

BACKGROUNDER*

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Options available to the Government of Canada in responding to Canadian corporate complicity with human rights abuses

Abstract

There are a growing number of reports concerning Canadian corporate complicity with overseas human rights abuses. To date, the Government of Canada has not enunciated a policy on this issue or publicly identified its options in grappling with this complicity. A number of avenues are open to the Government in dealing with this problem. This paper is a "Backgrounder" identifying options available to the Government and highlighting their advantages and disadvantages. The options discussed here are actions in relation to: "voluntary" codes of conduct; the Income Tax Act; the United Nations Act; the Customs Tariff; the Export and Import Permits Act; the Special Economic Measures Act; the prospect of special, country-specific sanctions legislation; changes to corporate law; federal law creating a civil rights of action for complicity, and; criminal prosecutions for crimes against humanity.

Recommendations

RECOMMENDATION ONE: Voluntary codes represent one means of addressing the issue of business complicity with human rights abuse. However, such codes will only be effective where external inducements encourage companies to adopt and apply human rights principles. Accordingly, certain government benefits extended to companies should be conditioned on adherence to a minimum standard of human rights conduct, including in their dealings with repressive regimes. In particular, the Government should introduce laws and policies:

- (a) conditioning government procurement on adherence by firms to human rights and human security country guidelines in their overseas operations;
- (b) conditioning financial and investment support contributions by government agencies, including the Export Development Corporation and CIDA INC., and embassy and trade promotion staff on adherence by firms to human rights and human security country guidelines in their overseas operations; and
- (c) requiring that adherence to these standards be assessed with reference to independently audited reports

Even with these inducements, other mechanisms will be necessary to deal with recalcitrant companies.

RECOMMENDATION TWO: Unilateral tax forgiveness for income tax paid to repressive regimes should be eliminated. At present, there is no bar on companies obtaining a Canadian taxpayer funded-tax subsidy for operations that amount to complicity with

* This backgrounder is the product of the CLAIHR Student Chapter at the University of Ottawa, Faculty of Law. It was compiled by Craig Forcese, Visiting Professor of Law, University of Ottawa, on the basis of research and writing by Natasha Bakht, Oneal Banerjee, Craig Forcese, Jennifer Egsgard, Jennifer Radford, Holly Reid and Clare da Silva.

human rights abuses. The Government should also bar business expense deductions in the calculation of corporate income taxes where those deductions are made for foreign projects raising serious human rights or human security issues. This power of disallowance should be introduced either as a separate amendment to the *Income Tax Act* or as an additional power possessed by Cabinet under a revamped *Special Economic Measures Act*.

RECOMMENDATION THREE: The *Export and Import Permits Act* should be used judiciously to regulate the export of equipment to controversial projects run by Canadian companies in countries with repressive regimes. However, the Government should take into account the limited effectiveness of this Act in dealing with instances of corporate complicity and should clarify the scope of other legal instruments, such as the *Special Economic Measures Act*.

RECOMMENDATION FOUR: The government must revisit the issue of whether the *Special Economic Measures Act* can apply to circumstances such as those existing in Sudan and Burma. More specifically, the government must have a legal instrument able to bar or restrict investment activities by Canadian firms in circumstances where the Canadian company's presence is fuelling human rights abuse, but where there is no international conflict and no international call for sanctions. The Government should either publicly acknowledge that the Act, as presently drafted, allows unilateral Canadian action in the absence of an international conflict, or it should amend the Act to clarify that such action is permissible.

RECOMMENDATION FIVE: To stop companies complicit in human rights abuses from hindering shareholder criticism and action, paragraph 137(5)(b) of the Canada Business Corporations Act should be amended to eliminate the words "or primarily for the purpose of promoting general economic, political, racial, religious, social or similar causes" as grounds for the exclusion of a shareholder proposal from management proxy circulars.

RECOMMENDATION SIX: The government should explore the possibility of enacting a Canadian equivalent to the *Alien Torts Claim Act*, creating a civil cause of action for foreign citizens harmed by Canadian companies complicit in overseas human rights abuses. It should seek a legal opinion as to whether such an Act is capable of falling within the jurisdictional competence of the federal Parliament by virtue of the *Constitution Act, 1867*.

RECOMMENDATION SEVEN: The government should explore the possibility that Canadian companies complicit in human rights abuses are in violation of the Criminal Code provisions concerning crimes against humanity, or those set out in Bill C-19, once enacted. To enhance the prospect of complicity being captured under Bill C-19, once enacted, the Government should include in the Bill the language found in present s.7(3.77) of the Criminal Code. This language indicates that "attempting or conspiring to commit, counselling any person to commit, aiding or abetting any person in the commission of, or being an accessory after the fact in relation to" a crime against humanity is also a crime.

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Introduction

There have been several reports in recent months concerning possible complicity by Canadian corporations with human rights abuses committed by foreign governments. Talisman Energy Ltd., in particular, has provoked intense controversy over the course of its oil operations in Sudan.¹

In October, 1999, at the behest of the Minister of Foreign Affairs, the Canadian Centre for Foreign Policy Development convened a consultation with governmental and non-governmental representatives, designed to elicit views on government options in

responding to corporate complicity with human rights abuses. Subsequently, in December 1999, the G8 foreign ministers, meeting in Berlin “considered how the G8, through an approach addressing the range of policy contributions and using the comparative advantages available to it, can work to strengthen the ability of the international community in conflict prevention, focussing on”, among other things, “the private sector, particularly in developing principles of corporate citizenship”.² These developments oblige a comprehensive review of the avenues open to the Government of Canada in grappling with corporate complicity. The backgrounder that follows identifies and discusses these options and makes a number of recommendations.

The Problem

The *Concise Oxford Dictionary* defines complicity as “partnership in evil action”. The *Merriam-Webster Dictionary* defines the word as meaning “association or participation in or as if in a wrongful act”. For its part, *Black's Law Dictionary* defines the term as meaning “[a] state of being an accomplice; participation in guilt”. “Complicity”, therefore, includes those circumstances where, though the party itself does not directly carry out the evil action, it participates in, or is associated with, the wrongful act.

(1) Examples of Complicity

Research suggests that there are several layers of possible business complicity in human rights abuses. Broadly speaking, “complicity” can be divided into those acts by the company that increase human rights-abusing *activity* by a regime and those acts that increase human rights-abusing *capacity* by a regime. In both instances, the company, while not the human rights abuser, facilitates or otherwise encourages that abuse.

With respect to *repressive activity*, the presence of a firm may induce a regime to increase its repressive activities and engage in human rights-abusing behaviour. Thus, a regime may use repressive means to supply resources to a company by, for example, clearing people off oil-rich lands, something that appears to be happening in Sudan. In Colombia, meanwhile, Human Rights Watch criticized two major multinational oil consortiums for retaining the services of the Colombian military to protect their pipelines. These security forces have been implicated in massive human rights abuses, including killings, beatings and arrests.³ In Indonesia, government army officials hired as security at a mining site on Irian Jaya have been accused of torturing and extra-judicially executing local people opposed to the mine.⁴ In Nigeria, oil companies have been implicated in “the systematic suppression by Nigerian security forces of protesting local communities.”⁵ In Burma, Burmese forces providing security for the massive Yadana pipeline are said to have committed “violations against villagers along the pipeline route, including killings, torture, rape, displacement of entire villages, and forced labor.”⁶ In Chad and Cameroon, a coalition of European and African environmental groups and German parliamentarians have pointed to a “noticeable increase in human rights violations” in the region surrounding another multinational corporation pipeline project. In particular, through the first eight months of 1998, there were persistent reports of “increased killings of civilians by government forces” in this area.⁷ More recently, in India, Human Rights Watch has accused the multinational firm Enron of being complicit in efforts by security forces to quash protest against its power project. Specifically, the

company "benefited directly from an official policy of suppressing dissent through misuse of the law, harassment of anti-Enron protest leaders and prominent environmental activists, and police practices ranging from arbitrary to brutal...The company...paid the abusive state forces for the security they provided to the company."⁸

With respect to capacity, there are several ways in which a firm's activities may bolster the *repressive capacity* and the staying power of a regime that systematically violates human rights. "Repressive capacity", in this context, is the ability to engage in human rights-abusing behaviour. First, the firm may produce *products* used by the regime that increase its repressive capacity. For example two US car companies were accused of supplying apartheid-era South African security forces with vehicles. Firms in a trading rather than investment relationship with repressive regimes can also provide products used by a regime in its repressive activities. For example, in the past, Canadian companies having supplied "dual purpose" military-civilian aircraft to regimes with poor human rights records such as Peru, China, Saudi Arabia and Iran.⁹ In 1994, dual-purpose helicopters were sold in a secret arrangement to Colombia, a country with an atrocious human rights record.¹⁰

Second, the firm may be a major source of *revenue* that increases a regime's repressive capacity.¹¹ For example, the Yadana pipeline project in Burma backed by US, French and Thai companies will provide the Burmese junta with its largest source of foreign capital.¹² In 1993, Petro-Canada International abandoned its Burmese operations, but not before facing intense criticism for having paid the Burmese regime a non-refundable \$6 million cash "signing bonus" for permission to conduct oil explorations.¹³ More recently, Vancouver-based Indochina Goldfields announced in November 1998 the start-up of a US\$300 million copper mine in Burma, one that is jointly owned by the regime's mining company.¹⁴ Edmonton-based Mindoro Resources, meanwhile, has partnered directly with the regime in a Burma gold exploration project.¹⁵ At present, Talisman's operations in Sudan are said to provide significant revenue to the Sudanese government.

Third, as with apartheid-era South Africa, the firm may provide infrastructure in the form of roads, railways, power stations, oil refineries, or the like, that increases a regime's repressive capacity. For example, in Burma, a country where telephones and faxes are closely controlled by the government, several international telecommunications companies -- including at least one Canadian firm -- have supplied, directly or indirectly, telephone equipment to the military government. Human rights groups say that this technology has been monopolized by the military regime to conduct its affairs.¹⁶ In Sudan, the government is using Talisman's airstrip and other infrastructure for its own purposes, including to mount attacks on civilians.

Finally, the presence of the firm in the country may provide international credibility to an otherwise discredited regime. For example, multinational firms in South Africa provided moral support to the apartheid regime¹⁷ and augmented the ranks of the pro-South Africa lobby abroad preaching tolerance for apartheid. More recently, opponents of foreign investment in Burma argue that

[e]ach new foreign enterprise that sets up shop in Burma only serves to validate the regime's belief that it can get away with resorting to slave-like practices to build the infrastructure these companies need. And above all, it is political legitimacy that [the regime] is after. It's the reason why, every time another Western business executive signs an investment deal with the Burmese military power, he or she is feted in the state-run media with a laudatory story and pictures with top army officials, everyone smiling in the camera.¹⁸

In Nigeria, "Royal Dutch/Shell provided both increased financial investment and a diplomatic public relations shield for the Nigerian government."¹⁹ In Afghanistan, a major US oil company has concluded a pipeline agreement with the Taliban *de facto* regime and has reportedly actively lobbied the US State Department to extend formal diplomatic recognition to the Taliban, despite the group's poor record on human rights.²⁰ In Canada, Talisman has made statements accusing human rights groups of exaggerating human rights problems in Sudan.

