic sanctions has come to appear a suitable response to virtually any problem, and their use is quickly becoming indiscriminate to the point of promiscuity."[11]

It might be instructive to examine just one illustration of this sanction-mania to see how the pressures form and how the players interact. The recent U.S. sanctions against Burma/Myanmar are a good example, in part because the stakes were relatively low, and because Burma was relatively insignificant. Let us take a look at how sausage is made.

Congress adopted a statement of U.S. policy toward Burma in legislation enacted in September, 1996.[12] The Senate drove the process, but, amazingly, the Senate Foreign Relations Committee held no hearings or markup. The Senate Banking Committee held a hearing, which lasted less than one hour, where the only witnesses were Adele Lutz, an actress who played Aung San Suu Kyi in a movie,[13] and her husband. Neither the State Department nor the CEO of Unocal, a company which had a one billion dollar investment in Burma, were called upon to attend.

The legislative vehicle for the statement of U.S.-Burma policy was the foreign operations portion of the appropriations bill. The Chair of the Foreign Operations Subcommittee was Senator Mitch McConnell (R-KY), who had taken it upon himself to be the champion of Aung San Suu Kyi, the Nobel Peace Prize winner living under house arrest in Yangon until mid-1995. He threatened a full trade and investment embargo against Myanmar, including disinvestment, but he settled for a ban on new investment in the face of heavy lobbying from the Administration, the business community, and some other senators.

Senator McConnell had legitimate desires to assist the democratic movement in Burma, and he had concerns about repression by the military government. He was also pressured by human rights groups, largely student-led.

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[11] *Id.* at 7.

[12] Foreign Operations, Export Financing, and Related Programs Act of 1996, *supra* note 5.

[13] BEYOND RANGOON (Columbia Pictures 1995).

Interestingly, there was heavy involvement by Burmese students in the United States, some of whom were connected by the Internet to their friends in Burma and at the Thai border. Expressing outrage and feeling good were important goals. Consideration of whether these sanctions might be effective in achieving the stated goal of enhancing democracy in Burma was lacking. McConnell was honest enough to note that this was a hard sell in the Senate and on Main Street in Lexington, Kentucky, so he focused heavily on Burma as the source of illegal opium. He failed to mention that the United States has refused to provide counter-narcotics assistance to Burma, and that hundreds of Burmese have been killed in their own fight against the narcotic traffickers. He also failed to make a link between drugs and repression of democracy.

When the Algerian military overturned freely held elections a couple of years ago, the United States did not impose sanctions. Perhaps this was because the electoral winners were viewed as Muslim fundamentalists. China eradicates political dissidents, in contrast to Burma, where opposition parties are permitted, but the United States does not ban investment in China. In Vietnam, where the United States subsidizes U.S. trade and investment, there is no political dissent. When the Secretary of State, Madeline Albright, was asked about the evident inconsistency and hypocrisy in U.S. policy, she offered a glib sound bite: "different strokes for different folks." She failed to note that her State Department was dependent upon the money from Senator McConnell's subcommittee.

The Administration formally imposed sanctions in May of 1997 in an Executive Order based in part on a declaration of a National Emergency and the invocation of the International Emergency Economic Powers Act.[14] The President declared formally that the "politics of the government of Burma constitute an unusual and extraordinary threat to the national security and foreign policy of the United States."[15] There was no factual basis for that finding, and, in my opinion, the invocation of the emergency was an abuse of power. But, Congress looked the other way, and so do others.

What was the result of last year's sanctions against Burma? Because of the poor timing of the U.S. announcement of sanctions, the Association of South East Asian Nations felt it necessary to admit Burma to membership – an embarrassing foreign policy defeat for the United States. U.S. companies walked away from investments in Burma, turning them over to foreign companies that rushed in behind. Contrary to U.S. long-term interests, the sanctions had the perverse effect of strengthening China's hand in Burma. And,

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[14] Exec. Order 13,059, *supra* note 7.

[15] *Id.* at 28,301.

there were no political changes that can be traced directly to the U.S. sanctions. The bottom line is that, as a result of this moral posturing, the United States has isolated itself from Burma and has demonstrated that we do not have the ability to isolate Burma from others. The good news is that Senator McConnell and his colleagues seem to have forgotten about Burma, and thus there are no serious calls for sanctions against foreign companies who continue to invest in Burma despite pressure from the United States. So far, extraterritoriality has not successfully reared its head with respect to the sanctions in Burma.