In each of these examples, the contribution made by the firm augments the capacity of the regime to engage in violations of human rights and human security.

(2) Canadian foreign policy and complicity

The Government of Canada regards economic engagement as an important means of fostering human security and the promotion of human rights. Economic engagement and human security are viewed as self-reinforcing. Foreign Affairs Minister Axworthy enunciated this view in a 1997 speech at McGill University:

Respect for human rights, both internationally and within Canada, is crucial to government policy. ... [Human rights] are integral to our foreign policy -- in fact, in our international relations, human rights could be considered a "threshold issue." Human rights will be a consideration in any relationship we have, whatever its other aspects, from the moment we enter into that relationship.²¹

Other comments made by the Minister in 1998 invoke a doctrine known as "responsible trade":

*Trade on its own does not promote democratization or greater respect for human rights. But it does open doors. It creates a relationship, within which we can begin to speak about human rights. In addition, as countries open up to foreign trade and investment, they come under increasing pressure to respect the rule of law -- and they see more and more reasons why it is in their own interests to do so. The key issue here is not a crude choice between trade or human rights, but rather a need for responsible trade. [emphasis added]*²²

Where, however, Canadian corporate complicity with human rights abuses exist, such complicity is clearly inconsistent with "responsible trade". In the context of Sudan, for example, the Government of Canada "supports Canadian participation in the economic development of Africa, [but] has grave reservations concerning private sector involvement that may heighten tensions or otherwise fuel ongoing conflicts... The private sector has an ethical responsibility to ensure their operations do no harm, but rather contribute to fostering a climate conducive to building a durable and just peace."²³ Given these views, consistency in

Canadian foreign policy may, on occasion, oblige the Government of Canada to use mechanisms designed to prevent complicity by Canadian corporations.

In fact, failure to act where there is clear evidence that Canadian companies are contributing to human rights violations may run counter to the spirit, and possibly the letter, of Canada's international obligations. Under Article 55 of the United Nations Charter, the United Nations undertakes to promote "higher standards of living, full employment, and conditions of economic and social progress and development," as well as "universal respect for, and observance of, human rights and fundamental freedoms for all." Member states, under Article 56, "pledge themselves to take joint and separate action in co-operation" with the UN to obtain this objective. The Government of Canada takes the view that the "UN Charter obliges all members to promote universal respect for human rights".²⁴ Failing to grapple with Canadian corporate complicity with human rights abuses is inconsistent with the promotion of universal respect for human rights.

It is also notable that the absence of a strong response by the Government of Canada to international human rights matters in human rights-abusing countries has sparked the emergence of "sub-national" foreign policies. For example, at present, two provincial legislatures have passed resolutions concerning Burma, a country with a highly repressive regime that remains a recipient of limited Canadian foreign direct investment.²⁵

In May 1999, British Columbia passed a Resolution in Support of Burma's Democracy Movement.²⁶ The Quebec National Assembly passed a resolution on December 8th, 1999²⁷ recognizing the Committee Representing the People's Assembly (CRPP) as a legitimate representative of the Burmese people. Both resolutions condemn the governing military regime for its continuing violations of human rights in Burma and urge the Canadian government to recognize the Committee Representing the People's Parliament as the legitimate instrument of the will of the Burmese people. Both resolutions were passed unanimously in the respective legislatures.

In addition, at the Canadian Regional Conference of the Commonwealth Parliamentary Association in August 1999, thirty Members of Legislative Assemblies (MLAs) signed a letter to the Minister of Foreign Affairs, Mr. Lloyd Axworthy, urging the Canadian government to bring the subject of Burma for discussion at the next meeting of the United Nations Security Council. The letter also stated that the MLAs would consider tabling and debating a motion similar to the one passed in the BC legislature in their own legislatures.

It appears that the legislatures of Alberta and Ontario will be the next assemblies to pass resolutions supporting the democratic movement in Burma and recognizing the CRPP. According to Canadian Friends of Burma, a motion has been drafted and referred on the Speaker of the Ontario Legislature. The motion was drafted by Liberal and NDP MLAs but has support of all parties in the Legislature. It is anticipated that the motion will be brought before the Legislature in April 2000. Similarly, in Alberta a motion is in

the initial drafting stages with the support of three MLAs and it is anticipated that the motion will be raised in the first house session of 2000.²⁸

These resolutions suggest that some provincial legislatures view the Canadian government as not acting vigorously enough in grappling with human rights abuses, at least insofar as Burma is concerned. These resolutions are statements only and contain no legal commitments on the part of the legislature. There appears to be no intention, at this stage, to implement provincial legislation with legal obligations. In the United States and Australia, however, sub-national foreign policy has sparked the adoption of state and municipal laws requiring agencies to boycott companies that do business in Burma.

At present, such human rights selective purchasing arrangements do not exist amongst Canadian municipalities or provinces. Developments in Canadian municipal law have constrained the ability of municipalities to apply human rights criteria in their purchasing decisions.²⁹ However, some municipal officials have expressed interest in working with non-governmental organizations to develop municipal sanctions laws that would meet the requisite legal requirements.

It is in this context that the Government of Canada must explore options available to it in dealing with corporate complicity.

Options available to the Government of Canada

(1) "Voluntary" Codes of Conduct

The Government of Canada is presently encouraging the use of voluntary business codes of conduct relating to human rights practices.³⁰ In 1997, the Government endorsed the "International Code of Ethics for Canadian Business", a document that 15 companies, including Talisman, have pledged to follow.

Advantages and Disadvantages

Voluntary codes have the advantage of being flexible, non-regulatory means of dealing with human rights matters. Codes do, however, have a number of disadvantages.

(a) Compliance and conditionalities

Over the past five years, a number of criticisms of individual corporate codes have been made by civil society and other stakeholders. First, many codes are vague. In particular, the codes do not identify the precise scope of the company responsibilities. For example, the International Code of Ethics for Canadian Business is very sparse in terms of specific, non-workplace human rights standards, merely indicating that businesses will "support and promote the protection of international human rights within [their] sphere of influence" and "not be complicit in human rights abuses". As was correctly noted in a recent commentary on the Code, these principles are not defined in the body of the document.³¹

Second, many codes are incomplete. For example, many company codes do not cover corporate relations with repressive regimes. Even in terms of workplace standards,

codes often omit important principles, such as the right to organize. Others refer only to child labour. Still others simply invoke broad mission or vision statements and lack reference to any specific standards. Alternatively, where specific standards are mentioned, there is no relationship between these standards and the international rights protected in international law.

Third, many codes are not implemented. Companies either do no monitoring at all or rely on internal monitoring. They fail to disclose information on how codes are being implemented and monitored, rendering it impossible for stakeholders, the public and the government to know whether they are applying their codes consistently.

Fifth, most codes are not independently monitored. Owing to repeated instances where internal monitoring has failed to guarantee against violations of codes, most of the debate relating to codes over the last four years has focused on independent monitoring of codes.

Studies suggest that even were these codes to be widespread, they are unlikely to be observed if businesses are not given an independent incentive to abide by them. Research suggests that modern corporate voluntary codes are typically introduced and implemented in response to external pressures. As Industry Canada noted in a March 1998 report:

[w]hile codes are voluntary -- firms are not legislatively required to develop or adhere to them -- the term 'voluntary' is something of a misnomer. Voluntary codes are usually a response to the real or perceived threat of a new law, regulation or trade sanctions, competitive pressures or opportunities, or consumer and other market or public pressures...[O]nce the code is in place, the initial pressure that led to its creation may dissipate, which could cause compliance among adherents to taper off.³²

The study urges that "voluntary codes that are well designed and properly implemented can help achieve public-interest goals...However, a code that is poorly designed, improperly implemented, or used in inappropriate circumstances, can actually harm both its proponents and the public."³³ As noted by other observers, a code of conduct "is not a corporate compliance program -- it is only part of it, and maybe not even the more important part of a corporate compliance program."³⁴ As a consequence, "the existence of a formal written corporate code of conduct is evidence that a company has begun a process of instituting a self-regulation program, but it is not conclusive evidence that the process has been completed or that it is effective."³⁵

If codes are successful to the extent that the external pressures are strong, then the development and effective implementation of codes will continue to be dependent on the glare of publicity and will disproportionately affect companies with a image and reputation to protect, particularly those in the consumer goods sector. Maintaining and broadening the spotlight on the multitude of companies, and ensuring adherence to codes, will tax the limited resources of human rights and other groups, effectively rendering many companies immune from scrutiny.

As a consequence, observers have argued that the Government of Canada's involvement with corporate codes of conduct should extend beyond promoting the development of codes. Instead, a code pledging companies not to be complicit in human rights abuses should be viewed as a condition precedent to the receipt of certain benefits provided by government. As the Standing Senate Committee on Foreign Affairs has noted, for example, the government "provides extensive trade and overseas investment promotion services, including the granting of invitations on Team Canada trade missions, without first assessing the company's human rights record".³⁶ The Committee has recommended that "[i]n order to ensure that Canadian public funds are being spent in a manner that complements Canadian values, the provision of federal assistance to support commercial activity should be made conditional on adherence to the minimum international standard for human rights."³⁷ In this regard, the Standing Committee cited with approval a recommendation that

Laws should be promulgated (a) conditioning government procurement on adherence by firms to...[human rights] country guidelines in their overseas operations; (b) conditioning financial and investment support contributions by government agencies, including the Export Development Corporation and CIDA [Canadian International Development Agency], on adherence by firms to...[human rights] country guidelines in their overseas operations; and (c) requiring that adherence to these [standards] be assessed with reference to independently audited reports.³⁸

Such an approach, in the words of the Committee, would "mesh well" with the government's endorsement of voluntary codes of conduct.

In fact, since the release of the Senate Committee report, the statute governing the Export Development Corporation (EDC) has undergone a mandatory review. Amongst other things, proposals for a formal link between human rights considerations and EDC decision-making have been proposed by non-governmental groups. To date, however, these recommendations have had relatively little impact on policy-makers³⁹, despite examples offered by non-governmental organizations of EDC-sponsored projects with detrimental human rights impacts.⁴⁰

(b) Need for responses to non-compliance

Canadian companies operating in countries such as Sudan and Burma may be entirely non-receptive to the human rights implications of their project. These firms may receive little or no government support for their operations, whether in the form of Export Development Corporation assistance or embassy support. For example, Talisman Energy in Sudan and Canadian companies operating in Burma are not presently receiving EDC support. As a consequence, these corporations will not respond to many of conditions encouraging adherence to codes of conduct identified above. For this reason, codes must be viewed as a partial solution. Demand will continue to exist for stronger Government of Canada responses to companies who refuse to abide by human rights values, despite positive inducements to do so.

RECOMMENDATION ONE: Voluntary codes represent one means of addressing the issue of business complicity with human rights and human security abuses. However, such codes will only be effective

where external inducements encourage companies to adopt and apply human rights principles. Accordingly, certain government benefits extended to companies should be conditioned on adherence to a minimum standard of human rights conduct, including in their dealings with repressive regimes. In particular, the Government should introduce laws and policies:

(a) conditioning government procurement on adherence by firms to human rights and human security country guidelines in their overseas operations;

(b) conditioning financial and investment support contributions by government agencies, including the Export Development Corporation and CIDA INC., and embassy and trade promotion staff on adherence by firms to human rights and human security country guidelines in their overseas operations; and

(c) requiring that adherence to these standards be assessed with reference to independently audited reports

Even with these inducements, other mechanisms will be necessary to deal with recalcitrant companies.

(2) Legal Instruments

A number of legal options are available to the Government of Canada. Some are likely to be effective, but may require minor legislative tinkering to ensure their applicability where there is corporate complicity with human rights abuses. Others are available at present, but may have a more limited impact.

(a) *Income Tax Act*

Canadian tax law allows Canadian companies to deduct a portion of their foreign business income tax from their Canadian taxes, even in the absence of a formal tax treaty between Canada and the foreign jurisdiction.⁴¹ Even where Canada has annulled double taxation treaties on human rights grounds in the past, this unilateral tax relief has remained. Thus, when Canada annulled the Canada-South Africa Double Taxation Agreement in 1985, critics argued that this move was largely symbolic as companies were able to continue deducting taxes paid in South Africa and Namibia under the foreign tax credit provisions of the *Income Tax Act*.

In 1998, the Senate Standing Committee on Foreign Affairs cited with approval a recommendation that the "government should publicly establish thresholds of systematic human rights abuses beyond which the government...[,amongst other things ,] will not provide tax credits for taxes paid to the regime...".⁴² This approach is a reasonable and logical way of reducing the incentive Canadian businesses might have to invest in countries where their operations contribute to human rights problems.⁴³

The *Income Tax Act* also governs deductions that can be made for business expenses in calculating taxable income. The *Income Tax Act* is amended regularly to control the nature of these deductions. The *Act* could be amended to prohibit deduction of

business expenses associated with overseas projects to which the Government of Canada objects on human rights grounds.

Advantages and Disadvantages

Tying income tax deductions to human rights performance would enable the Government to respond flexibly to problematic overseas projects without engaging in direct regulation or imposing blanket, country-wide sanctions. In the absence of a tax treaty, Canada is under no obligation to extend double-taxation relief to Canadian companies operating internationally. Further, the elimination of tax deductions for problematic projects or operations in particularly repressive countries might, depending on the nature of a corporation's operations, act as a real financial disincentive to complicity. Further, at present, permitting deductions for taxes paid to repressive regimes might be regarded by the public as a Canadian tax subsidy for problematic overseas operations by Canadian corporations. Eliminating this tax subsidy would send a clear political message that such operations are viewed as improper by the Government of Canada.

Introducing such a provision into Canadian law would require legislative amendment. Further, in order to allow the Government of Canada to respond in a timely fashion, the powers to disallow deductions should be delegated to Cabinet. One possible approach would be to add a power to disallow tax deductions for overseas operations to a revamped *Special Economic Measures Act*, discussed below.

RECOMMENDATION TWO: Unilateral tax forgiveness for income tax paid to repressive regimes should be eliminated. At present, there is no bar on companies obtaining a Canadian taxpayer funded-tax subsidy for operations that amount to complicity with human rights abuses. The Government should also bar business expense deductions from gross income in the calculation of corporate income taxes where those deductions are made for foreign projects raising serious human rights or human security issues. This power of disallowance should be introduced either as a separate amendment to the *Income Tax Act* or as an additional power possessed by Cabinet under a revamped *Special Economic Measures Act* (see below).

(b) Sanctions Law

Economic sanctions impose constraints on the exchange of goods and services and on investment and other forms of economic exchange. Accordingly, these laws can be used to affect, both directly and indirectly, the international operations of Canadian corporations. At present, there are four Canadian statutes relating to economic sanctions. These are the *United Nations Act*, the *Customs Tariff*, the *Export and Import Permits Act*, and the *Special Economic Measures Act*. The use of economic sanctions raises both international legal and foreign policy issues. Further, each of these sanctions laws has both strengths and weaknesses in terms of utility in influencing Canadian corporate actions overseas.

(i) International law considerations

There is no principle in customary international law obliging states to trade with, or invest in, one another. Accordingly, there “is no across-the-board prohibition on the use of trade sanctions, in the form of export and import controls, under customary international law or general principles of international law.”⁴⁴ This position has, however, been substantially modified by the World Trade Organization/General Agreement on Tariffs and Trade (GATT), at least insofar as trade in goods is concerned.

WTO/GATT

Article XI of the GATT, 1947, prohibits any restrictions other than duties, taxes or other permissible charges on goods imported from, or exported to, any other member country. The exceptions to this rule, set out in Article XI(2), do not include reference to any consideration or relevance in the application of political sanctions. In addition, the general exemptions to the GATT, established in Article XX, are narrowly phrased and are likely of limited utility in defending sanctions imposed on broad human rights grounds, though there is not universal agreement on this issue.⁴⁵

Article XXI includes general exemptions based on national security grounds. In particular, the provision indicates that “[n]othing in this Agreement shall be construed...to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests” relating to a number of war-related issues and to any “other emergency in international relations”. Article XXI also provides that nothing in the GATT is to be construed “to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security”.

On this basis, it is clear that Article XXI does not impede states in responding to a UN Security Council resolution calling for the imposition of sanctions. Further, unilateral sanctions might well be justified where national security grounds warrant. Notably, the breadth of the national security provision has proven fairly elastic in the past.⁴⁶ Presumably, “national security” and “emergency in international relations” are broadly enough worded to accommodate action on human rights grounds.

Investment

As with trade sanctions, in international public law, there is no requirement that investment sanctions must be preceded by action taken by the United Nation Security Council. Past practice by states suggests that restrictions imposed by countries on direct investment in another state are legal, even in the absence of a resolution by the Security Council. Further, unlike trade in goods, investment sanctions are not governed in any way by the GATT, or even the WTO “Trade-Related Investment Measures” agreement. Therefore, the imposition of investment sanctions barring or restricting one’s own nationals from operating in a target country will generally not constitute a breach of WTO obligations.

(ii) Foreign Policy Considerations

There is an extensive literature on economic sanctions and their utility in influencing rogue regimes. Much of it has been critical of sanctions, suggesting that sanctions are rarely, if ever, effective⁴⁷ and can often be counterproductive.⁴⁸ A recent study focusing on the utility of sanctions for middle powers, argues that “sanctions are, on balance, a normatively bad policy instrument: not only are they generally ineffective in producing political change in the target nation, but that also are a violent, blunt, and gendered tool of statecraft.”⁴⁹ Sanctions introduced by middle powers like Canada and Australia are viewed as “rain dances”: measures satisfying domestic constituencies without having appreciable impact on the political behaviour of the sanctioned country. More than ineffective, sanctions have a discernable negative impact on the most vulnerable populations, leaving the political elite untouched.

On the other hand, “sanctions can on occasion achieve (or help to achieve) various foreign policy goals ranging from the modest to the fairly significant.” In this regard, sanctions introduced after the Gulf War are said to have increased Iraqi compliance with resolutions on the destruction of weapons of mass destruction. Sanctions are also said to have contributed to Serbia's acceptance of the Dayton agreement on Bosnia in August 1995.⁵⁰ A recent study suggests that sanctions are most likely to be successful where the goal is relatively modest, the target is much smaller than the country applying the sanctions, there is substantial trade between the two nations, the sanctions are imposed rapidly and decisively, and the cost to the sanctioning country is low.⁵¹

It should be noted that these discussions of sanctions concern the effectiveness of sanctions in influencing *regimes*. Where the impetus for sanctions is corporate complicity with the regime, the goals driving the measures are much more modest. Viewed from this optic, sanctions sparked by corporate complicity with human rights abuses are concerned with discouraging this complicity, not necessarily with reforming governments. The advantages and disadvantages of Canada's sanctions laws are reviewed from this perspective.

(iii) Canadian Sanctions Law

The United Nations Act

The *United Nations Act*⁵² is a brief statute empowering Cabinet to make orders and regulations that appear to it "to be necessary or expedient" as means to implement a measure called for by the UN Security Council under Article 41 of the United Nations Charter. Article 41 sets out the powers of the Security Council to call for economic sanctions against a state.

Advantages and Disadvantages

A restraint on trade introduced under the *United Nations Act* would not conflict with Canada's trade law obligations. Any measure authorized by Article 41, and

implemented under the *United Nations Act*, would likely be permissible under the WTO by virtue of Article XXI (c) of the GATT. On the other hand, the *United Nations Act* requires a UN Security Council resolution issued under Article 41, a comparatively rare event. Such a resolution is particularly unlikely where the Government of Canada's interest is driven, in large part, by Canadian corporate complicity with human rights abuses. In these circumstances, Canada may have a large stake in events that is not shared by the Security Council. Accordingly, where Canadian corporations are complicit with human rights abuses committed by a government that has yet to spark concerted UN action, there is a real prospect that Canada will have a larger incentive to respond than does the UN. Since UN action will not be forthcoming, the *United Nations Act* will not be available to justify action.

The Customs Tariff

The *Customs Tariff*⁵³ empowers Cabinet to extend a special tariff rate, known under Canadian law as the General Preferential Tariff, to developing countries. While these tariff benefits are not formally conditioned on human rights performance, the law permits Cabinet to remove the tariff, apparently at its discretion.⁵⁴

Advantages and Disadvantages

There are no trade law constraints on GPT benefits. Articles XXXVI and XXXVII of the GATT -- situated under the heading of trade and development -- permit developed countries to grant non-reciprocal tariff benefits to developing nations. Non-reciprocal benefits under the GATT are considered non-binding on the importing country, and thus can be raised again should the importing country so desire. Further, "these benefits may...be denied on a discriminatory basis without violating the international rules governing trade among nations."⁵⁵

On the other hand, the economic impact of removing these measures may be limited. For example, the average annual value of Sudanese exports to Canada between 1994 and 1998 was \$308,000,000. Similarly, imports from Burma, a country whose GPT status was removed in 1997, averaged \$17,700,000 between 1994 and 1998. In fact, in the two years since Burma's GPT status was removed, Burma's exports to this country have risen, reaching over \$22,000,000 for the period January to October 1999.⁵⁶

Further, the GPT is a blunt sanctioning instrument, targeting goods receiving special tariff benefits without necessarily having any bearing on the actions of Canadian corporations who may be complicit in human rights abuses. It is therefore of limited utility in dealing with Canadian corporate complicity with human rights abuses.