The two recent U.S. sanctions programs that have drawn the most complaints from the government of Canada are the infamous Helms-Burton Act[16] and the Iran/Libya Sanctions Act (ILSA),[17] both enacted in 1996. The complaints charge the United States with once again engaging in extraterritoriality.

I will not discuss the Helms-Burton Act in any depth, because I am uncomfortable in raising a spirited defense of its most egregious provisions. I believe it was a mistake and that the circumstances of its passage through Congress and under the President's pen reflect a political cowardice and an ignorance of international law. I tend to agree with the August 1996 report of the Inter-American Juridical Committee, which concluded that, in certain areas, the potential application of the law would not be in conformity with international law. (The record should note that the key author of that opinion was an official of the Canadian government, and that no U.S. government official was involved.)

ILSA may be less well-known, and perhaps it requires a very brief explanation. As a practical matter, the legislation was driven almost wholly by domestic political concerns, and it was crafted and accomplished by the so-called Israeli lobby during an election year. It was the analogue to the Helms-Burton Act1, which was similarly driven by the so-called Cuban lobby in America, and was accomplished in the wake of the attack by the Cuban military on U.S. civilian aircraft.

Without regard to the domestic political driving forces, ILSA was born out of frustration that our allies and friends were unwilling to restrict investment into Iran's petroleum sector – as the United States did in 1995. In the U.S. view, Iran's economy was fragile, but development of its gas and oil capacity would provide strength to Iran and give it the ability to acquire weapons of mass destruction and the will to continue to engage in terrorist acts. The Act forced non-U.S. companies to choose between the United

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[16] Helms-Burton, *supra* note 3.

[17] ILSA, *supra* note 4.

States and Iran. Specifically, today, if a Canadian company invests more than twenty million dollars (U.S.) in Iran's petroleum development, the President is required to impose two sanctions against that company. He has a choice of six different sanctions. Most of the potential sanctions are merely the withholding of public benefits, such as the denial of EximBank loans to the sanctioned Canadian company. None of the potential sanctions can legitimately be charged with the dreaded extraterritoriality, even though many in Canada and elsewhere hurl that charge. The law asserts no jurisdiction over Canada or events in Canada.

Is ILSA a dumb law? Yes, and it is even dumber foreign policy. Are elements of it problematic under international law, including the element of the issuance of a secondary boycott? Yes. Indeed, when I testified in the House against ILSA, I urged that the International Relations Committee refrain from marking up the bill unless, and until, it had sought and received a legal opinion from the Attorney General on the bill's compatibility with international law. My view was ignored.

Sometimes our friends abroad get a bit too excited about our alleged extraterritorial sins, and sometimes they even sound like they are whining. In the case of Canada and the Helms-Burton and ILSA laws, I hope our Canadian friends will remain as practical as they usually are and recognize that, extraterritorial theory aside, no one in Canada has been harmed by these laws. On the other hand, theory and international law are important and cannot be ignored. The Canadian "blocking" statutes are excellent measures to protect Canadian interests. Canadian humor was also very effective when Members of Parliament asserted pre-Revolutionary property claims against the United States.

Canada has a special opportunity when situations like these two laws exist. One of the reasons that Congress passes these laws targeting the behavior of non-U.S. companies and governments, and why the White House is unwilling to veto them, is because there is a general perception that foreign companies and their governments have sold themselves to the devil. The French, we all know, want to make profits even if it means helping terrorist countries. Russians are probably still Communists anyway; we know about the "Asian values" of the Japanese, and so on. In contrast, most Americans perceive Canadians as virtually indistinguishable from themselves. They are the good guys who will stand up for justice and right at the expense of a few dollars.

Therein is the opportunity. When Canada is confronted with an enactment by the United States such as Helms-Burton or ILSA, I believe it is important for the government of Canada to take the United States to court. Seek to adjudicate the issue as soon as possible in the most appropriate international

forum, with respect and without whining. The European Union action within the WTO against the United States was fair and appropriate, but was an analogous one. (This assumes, of course, that during the legislative process the Canadian side will communicate clearly its intentions in private to the U.S. government.) Win or lose, such actions will be noticed by the U.S. public, and they will not be dismissed as craven acts by money-driven foreigners. This will be instructive for the U.S. public and ultimately might result in some stiffening of the backs of our political leaders, and it might lead to the derailment of such foolish means of achieving laudable foreign policy goals.