The Export and Import Permits Act

The *Export and Import Permits Act*⁵⁷ is a fairly complex statute regulating various aspects of Canada's trade relations and serving as an important tool of trade policy. The Act includes an "Export Control List", an "Import Control List" and an

"Area Control List", all of which are capable of restricting trade for certain enumerated reasons. In particular, the grounds for placing goods on an Export Control List include instances where goods having "a strategic nature of value" might be used in a fashion detrimental to national security.⁵⁸ Similarly, many of the bases for placing goods on the Import Control list are arguably grounded in national security justifications.⁵⁹ Further, goods may also be placed on both lists "to implement an intergovernmental arrangement or commitment".⁶⁰

The Area Control list allows Cabinet to "establish a list of countries" where it deems "it necessary to control the export of any goods."⁶¹ This appears to be a discretionary power unconnected with the Export or Import Control lists, and thus unfettered by any conditions. As one observer has put it, the Area Control List mechanism "assumes that the destination of the good is *per se* a reason for the restriction of its export, regardless of the nature of the good and its potential applications under any circumstance."⁶² Where goods are placed on either the Export or Import Control lists or are destined for a country on the Area Control List, international trade in these goods is illicit in the absence of ministerial permits.

Advantages and Disadvantages

The Area Control List provides the Government of Canada with a fairly flexible means of controlling the transfer of equipment to problematic projects. Judicious use of the Act might enable the government to deter Canadian business operations in repressive regimes that depend on the export from Canada of equipment and material.

At the same time, export or area controls may not prevent firms from substituting foreign for Canadian products, and thus continuing their operations. Section 15 of the Act bars a person from "knowingly do[ing] *anything in Canada* that causes or assists or is intended to cause or assist any shipment, transshipment or diversion of goods excluded in an Export Control List to be made, from Canada or any other place, to any country in an Area Control List" [emphasis added]. While this section, on its face, appears to grapple with the problem of diversions, it is unclear whether the section prohibits all diversions of exports to countries on the Area Control List, or merely diversions to these countries of those exports named in the Export Control List, established in s.3 of the Act. Further, there appears to be no bar on someone arranging, while outside of Canada, the diversion to the country on the Area Control List. If a Canadian firm fashioned a barrier between its operations in Canada and activities constituting "diversion" in other countries, it seems it would not be captured by s.15.

In addition, control on exports of sensitive or key technologies or equipment may be relevant at only certain points in the company's operations. Thus, controls placed on the export of oil pipeline equipment are of little importance, if imposed after the pipeline is built. For example, between January and October 1999, there were notable increases in exports from Canada to Sudan of machine parts, boring tools, construction machinery, valves, tube fittings, and various electrical equipment. Presumably many of these products were used in the oil industry and in pipeline construction. The recent

completion of Talisman's pipeline project in Sudan may have the effect of reducing demand for these materials, and thus the effectiveness of area controls.

With respect to international trade law, several of the grounds regarding the placement of goods on the Export and Import Control Lists echo exemptions included in the GATT. On the other hand, the placement of a country on the Area Control List through a simple exercise of Cabinet discretion, unless justified in some more concrete fashion, might well run afoul of GATT Article XI, restricting export controls.

The trade law implications of action under the *Export and Imports Permits Act* clearly only pertain to countries that are members of the World Trade Organization. (Sudan is not a member at the present time, though it is an observer country. Burma, on the other hand, is a WTO member.) Further, the exceptions under Article XXI discussed above might be used to justify Canada's action under the Act, were it to be challenged.

RECOMMENDATION THREE: The *Export and Import Permits Act* should be used judiciously to regulate export of equipment to controversial projects run by Canadian companies in countries with repressive regimes. However, the Government should take into account the limited effectiveness of this Act in dealing with instances of corporate complicity and should clarify the scope of other legal instruments, such as the *Special Economic Measures Act*.

The Special Economic Measures Act

The *Special Economic Measures Act* is Canada's relatively new sanctions law, designed to fill in the gaps left by the older legislation. In particular, the Act permits Cabinet to impose a broad array of economic measures against a state, first, in response to a call for such measures by an international organization of which Canada is a member or, second, where Cabinet is of the opinion there is, or likely will be, a grave breach of international peace and security likely to lead to a serious international crisis. The measures that may be imposed under the Act include extensive bars on trade, financial exchanges and exchanges of technical information. The Government's powers under the Act read as follows:

- 4.(2) Orders and regulations may be made pursuant to paragraph (1)(a) with respect to the restriction or prohibition of any of the following activities, whether carried out in or outside Canada, in relation to a foreign state:
- (a) any dealing by any person in Canada or Canadian outside Canada in any property wherever situated held by or on behalf of that foreign state, any person in that foreign state, or a national of that foreign state who does not ordinarily reside in Canada;
 - (b) the exportation, sale, supply or shipment by any person in Canada or Canadian outside Canada of any goods wherever situated to that

- foreign state or any person in that foreign state, or any other dealing by any person in Canada or Canadian outside Canada in any goods wherever situated destined for that foreign state or any person in that foreign state;
- (c) the transfer, provision or communication by any person in Canada or Canadian outside Canada of any technical data to that foreign state or any person in that foreign state;
 - (d) the importation, purchase, acquisition or shipment by any person in Canada or Canadian outside Canada of any goods that are exported, supplied or shipped from that foreign state after a date specified in the order or regulations, or any other dealing by any person in Canada or Canadian outside Canada in any such goods;
 - (e) the provision or acquisition by any person in Canada or Canadian outside Canada of financial services or any other services to, from or for the benefit of or on the direction or order of that foreign state or any person in that foreign state;
 - (f) the docking in that foreign state of ships registered or licensed, or for which an identification number has been issued, pursuant to any Act of Parliament;
 - (g) the landing in that foreign state of aircraft registered in Canada or operated in connection with a Canadian air service licence;
 - (h) the docking in or passage through Canada by ships registered in that foreign state or used, leased or chartered, in whole or in part, by or on behalf of or for the benefit of that foreign state or a person in that foreign state; and
 - (i) the landing in or flight over Canada by aircraft registered in that foreign state or used, leased or chartered, in whole or in part, by or on behalf of or for the benefit of that foreign state or any person in that foreign state.

Advantages & disadvantages

The SEMA empowers Cabinet to impose sanctions unilaterally where it 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.⁶³ Clearly, this is a discretionary power that does not require formal action by the United Nations Security Council, as is the case under the *United Nations Act*. Further, the Government can act in concert with other states 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. Once again, there is no need to wait for a UN Security Council resolution.

Indeed, there may be no need for an actual “decision, resolution or recommendations”. In 1998, Canada employed SEMA to impose sanctions on Yugoslavia, apparently on the basis of a “recommendations” from the G8 foreign ministers meeting in Birmingham. Arguably, this “recommendation” was not a statement by the G8 as an organization, but rather the announcement of unilateral action by several G8 members made in the context of the G8 meeting.⁶⁴

In addition, the powers available to the Government of Canada under the SEMA are quite potent. While the language of the Act itself is somewhat less than clear on this issue, it has been used to prohibit investment, most recently in Yugoslavia.⁶⁵ Further, s-s.4(2) refers to both “restrictions” and “prohibitions”, implying that the Government of Canada is able both to bar the activities enumerated in s-s.4(2) and to restrict and regulate them. As a consequence, the SEMA is the only instrument available to the Government of Canada that can be used to oblige Canadian companies to cease operations in a given country. It also appears to be an instrument that allows the Government to restrict the nature and conduct of that overseas activity.

The debate at present, in policy circles, focuses on what is meant by “breach” of international peace and security in the context of unilateral action under the SEMA. The Department of Foreign Affairs apparently takes the view that “grave breach of international peace and security” was intended by Parliament to accord with the ill-defined international construction of this language. At the international level, determining whether a “breach” of international peace and security occurs is the responsibility of the UN Security Council under Article 39 of the UN Charter. There is no fixed, binding standard set out in the UN Charter as to when and where the UN Security Council can make such a declaration. As a consequence, the assessment of “breaches”, as with “threats”, to international peace and security is conducted on a case by case basis. The term “breach of international peace and security” appears once in Security Council practice: in Security Council Resolution 660, where the Security Council found “there exists a breach of international peace and security as regards the Iraqi invasion of Kuwait”. Reportedly on this basis, the Department concludes that a “breach” requires a trans-border conflict, analogous to that in the Gulf War.

Others have argued that the Department's position is very conservative, that it reflects a reversal of the interpretation of “breach” adopted by the Department when the Act was passed, and that the Department's opinion is largely inconsistent with the more flexible view of the Act contained in the law's legislative history (see appendix 1). Accordingly, there are contradictory views on the legality of Cabinet acting unilaterally in the absence of a Gulf-like war.

Use of the SEMA may also raise questions as to Canada's WTO obligations. In this respect, as with the *Export and Imports Permits Act*, bars on *trade*, though not investment, authorized under the SEMA but not justified by a Security Council resolution, may well run afoul of the WTO, where WTO members are the target of such measures. On the other hand, were Cabinet to authorize action on the basis of a “grave breach of international peace and security likely to lead to a serious international crisis”,

it seems likely that Canada's actions could be exempted from WTO discipline by those parts of GATT Article XXI invoking "national security" and an "emergency in international relations". Where the SEMA measures target investment activity, and not trade in goods, the WTO is of little or no relevance, for the reasons set out above.

Full-fledged investment sanctions do, however, raise the spectre of compensation. Sub-section 6(3) of the SEMA states that the Governor in Council "may" designate, to a Minister, the duty of submitting a report to the Governor in Council,

with respect to claims for compensation, to receive and assess reasonable claims for compensation from any person who alleges to have suffered any loss or damages as a result of anything done or purported to have been done under this Act or any order or regulations made under this Act.

The wording in s-s. 6(3) of the *SEMA* does not refer to expropriation or expropriated interests in discussing the issue of economic loss or damage. In a 1993 policy paper, the Department of Foreign Affairs and International Trade expressed the view that SEMA "does not necessarily create a right to compensation; any payment made would apparently be on an ex gratia basis."⁶⁶ This 1993 policy paper notes that, while the Canadian Charter of Rights and Freedoms contains no property rights, the *Canadian Bill of Rights* continues to apply to the federal government and guarantees, amongst other things, "the enjoyment of property, and the right not to be deprived thereof except by due process of law". However, "due process of law" in this context is a procedural requirement that does not appear to have substantive content. Nor is this right guaranteed to corporations.⁶⁷ Finally, it is likely that a civil action brought against the Government of Canada for any of the economic torts that might flow from the imposition of sanctions -- such as the tort of inducing a breach of contract -- would be blocked by Crown immunity. Accordingly, there is no real prospect that action under the SEMA will compel compensation by the government.

Enacting Separate Legislation

In the past, Canada has enacted special legislation to deal with sanctions directed at individual countries. For example, in 1980, Parliament passed the *Iranian Economic Sanctions Act*⁶⁸ to impose sanctions on Iran.

Advantages & Disadvantages

An Act of this sort could be carefully tailored to deal with the particular circumstances associated with a given country. On the other hand, enacting special Acts for each country where instances of series Canadian corporate complicity with human rights abuses exist would be a laborious and slow process.

(iv) Discussion of Sanctions Measures

Many of Canada's sanctions laws reflect a country-wide sanction approach. A few of the laws enable the Government to impose measures that might be more tightly

tied to individual projects or corporate operations. The two key measures, the *Export and Imports Permits Act* and the *Special Economic Measures Act*, each have certain disadvantages, as noted above. The most promising law, in terms of the powers it provides the Government, is the *Special Economic Measures Act*.

Unfortunately, the Department of Foreign Affairs and International Trade's view on when the SEMA can be used has the effect of making it near impossible for the Government to impose investment sanctions *unilaterally* in most of the countries where Canadian business involvement with repressive regimes is presently a cause of concern, including Sudan. Most of these countries are not in the midst of the Gulf-like War the Department feels as necessary for Cabinet to act unilaterally under the SEMA. Further, the prospect of multilateral action in the context of the group or organization of which Canada is a member may be remote where Canada's disproportionate interest in sanctions is being driven by concerns of Canadian corporate complicity. It would also be deeply embarrassing to the Government of Canada, were it obliged to seek an international endorsement of sanctions in the form of "a decision, resolution or recommendation of an international organization of states or association of states, of which Canada is a member" in order to be legally empowered to grapple with wrongdoings by Canadian firms.

It should be noted, in this last regard, that the SEMA is much more restricting of government powers to impose investment sanctions than are the laws of other key jurisdictions. For example, European Community (EU) law gives Member States the express right to impose investment sanctions 'for serious political reasons' and 'on grounds of urgency'.⁶⁹ The meaning of these provisions was debated recently in the context of an application for judicial review in the United Kingdom High Court, resulting in a determination that the situation in Burma amounts to "urgent political reasons".⁷⁰

In the United States, the President is authorized to make an executive order declaring unilateral investment sanctions vis a vis a particular country pursuant to the *International Emergency Economic Powers Act*⁷¹ (IEEPA), and the *National Emergencies Act*⁷² (NEA). The IEEPA may be invoked by the President in order to deal with 'any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy or economy of the United States, if the President declares a national emergency with respect to such a threat.'⁷³ These powers have been used with respect to both Burma⁷⁴ and Sudan.⁷⁵

Beyond comparing unfavorably with the standards set for investment sanctions found in other countries, it should also be noted that the absence of a credible Canadian sanctions law undermines the leverage the Canadian Government might have over businesses. The prospect of facing investment sanctions should the company be complicit with a human rights-violating regime might act as a real incentive for Canadian firms to avoid complicity.

RECOMMENDATION FOUR: The government must revisit the issue of whether the *Special Economic Measures Act* can apply to circumstances such

as those existing in Sudan and Burma. More specifically, the government must have a legal instrument able to bar or restrict investment activities by Canadian firms in circumstances where the Canadian company's presence is fuelling human rights abuse, but where there is no international conflict and no international call for sanctions. The Government should either publicly acknowledge that the Act, as presently drafted, allows unilateral Canadian action in the absence of an international conflict, or it should amend the Act to clarify that such action is permissible.

(3) Additional options

(a) Corporate governance

Roughly 50% of Canada's largest corporations are incorporated under the federal *Canada Business Corporations Act*. Under the *Canada Business Corporations Act* (CBCA), directors manage the affairs of the corporation. As a consequence, shareholders cannot directly impose their views on management. They cannot micro-manage the affairs of the corporation. However, they are in a position to affect indirectly the operations of the corporation through their voting power. Beyond voting for or against directors, the most effective tool that shareholders have in their toolkit is something called the shareholder proposal. The proposal process gives shareholders a limited right to add items to the agenda of annual meetings. For federal corporations, this process is governed by s.137 of the CBCA. Under the CBCA, any shareholder entitled to vote may submit to the corporation notice of any matter s/he wishes to discuss and have voted on at the annual general meeting (AGM). Where a corporation is obliged to send out a management proxy circular (i.e. where it has enough shareholders), then the proposal must be included in this mailout along with a supporting statement of up to 200 words. If and when a proposal is accepted by management, it is then voted upon at the AGM. These proposals are usually unsuccessful. However, proposals are often an excellent way of raising issues that would otherwise be overlooked.

Unfortunately, the CBCA strongly inhibits shareholder abilities to bring forward proposals that might deal with corporate complicity. Section 137 of the CBCA allows management to reject proposals on a number of grounds. Most important from the human rights perspective: the proposal can be rejected where it clearly appears (to management) that the proposal is being submitted primarily for the purposes of promoting general economic, political, racial, religious, social or similar causes. These terms provide enormous discretion to management to exclude shareholder proposals dealing with social responsibility matters. In fact, the section effectively bars shareholders from expressing concern on social responsibility issues, including human rights, unless the proposal is strongly couched in language dealing with more traditional business matters. Even then, nothing stops management from abusing the section to avoid proposals questioning the business impacts of poor human rights behaviour.

In this last regard, if management decides to reject a proposal on one or more of these grounds, the corporation must notify the shareholder within 10 days of receipt of

the proposal, and include reasons. If the shareholder is unhappy with this decision, he or she may go to court and apply to have AGM delayed. In other words, if management excludes a proposal, the only recourse a shareholder has is to an expensive and time-consuming court challenge.

Companies often do not hesitate in rejecting proposals, including those relating to human rights matters. In February 1999, 11 churches and religious orders from Canada and the US submitted shareholder proposals to Talisman Energy. This proposal asked the Board to assure shareholders that the company was not materially aiding the Sudanese government in its civil war in that country nor in its repeated violations of internationally accepted standards of human rights. The company was also asked to prepare an independently verified report of its compliance with this commitment.

On February 2, 1999, Talisman rejected the proposal on two grounds. One of these grounds was an allegation that the proposal clearly appeared to be submitted primarily for the purpose of promoting general economic, political, racial, religious, social or similar causes, despite the clear business implications of operating in the midst of a civil war.

Advantages & Disadvantages

A liberalized shareholder proposal process would enable shareholders, many of whom have expressed concern with corporate complicity, to press management on corporate human rights behaviour. Shareholder proposals are a "private" response to improper corporate behaviour. It seems counterintuitive for the Government of Canada, on the one hand, to condemn corporate behaviour and respond to corporate complicity and, on the other hand, leave in place statutory provisions that bar shareholders from doing the very same thing.

It is anticipated that Industry Canada will be sponsoring a bill amending the *Canada Business Corporations Act* as early as the end of February. It is unknown whether this Bill will include amendments to the shareholder proposal process.

RECOMMENDATION FIVE: To stop companies complicit in human rights abuses from hindering shareholder criticism and action, paragraph 137(5)(b) of the Canada Business Corporations Act should be amended to eliminate the words "or primarily for the purpose of promoting general economic, political, racial, religious, social or similar causes" as grounds for the exclusion of a shareholder proposal from management proxy circulars.

(b) Civil Rights of Action

It is entirely possible that Canadian companies complicit in human rights abuses overseas will be sued in Canadian courts for that complicity by foreign plaintiffs. A successful lawsuit in such a case would have an enormous precedential value. However, there are a number of jurisdictional hurdles to a successful lawsuit, most notably the common law doctrine of *forum non conveniens*. In the United States, the *Alien Torts*

Claim Act removes many of these jurisdictional hurdles by giving foreign citizens a right to sue US defendants for an act committed in violation of the law of nations or a treaty of the United States. This Act is presently being used by foreign plaintiffs to sue in US court US companies alleged to be complicit in human rights abuses overseas.

Advantages & Disadvantages

Providing plaintiffs wronged by Canadian corporate complicity overseas with guaranteed standing in Canadian civil court would provide a non-regulatory means of compensating persons wronged by complicity. It might also serve as a strong deterrent to corporate complicity.

Enacting such a law raises some constitutional concerns relating to division of powers in the *Constitution Act, 1867*, which gives the provinces jurisdiction over civil rights and property and the administration of justice. On the other hand, given that a Canadian *Alien Torts Claim Act* would be directed at conduct outside of Canada's borders, there might be some basis in arguing that the matter falls within federal powers over international trade and perhaps even peace, order and good government.

RECOMMENDATION SIX: The government should explore the possibility of enacting a Canadian equivalent to the *Alien Torts Claim Act*, creating a civil cause of action for foreign citizens harmed by Canadian companies complicit in overseas human rights abuses. It should seek a legal opinion as to whether such an Act is capable of falling within the jurisdictional competence of the federal Parliament by virtue of the *Constitution Act, 1867*.

(c) Prosecution for Crimes Against Humanity

Pursuant to s-s.7(3.71) of the *Criminal Code*, every person "who...commits an act or omission outside Canada that constitutes ...a crime against humanity and that, if committed in Canada, would constitute an offence against the laws of Canada...shall be deemed to commit that act or omission in Canada at that time...". This provision is subject to the further requirements that the accused be a Canadian citizen or be employed by Canada in a civilian or military capacity. Alternatively, Canada must, under international law, be able "to exercise jurisdiction over the person with respect to the act or omission on the basis of the person's presence in Canada and, subsequent to the time of the act or omission, the person is present in Canada." Corporations would likely be covered by this latter requirement.

A "crime against humanity" is defined in s-s.7(3.76) as

murder, extermination, enslavement, deportation, persecution or any other inhumane act or omission that is committed against any civilian population or any identifiable group of persons, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission, and that, at that time and in that place, constitutes a contravention of customary international law or conventional international law or is

criminal according to the general principles of law recognized by the community of nations

Notably, s-s.7(3.77) indicates that, in the context of crimes against humanity, "act or omission" includes "attempting or conspiring to commit, counseling any person to commit, aiding or abetting any person in the commission of, or being an accessory after the fact in relation to, an act or omission."

Bill C-19, presently at First Reading, would repeal these provisions and introduce new measures easing past problems associated with war crime and crimes against humanity prosecutions. A person who commits genocide, war crimes or crimes against humanity overseas is subject to prosecution in Canada. The definition of "crime against humanity" is revised somewhat to remove the need for the crime to be directed against "any civilian population" or "any identifiable group of persons", thus eliminating an important stumbling block to convictions imposed by the Supreme Court of Canada in *R v. Finta*. Further, while Bill C-19 includes no language on aiding and abetting or counseling the commission of the offence, it introduces a new offence where a "superior, outside Canada" fails to exercise control properly over a person under their effective authority and control, and as a result the person commits a crime against humanity, war crime or genocide. A "superior" is defined in the Bill as a "person in authority, other than a military commander".

The Bill also specifies that "[n]o person shall possess any property or any proceeds of property knowing that all or part of the property or proceeds was obtained or derived directly or indirectly as a result of", amongst other things, "an act or omission outside Canada that constituted genocide, a crime against humanity or a war crime".

The definition of crime against humanity, coupled with the offence directed at failure of superiors to exercise control, may be sufficient to capture complicity by Canadian corporations and their directors with serious human rights abuses. If Bill C-19 were to restore the language concerning aiding and abetting and counseling an offence found in the present s-s.7(3.77) of the *Criminal Code*, the prospect of complicity being captured under the Act would be that much greater. Further, the bar on proceeds of crime might be used to confiscate corporate profits derived from projects associated with serious human rights abuses.

Advantages & Disadvantages

Proceedings brought under the present *Criminal Code* or Bill C-19, once enacted, would direct a very potent message at Canadian companies complicit with human rights abuses. However, there will probably be relatively few cases where acts of complicity by Canadian companies are serious enough to amount to "crimes against humanity". Further, criminal law does not provide the Government with a means of forestalling or curbing actions that, left unchecked, might eventually constitute crimes against humanity. Accordingly, a need will remain for other mechanisms to grapple with acts of complicity

that, while serious, do not themselves constitute a crime against humanity under criminal law.

RECOMMENDATION SEVEN: The government should explore the possibility that Canadian companies complicit in human rights abuses are in violation of the *Criminal Code* provisions concerning crimes against humanity, or those set out in Bill C-19, once enacted. To enhance the prospect of complicity being captured under Bill C-19, once enacted, the Government should include in the Bill the language found in present s-s.7(3.77) of the *Criminal Code*. This language indicates "attempting or conspiring to commit, counselling any person to commit, aiding or abetting any person in the commission of, or being an accessory after the fact in relation to" a crime against humanity is also a crime.

Appendix 1: Legislative History of the Special Economic Measures Act

A review of the Special Economic Measures Act's legislative history suggests that Parliament either was largely unconcerned with the technical international meaning of the term "grave breach of international peace and security" or meant "breach" to take on a much broader meaning than the Gulf War.

For example, on second reading of the Act in the House of Commons, then Minister of External Affairs Barbara McDougall indicated that "the purpose of the Bill C-53 is to enable Canada to impose a broad range of economic sanctions against a state or part of a state whose actions pose a *serious threat to international peace and security or fail to conform to commonly accepted standards of behaviour.*" In this passage, the Minister uses the term "threat," rather than "breach". The term "threat" has its own international meaning and Security Council practice has made it quite clear that the term is capable of including an internal conflict and serious human rights abuses. For example, in recent years, the Security Council has found "threats" to international peace and security in internal conflicts occurring in Haiti, Bosnia, Angola, Croatia, Sierra Leone and the Central African Republic.

The Minister later uses the term "breach", but then goes on to state that Canada's decisions to implement sanctions will "involve a complex balancing of many considerations". Listed among the factors are the likely effectiveness of the sanctions and their potential cost to Canadians. No mention is ever made to an international standard for "breach", let alone one tied to a trans-border conflict. In fact, the Minister goes on to say that Bill C-53 "*signals no intention to apply sanctions either more or less frequently than we have in the past.* Canadian decisions to use sanctions will be guided by established policies and the need for sanctions will be dictated by developments in international relations.... *Bill C-53 does not dictate the policy considerations that would determine whether or not to apply sanctions in any particular situation,* nor does it dictate the types of measures to be used when the government decides to apply sanctions" [emphasis added].⁷⁶ This passage, from the Minister responsible for the law, does not support the conclusion that Parliament meant to constrain Cabinet's discretion and dictate policy considerations by imposing a particular meaning on the term "breach of international peace and security", particularly as, at the time the Minister made these statements, Canada had a history of imposing unilateral sanctions in response to events other than trans-boundary wars.⁷⁷ The Minister then goes on to repeat that the Act "will be a valuable addition to the peaceful option available to the government to respond to *threats* to international peace and security" [emphasis added].⁷⁸

This view of the Act as a flexible instrument is enhanced by statements made while the Bill was considered in Committee. The following passage is of particular relevance:

Mr. Axworthy: Can I ask on the second threshold...The interpretation of that grave international crisis is exclusively again, an executive judgment. It could be anything from an outbreak of violence to a major ecological disaster, presumably. Let's say somebody was pumping oil into the ocean

and we wanted to stop them. But that interpretation is not spelled out in the act in any way, is it?

Mr Mawhinney [Legal Advisor, Secretary of State for External Affairs]: No, it is not, and I think it would be very difficult to set out a set of criteria, which would virtually have to be as inexhaustible as the types of situations that might arise. *It is very clear that the policy aspects of this are not addressed in the act. What the act attempts to do is to set out two broad thresholds. But I would be foolhardy as an individual and even more an official to speculate on what the particular situation might be that would trigger this threshold. The threshold is designed to describe in a broad way two areas where the government would feel compelled to act...* [Emphasis added]

There are passages later on in the Committee proceedings suggesting that Parliamentarians were concerned about some of the ambiguity in the phrase “breach of international peace and security” and wished to clarify its meaning by adding to this passage “or international law.” This was done out of an “abundance of caution”. This view was critiqued by the Director General of the External Affairs legal department, who argued that “international law” was too imprecise. The Director General argued that “international peace and security” had “taken on a certain meaning over the years.”

You can look at certain resolutions of the Security Council to know under what type of circumstances a grave breach of peace and security has occurred, as precedent.⁷⁹

Subsequently, at the report stage, Lloyd Axworthy, then opposition Member of Parliament, moved for the inclusion of language in s.4 that would “broaden the application of the act.” The proposed amendments would have allowed the application of the Act where “the Governor in Council is of the opinion that grave violations of human rights have occurred in a foreign state and continue or are likely to continue...” This amendment was to be added to the Act “so we can clearly say that in these evolving areas of international development” the Act could be applied. NDP MP Svend Robinson, in supporting the motion, noted that “[g]rave violations of human rights may not be a breach of international peace and security”. The government rejected the motion. Benno Friesen, then Parliamentary Secretary to the Secretary of State for External Affairs urged that human rights would be too ambiguous a term to serve as a threshold.⁸⁰

These are the only passages in the Commons legislative history that appear to support the Department’s interpretation of the Act. The Director General’s observations suggest that international law may prove an important guide for the interpretation of the Act, but are not compelling authority for the proposition that, in assessing whether there has been a grave breach of international peace and security, Cabinet *must* refer to international use of the term. The comments by Messrs. Axworthy and Robinson voice the concern that human rights violations may not be enough to amount to “breaches of international peace and security.” However, they do not suggest that human rights

violations, if serious enough, cannot amount to a “breach”. Further, they do not define this term or refer to some international standard for “breach”. Indeed, like Minister McDougall, both speakers, in their submissions, used the term “threat” and “breach” seemingly without distinction, suggesting that they, like the Minister, did not have the technical international distinction between the terms in mind when enacting the Act.⁸¹

In the Senate, there was a similar pattern of discussion surrounding the triggering mechanisms of the Act. In debate, one Senator noted that the “breach” language mimicked that in the UN Charter, but made no effort to define the meaning of “breach” in this context (i.e. as requiring an international conflict). In this regard, on third reading, Senator Kelleher noted that “...the criteria [for grave breach] is well known in international law, being modelled on the language of Article 39 of the United Nations Charter [sic].” However, “[g]iven *the variety of circumstances that could constitute a grave breach of international peace and security, and given the highly political nature of the determination required, it is not feasible to define the expression further, nor does it lend itself easily to judicial review*” [emphasis added].⁸² The Senator urged that unilateral sanctions would be applied in only the rarest of circumstances and in keeping with Canada’s longstanding sanctions policies. He noted that “[t]he grave breach threshold is designed precisely to allow Canada to act in a timely fashion in rare situations of extreme gravity where measures must be taken unilaterally, pending action by the international community.” Senator Stewart, in responding to Senator Kelleher, agreed that “...the bracket of discretion that is being conferred upon the Governor in Council is very wide.”⁸³ The Senator returned to this theme later on, noting that the “grave breach” language conferred on the government “broad and extensive powers” and “very broad discretionary powers”.⁸⁴ Senator Murray, responding to Senator Stewart, noted Senator Kelleher’s statement that “grave breach” has a meaning in international law, to which Senator Frith responded “a very subjective one”.

Other passages in Senate proceedings suggest strongly that the Act was not intended to prescribe the circumstances in which Cabinet could act, or to tie Cabinet to Security Council interpretations of the term “breach”. In this regard, on second reading, Senator Frith, leader of the opposition, asked the following: “Generally speaking, we may all understand what a ‘grave breach’ of international peace and security is. Question: Is a general understanding of the words adequate in a piece of legislation of this kind? The bill provides no definition for a grave breach of international peace and security.”⁸⁵

This question was addressed in the Senate Foreign Affairs Committee. The Committee Chair asked the following of the Legal Advisor, Secretary of State for External Affairs: “...does the expression ‘a grave breach’ have legal meaning, or is it up to the Governor in Council to charge those words with what meaning it wishes?” The legal advisor responded as follows:

It would be impossible to reach an agreement on a legal meaning of grave breach because of the very nature of the subject with which we are dealing. It is a highly subjective area. It is very much a matter of judgment of the political circumstances. As far as I am

aware, senator, there simply is no agreed legal definition of ‘a grave breach.’ We can draw on various UN documentation, I would suppose, such as a definition of aggression...There are other documents produced by the United Nations which in one way or another might attempt to characterize situations, *but it is impossible, I would suggest, to render a precise legal definition of ‘grave breach’*. [emphasis added].

The legal advisor was pressed as to whether the situation in Haiti, clearly not a trans-boundary conflict, could amount to a “grave breach” under the Act. The legal advisor responded as follows: “I could not answer that, Senator. It depends very much on the circumstances, the impact that crisis internationally, the impact it may have on Canada directly.”

Asked whether there would be a “grave breach” in situations where there was a gross and consistent pattern of human rights violations, but no action by the UN, the legal advisor responded:

Senator, again I do not wish to be coy or evasive, but it is simply impossible for me to answer that kind of question. It would very much depend on the judgment of the government and all of the surrounding circumstances which might obtain in that particular situation. *These are matters of policy*, and it is really impossible for me to give an answer within which we compartmentalize different types and different categories of crisis. I think this is something which will have its unique situation, unique circumstances in each particular case. [emphasis added].

In responding to the legal advisor's observations, Senator Kinsella made the following comments: “Fine, I think it underscores the *discretionary nature of the whole provision...*” [emphasis added].⁸⁶

At the report stage, the Committee Chair summarized the legal advisor's position and noted that the Act conferred “a great deal of power” on Cabinet and, in terms of the meaning of “grave breach”, the Committee was told that it “would have to rely upon the good judgment of the Governor in Council.”⁸⁷ He went on to note “...the recognition that the term ‘grave breaches’ has no precise meaning; and the argument that Parliament would have to rely on the Governor in Council to use extraterritorial power wisely, led some members of the committee to suggest that the bill is defective” because it did not require the reconvening of Parliament.⁸⁸ Subsequently, opposition members, recognizing the power accorded Cabinet, proposed unsuccessfully that Parliament be reconvened should Cabinet be of the view that sanctions were necessary.

In net, this legislative history supports a flexible interpretation of the term “breach” in the *Special Economic Measures Act*. Parliament, in the House of Commons, made no meaningful distinction between “threat” and “breach”. Parliament made no mention of precise international definitions of “grave breach”. Indeed, it was informed

that there could be no precise legal definition. Parliament expressed a repeated desire to create an instrument that would not rigidly prescribe the terms under which sanctions could be imposed. Instead, the Act was intended to supply a large measure of policy discretion to Cabinet.

Endnotes

¹ C. Gillis, "Talisman airstrip used by military, CEO discloses," *National Post* (Jan. 14, 2000); Ian McKinnon, "Heat turned up on Talisman for Sudan investment," *National Post* (January 7, 2000); Claudia Cattaneo, "Talisman falls amid turmoil in Sudan," *National Post* (December 14, 1999); Charlie Gillis, "U.S. pension fund dumps its stake in Talisman," *National Post* (December 8, 1999); Sheldon Alberta & James Young, "Envoy heads to Sudan to dig into Talisman's papers," *National Post* (December 2, 1999); Charlie Gillis, "Meeting the victims of Sudan's oil boom," *National Post* (November 27, 1999).

² G8 Foreign Ministers' Meeting in Berlin (Conclusion), on the internet at < http://www.dfait-maeci.gc.ca/foreignp/g7/2000/g8_ministers_meeting_conclusion_dec99-e.asp>.

³ See Human Rights Watch, *World Report, 1997* and *World Report, 1999* (available on the Internet at <www.hrw.org/hrw/worldreport99/special/corporation.html> as of February 1999). See also Dan Atkinson, *BP denies MEP's Colombia claims*, THE GUARDIAN, Oct. 23, 1996; Amnesty International, COLOMBIA: BRITISH PETROLEUM RISKS FUELLING HUMAN RIGHTS CRISIS THROUGH MILITARY TRAINING (June 30 1997); Project Underground, *Oil Companies Buying Up Colombian Army to Fight Pipeline Violence*, DRILLBITS & TAILINGS, Sept. 1, 1996.

⁴ Pratap Chatterjee, *The Mining Menace of Freeport McMoRan*, MULTINATIONAL MONITOR, April 1996 at 11. For a detailed description of the military role in the events and their aftermath, see also Amnesty International, INDONESIA: FULL JUSTICE? MILITARY TRIALS IN IRIAN JAYA, AI Index: ASA 21/17/96, March 1996.

⁵ Jessie Banfield, *The corporate responsibility debate*, AFRICAN BUSINESS, Nov. 1998 at 30-31.

⁶ Human Rights Watch, *World Report 1999* (1999).

⁷ *Id.*

⁸ Human Rights Watch, THE ENRON CORPORATION: CORPORATE COMPLICITY IN HUMAN RIGHTS VIOLATIONS (January 1999), available on the Internet at <www.hrw.org/hrw/reports/1999/enron/>, as of February 1999.

⁹ See Ken Epps, *Canada's unrecorded military trade*, PLOUGHSHARES MONITOR, Sept. 1996 at 20.

¹⁰ Dave Todd, *Copter deal to Colombia approved*, THE MONTREAL GAZETTE, June 8, 1994.

¹¹ For example, at least one Canadian mining company has reportedly provided financial support to the new government in the Democratic Republic of Congo, a regime that has since been implicated in human rights abuses against Rwandan refugees. See Associated Press, *Canadian company helps pay for*

rebels, THE GLOBE AND MAIL, May 10, 1997 at A1; Gordon Clark, *Firm pays millions to rebels in Zaire*, VANCOUVER PROVINCE, May 11, 1997 at A4. Also, at least one major Canadian retail company has been accused of sourcing clothing from factories whose major shareholders include the Burmese army Directorate of Procurement, the body charged with purchasing arms and military equipment for the military regime. See Canadian Friends of Burma, DIRTY CLOTHES-DIRTY SYSTEM 11-12 (CFOB 1996).

¹² See EarthRights International & Southeast Asian Information Network, *Total Denial: A Report on the Yadana Pipeline Project in Burma* (July 1996), available on the internet at <<http://metalab.unc.edu/freeburma/docs/totaldenial/td.html>> and Lucien Dhooge, *A Close Shave in Burma: Unocal Corporation and Private Enterprise Liability for International Human Rights Violations*, 24 N.C. J. INT'L L. & COM. REG. 1 (1998). Note, however, that while "revenues from the pipeline were supposed to bolster and support the weak Burmese economy by mid-1998", the IMF has reported that the "junta has already mortgaged its projected revenues of \$200 million a year to repay new loans and finance its 15 percent stake in the project." Profits from the project are expected to be delayed until 2002. See Human Rights Watch webpage.

¹³ See *Petrocan ending drilling in Myanmar*, THE GLOBE AND MAIL, Nov. 3, 1992.

¹⁴ Indochina Goldfields, START OF COPPER PRODUCTION AT MONYWA PROJECT CONFIRMS INDOCHINA GOLDFIELDS' FIRST MINE ON TARGET TO BECOME ONE OF THE INDUSTRY'S LOWEST COST PRODUCERS, Press release, Nov. 2, 1998. Indochina Goldfields, INDOCHINA GOLDFIELDS COMPLETES FINANCING TO CONSTRUCT MYANMAR COPPER MINE, Press Release, Sept. 24, 1997.

¹⁵ Mindoro Resources, MINDORO INCREASES INTEREST AND IDENTIFIES NEW GOLD POTENTIAL IN MYANMAR PROJECT, Press Release, Jan.12, 1998.

¹⁶ Paul Watson, *How Burma's junta defies world*, TORONTO STAR, March 16, 1997 at A12. Interview with Christine Harmston, then-Co-ordinator, Canadian Friends of Burma, July 1997.

¹⁷ Lou Wilking, *Should US Corporations Abandon South Africa?* in THE SOUTH AFRICAN QUAGMIRE 390 (S. Prakash Sethi, ed., Ballinger, 1987). See also JEANNE STEPHENS, MNCS AND CHANGE IN SOUTH AFRICA 38 (MA Thesis, Carleton University, Ottawa, 1983).

¹⁸ Canadian Friends of Burma, *supra*.

¹⁹ Human Rights Watch, *World Report 1997* at 360.

²⁰ *Unocal looks to Afghanistan's Taliban for New Profits*, DRILLBITS & TAILINGS, Aug. 2, 1997.

²¹ *Notes for An Address by the Honourable Lloyd Axworthy Minister of Foreign Affairs At McGill University "Human Rights and Canadian Foreign Policy: Principled Pragmatism"*, October 1997.

²² *Notes for An Address by the Honourable Lloyd Axworthy to the International Conference on Universal Rights and Human Values "A Blueprint for Peace, Justice and Freedom,"* November 27, 1998.

²³ Department of Foreign Affairs and International Trade, Press Release #232, Backgrounder (October 26, 1999).

²⁴ The Honourable Christine Stewart, then-Secretary of State (Latin America and Africa):

The promotion of human rights and democracy is a tenet of Canadian foreign policy. It is a reflection of Canadian values. As was demonstrated by the report of the Special Joint Committee reviewing Canadian foreign policy, Canadians expect their elected leaders

and government officials to uphold the democratic principles upon which our society was founded. Respect for human rights is a key to international peace and prosperity and thus crucial to creating a world environment in which Canadians can best pursue their interests. Furthermore, the *UN Charter obliges all members to promote universal respect for human rights and Canada regards the principles of the Universal Declaration of Human Rights as entrenched in customary international law binding on all governments.* [emphasis added]

Statement 95/1 Notes For An Address By The Honourable Christine Stewart, Secretary Of State (Latin America And Africa), At The 10th Annual Consultation Between Non-Governmental Organizations And The Department Of Foreign Affairs And International Trade In Preparation For The 51st Session Of The United Nations Commission On Human Rights, (January 30 - March 10, 1995) Ottawa, Ontario, January 17, 1995.

²⁵ For example, in November 1998, Indochina Goldfields, a corporation incorporated under the laws of British Columbia and traded on the Toronto Stock Exchange, announced the opening of a copper mine in Burma. The company, "through its subsidiary, Ivanhoe Myanmar Holdings, Ltd., holds a 50% interest in a joint venture with No. 1 Mining Enterprise (ME1), an entity wholly-owned by the government of Myanmar." Indochina Goldfields internet site, <www.goldfields.com/properties.htm>. The prevailing view among non-governmental organizations is that it remains impossible to do business in Burma without supporting the regime at some level, particularly where investment projects amount to joint ventures with the military.

²⁶ Motion 61, "British Columbia Resolution in Support of Burma's Democracy Movement", May 4, 1999, Hansard Vol. 14, Number 22, p. 12197.

²⁷ Resolution "Quebec National Assembly Recognizes CRPP", December 8, 1999, available on the internet at <http://www.assnat.qc.ca/fra/publications/debats/journal/ch/991208/1110.htm#991208072>.

²⁸ Conversation with Canadian Friends of Burma, January 17th, 1999.

²⁹ Specifically, the Supreme Court ruling in *Shell Canada Products Ltd. v. City of Vancouver* [1994] 1 S.C.R. 231 has put a chill on municipalities' willingness to pass selective purchasing by-laws. See discussion in C. Forcese, "Municipal Buying Power and Human Rights in Burma," (1998) *University of Toronto Faculty of Law Review*, 56(2).

³⁰ After a 1996 House of Commons report on child labour, the federal government created a fund for the development of child labour codes of conduct for medium and small-enterprises. More recently, former Member of Parliament, John English, has been appointed to help facilitate the establishment of Canadian anti-sweatshop task force.

³¹ Peter Foster, "Ethics Code Traps Talisman," *National Post* (December 14, 1999).

³² Government of Canada, *Voluntary Codes: A Guide For Their Development And Use* 8-9 (March 1998).

³³ *Id.* in preface.

³⁴ John Ruhnka & Heidi Boerstler, *Governmental incentives for corporate self-regulation*, (1998) 17 *Journal of Business Ethics* 3.

³⁵ *Id.*

³⁶ Standing Senate Committee on Foreign Affairs, *Crisis In Asia: Implications For The Region, Canada, And The World* 105 (December 1998).

³⁷ *Id.* at 110.

³⁸ *Id.* at 107, citing Craig Forcese, *Putting Commerce Into Conscience* (International Centre for Human Rights and Democratic Development 1997). On the issue of government procurement, there is some concern that conditioning procurement on human rights performance might run afoul of the Government Procurement Agreement of the WTO. Recently, the European Union has brought a trade complaint against the United States for a Massachusetts Burma selective purchasing law barring dealings with companies operating in Burma. It remains to be seen, however, whether the Massachusetts law is in fact a violation of the GPA or that human rights selective purchasing laws in general are GPA-illicit. For a recent discussion of issues surrounding the Massachusetts law, see Jennifer Loeb-Cederwall, *Restrictions on trade in Burma: Bold moves or foolish acts?* 32 NEW ENG. L. REV. 929 (1998). For a discussion of selective purchasing laws at the municipal level, see Craig Forcese, *Municipal buying power and human rights in Burma: The case for Canadian municipal selective purchasing policies*, 56 U.T. FAC. L. REV. 2, 252 (1998).

³⁹ Standing Committee On Foreign Affairs And International Trade, *Exporting In The Canadian Interest: Reviewing The Export Development Act* (December 1999).

⁴⁰ The NGO report on this issue can be found at <http://www.sierraclub.org/canada/national/halifax/edc/pubs/policy.htm>.

⁴¹ *Income Tax Act*, R.S.C. 1985, 5th Supp., s-s.126(2). See discussion in Vern Krishna, *The Fundamentals Of Canadian Income Tax*, 5th Ed. 1166 (Carswell, 1995).

⁴² Standing Senate Committee on Foreign Affairs, *supra*, at 106.

⁴³ The impact of eliminating this measure may be reduced by the fact that the foreign taxes for which credits are available do not include resource royalties. See Revenue Canada Interpretation Bulletin IT-270, *Foreign Tax Credit*. In a state with a poor administrative structure, resource royalties and licensing arrangements may be more important source of revenue for the state than income tax.

⁴⁴ Allan Rosen, "Canada's Use of Economic Sanctions for Political and Human Rights Purposes", (1993) *University of Toronto Faculty of Law Review*, 51, 2.

⁴⁵ The parts of Article XX that might arguably prove relevant in justifying a trade ban predicated on human rights considerations on read as follows:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

- (a) necessary to protect public morals;
- (b) necessary to protect human, animal or plant life or health;
- ...
- (e) relating to the products of prison labour;
- ...
- (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production of consumption...

⁴⁶ See Riyaz Dattu & John Boscarol, "GATT Article XXI, Helms-Burton and Continuing Abuse," (1997)*Canadian Business Law Journal* 28, 198.

⁴⁷ For example, between 1914 and 1990, countries imposed, mostly unilaterally, sanctions 115 times. These sanctions were effective in 34% of the cases, with success in the post-1973 period being significantly lower than between 1914 and 1973. See Kimberly Ann Elliot, "Factors Affecting the Success of Sanctions," in David Cortright & George Lopez, eds. *Economic Sanctions: Panacea or Peacebuilding in a Post-Cold War World?* (Boulder, Co.: Westview Press, 1995).

⁴⁸ Richard N. Haas, Economic Sanctions: Too Much of a Bad Thing, Brookings Institution Policy Brief, June 1998, < <http://www.usaengage.org/studies/haas1.html>>. A recent report by Richard Haas of the Brookings Institution, makes a number of observations on the effectiveness of US sanctions. First, "sanctions alone are unlikely to achieve desired results if the aims are large or time is short." Unilateral sanctions, in particular, are unlikely to be successful. In addition, "[s]anctions tend to be easier to introduce than to lift" and "[s]anctions fatigue tends to settle in over time and international compliance tends to diminish." Finally, "[s]anctions are blunt instruments that often produce unintended and undesirable consequences." In particular, "sanctions can have the perverse effect of bolstering authoritarian, statist societies. By creating scarcity, they enable governments to better control distribution of goods. The danger is both moral, in that innocents are affected, as well as practical, in that sanctions that harm the population at large can bring about undesired effects that include bolstering the regime, triggering large scale emigration, and retarding the emergence of a middle class and civil society."

⁴⁹ Kim Richard Nossal, *Rain Dancing: Sanctions in Canadian and Australian Foreign Policy* (Toronto: University of Toronto Press, 1994) at 252.

⁵⁰ Haas, *supra*.

⁵¹ Elliot, *supra*.

⁵² R.S.C. 1985, U-2

⁵³ S.C. 1997, c. 36.

⁵⁴ *Ibid.* at s.34.

⁵⁵ J. Ballon, *The Implications of Making the Denial of Internationally Recognized Worker Rights Actionable under Section 301 of the Trade Act of 1974*, (1987) *Virginia Journal Of International Law*, 1, 73 at 97.

⁵⁶ Figures calculated from Industry Canada, Trade Data Online Database.

⁵⁷ R.S.C. 1985, E-19

⁵⁸ *Ibid.*, s.3.

⁵⁹ *Ibid.*, s.5.

⁶⁰ *Ibid.* s-ss.3(d) and 5(e).

⁶¹ *Ibid.*, s.4.

⁶² Selma M. Lussenburg, " The Collision of Canadian and U.S. Sovereignty in the Area of Export Controls," (1994) 20 Can.-U.S. L.J. 145.

⁶³ S.C. 1992, c. 17, s.4.

⁶⁴ The text of the Foreign Ministers communique reads as follows:

"..in the light of Belgrade's failure to start a dialogue to bring about a political solution in Kosovo, Canada, France, Germany, Italy, the United Kingdom, the United States and the European Commission have agreed to implement the decision by members of the Contact Group to freeze funds held abroad by the FRY and Serbian Governments and to stop new investments in Serbia. Japan supports this approach and will study possible action. Other countries are encouraged to take similar action. The Russian Federation does not associate itself with these measures."

⁶⁵ See *Special Economic Measures (Federal Republic of Yugoslavia) Regulations*, SOR/98-397 (July 28, 1998). The relevant provisions read as follows:

3. (1) Subject to subsection (2), no person in Canada and no Canadian outside Canada shall make an investment in Serbia.
 (2) Subsection (1) does not apply to the acquisition of an investment from a person who ordinarily resides in Canada.

"Investment" was defined in the order as follows:

"investment" means acquiring, directly or indirectly, ownership or control of any of the following properties:

- (a) assets of an organization;
- (b) an equity security of an organization;
- (c) a debt security of an organization;
 - (i) where the organization is an affiliate of the investor, or
 - (ii) where the original term of the debt security is at least 180 days;
- (d) a loan to an organization
 - (i) where the organization is an affiliate of the investor, or
 - (ii) where the original term of the loan is at least 180 days;
- (e) an interest or a right in an organization that entitles the owner to share in income or profits of the organization;
- (f) an interest or a right in an organization that entitles the owner to share in the assets of that organization on termination or dissolution;
- (g) property used or intended to be used for the purpose of economic benefit or other benefits; or
- (h) interests or rights arising from the commitment of capital or other resources, including
 - (i) contracts involving an investor's property, turnkey construction contracts, and concessions, and
 - (ii) contracts where remuneration depends principally on the production, revenues or profits of an organization

⁶⁶ Jean Prévost, *For Effective and Appropriate Sanctions*, DFAIT POLICY STAFF PAPER -- NO. 93/04. It is unlikely the *Expropriation Act* would apply if a company were obliged to divest assets under a SEMA order, given that the Act concerns itself with the taking of land by the Crown.

⁶⁷ See discussion in David Mullan, *Administrative Law* (Toronto: Carswell, 1996) at 226.

⁶⁸ R.S.C. 1985, c.39.

⁶⁹ This statement is found in European Community Treaty, s.73(g)(2).

⁷⁰ Recently, the NGO *Burma Campaign* (TBC) initiated a judicial review of unilateral investment sanctions. The group challenged Foreign Secretary Robin Cook in court because of the UK government stance on unilateral investment sanctions against Burma. The government asserted that the UK was legally constrained from implementing such measures. The crux of the case involved the extent of the right of Member States of the EU to impose financial sanctions on third party states under Article 73(g)(2) of the European Community Treaty. Article 73(g)(2) stipulates that the Member State may impose unilateral sanctions for 'serious political reasons and on grounds of urgency'. The issue of contention between the government and Burma Campaign focused on the meaning of 'urgent'. The government did not dispute that there were serious political reasons for action, but rather framed it as a question of law. The government argued that because the situation in Burma had been ongoing, the situation did not fall within the realm of urgency. TBC pursued a two-pronged argument. First, the Campaign argued that it was exactly because the situation had been going on for so long that it was urgent. Second, the Campaign gave evidence to demonstrate recent deterioration in the situation. On December 12, the Court found that the situation in Burma passed the urgency test. The wording of Article 73(g)(2) seems to suggest that Member States have a broad discretion to impose financial sanctions if they feel it necessary - although there is a possibility that such a decision to impose may be overturned or challenged.

⁷¹ 50 U.S.C. s.1701 et seq.

⁷² 50 U.S.C. 1601 et seq

⁷³ 50 U.S.C. 1701(a)

⁷⁴ In 1997, the situation in Burma was declared 'an unusual and extraordinary threat to the national security and foreign policy of the United States', and a prohibition on new investment in Burma by United States persons was invoked pursuant to the IEEPA. Upon its expiry this year, the President declared an extension of the State of Emergency and continued the ban on new investments.

⁷⁵ In order to impose sanctions, the US declared a national emergency pursuant to the IEEPA, and the NEA. The *Sudanese Sanctions Regulations*, 31 C.F.R. Part 538 implement this order. The purpose of the sanctions is to deprive the regime in Khartoum of the financial and material benefits of US trade and investment.

The sanctions prohibit the importation of any goods or services of Sudanese origin into the United states, and the exportation (or facilitating the exportation) of goods, technology or services from the United States to Sudan. As well, United States nationals are prohibited from financing any contract in support of an industrial, commercial, public utility or governmental project in Sudan. Credit or loans may not be granted to the government of Sudan by a United States national, and cargo transactions are strictly regulated. Exceptions to these prohibitions exist to the extent described in section 203(b) of the IEEPA, and in any regulations, orders, directives or licenses which may be issued pursuant to Exec. Ord. No. 13067.

⁷⁶ Parliament of Canada, COMMONS DEBATES at 7403, 7405 (Feb. 20, 1992).

⁷⁷ See Jean Prévost, Economic and Trade Policy (CPE), Policy Staff, *For Effective and Appropriate Sanctions*, DFAIT POLICY STAFF PAPER -- NO. 93/04 (March 1993): "Initiatives related to nuclear non-proliferation make up the bulk of our "unilateral" moves. The countries affected have included Pakistan, India, South Korea, the EEC and Japan."

⁷⁸ Commons Debates, *supra*, at p.7406.

⁷⁹ Standing Committee on External Affairs, Committee proceedings on Bill C-53, at p.9:18.

⁸⁰ Parliament of Canada, COMMONS DEBATES at 10149-10151.

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- 81 *Ibid.* at pp.10149, 10249.
- 82 SENATE DEBATES, at p.1584-85.
- 83 SENATE DEBATES, at p.1586 (June 2, 1992).
- 84 SENATE DEBATES, at p.1587 (June 2, 1992).
- 85 SENATE DEBATES at p. 1572 (May 14, 1992).
- 86 Standing Senate Committee on Foreign Affairs, Proceedings on Bill C-533, at 13-29 and 13-30 (May 21, 1992).
- 87 SENATE DEBATES, at p.1572 (June 1, 1992).
- 88 SENATE DEBATES at p.1574.