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Canada-Iran Relations: Sanctions, Diplomatic Relations, Booby-Traps, and the Law

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This week, it was reported that Canada's Foreign Minister Stephane Dion and the Liberal government were considering lifting sanctions on Iran and re-establishing diplomatic relations between the two nations. The quandary here – to lift or not to lift, to engage or not to engage – has been foreseeable for some time: I wrote an op-ed in the Globe & Mail back in July warning the next government that they would have to be prepared to act, and act quickly, once the US lifted its sanctions on Iran (see here).

The repercussions of Canada's delay for Canadian business are immense: Our companies do not want to be left behind as Iran's enormous emerging market – 80 million people with a dilapidated infrastructure and close connection to a large Diaspora in Canada – begins to open up to the rest of the world. There is no such thing as a second-movers advantage.

But Canada's business interests are not the only consideration here, even in our struggling economy; Canada's national security regime is also implicated and the situation is both complicated and controversial.

Let's start with a reminder of why Iran sanctions are now in the news before getting into the commentaries that have recently set off a debate in Canada.

Iran Sanctions in the News

In the context of Iran-US relations, Saturday 16 January 2016 was "implementation day" – the day that, with the release of an International Atomic Energy Agency (IAEA) Report, the US was to begin implementing terms of the Joint Comprehensive Plan of Action (JCPOA) agreement by lifting its nuclear proliferation-related sanctions on Iran. The JCPOA is an agreement between the US and Iranian governments, signed on 14 July 2015. (Formally the so-called E3+3 – France, Germany, the UK, China, Russia and the European Union – were also signatories to the agreement and will likewise lift sanctions, where relevant). The UN Security Council subsequently adopted the terms of the agreement (see: UN Security Council Resolution 2231 of 20 July 2016, available here).

The agreement is long, complicated, and technical, but at the risk of oversimplifying, it can be explained as follows: the US agreed to lift its nuclear proliferation-related sanctions on Iran that had contributed to the crippling of Iran's economy in exchange for Iran agreeing to a surprisingly intrusive monitoring and enforcement system headed by the IAEA (see here).

Since July, the IAEA has been working on monitoring and verification of Iran's terms of compliance with the initial stage of the agreement (for an overview see here). Essentially, this work was a preparatory process to ensure that Iran would be ready to comply with the terms of

the JCPOA – and would formally begin compliance – at the same as the US lifted its sanctions. As expected, the IAEA issued its report confirming Iran's requisite preparatory compliance (it issued its report on 16 January 2016). At that moment, it was then on the US to fulfill its obligations and start lifting sanctions.

When the US subsequently fulfilled its obligations by lifting its nuclear-related sanctions – and levying sanctions on 11 persons or entities with ties to Iran's ballistic missile program, something I will get to – the question in Canada naturally became: "on this crucial foreign policy file, what are we going to do"? There are arguments for and against a rapprochement with Iran.

On the one hand, it is likely that few who follow the file trust the Iranian regime, and not just because of its possible nuclear ambitions, but also because of its support for terrorist groups (Hezbollah), its troubling actions in support of Assad in Syria, its worrying ballistic missiles program, its active electronic army, its regional meddling, and generally its internal repression and widespread domestic human rights abuses. On the other hand, current Canadian sanctions relate not to these other (valid) concerns but to what Canada asserted to be a "breach of international peace and security" resulting from Iran's nuclear ambitions (see discussion of SEMA below). Moreover, Canadian businesses would be at a distinct disadvantage if they were left unable to engage with Iran while their competitors were free to negotiate. A good example is the Canadian company Bombardier, surely tempted by Iran's needs in the airplane and train industries. Bombardier, already in a difficult financial situation, will be at a distinct disadvantage if American Boeing and European Airbus move first into the Iranian market. Finally, it is uncertain how effective Canadian sanctions have been period, let alone if we go it alone on the Iran file. A hard-line could be more symbolic than anything – though again there are reasons to maintain a symbolic hard-line.

In Canada, since the JCPOA was agreed upon, the complexities of these issues have not been fleshed out, either by the government or by commentators. Instead, in response to the US's recent lifting of sanctions, the Canadian media focused in the first instance on some talk of Harper's "booby-trap", wherein it was asserted that by designating Iran as a state sponsor of terror, the Harper government set a legal booby-trap for the Liberals that limited their future course of action on sanctions and in re-establishing diplomatic relations (see e.g. CBC article here). Legally speaking, the Harper government did no such thing, at least not related to Canada's sanctions on Iran. Politically speaking, Harper may well have done so, though it was less a "booby-trap" – which implies a covert attempt to limit future governmental action – than the sort of ordinary policy decision that is regularly taken by governments. In any event, the CBC article that first reported the controversy seems to conflate the situation with respect to Canada's sanctions regime and the situation relating to our diplomatic relations with Iran. These are distinct topics with distinct political and legal considerations, so in order to clarify the situation they will be treated separately, below.

Let's start with a brief analysis of Canadian sanctions on Iran before moving to a discussion of re-establishing diplomatic relations.

Canada's Sanctions on Iran and the Limitations of our Legislative Regime

Canadian sanctions are governed by umbrella legislation, the *Special Economic Measures Act*, SC 1992, c 17 (SEMA). In relevant part, section 4(1) of the SEMA states:

> **4 (1)** The Governor in Council may, *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, or where the Governor in Council is of the opinion that a grave breach of international peace and security has occurred that has resulted or is likely to result in a serious international crisis*,
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> **(a)** make such orders or regulations with respect to the restriction or prohibition of any of the activities referred to in subsection (2) in relation to a foreign state as the Governor in Council considers necessary; and
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> **(b)** by order, cause to be seized, frozen or sequestrated in the manner set out in the order any property situated in Canada that is held by or on behalf of
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> **(i)** a foreign state,
>
> **(ii)** any person in that foreign state, or
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> **(iii)** a national of that foreign state who does not ordinarily reside in Canada (emphasis added).

Put simply, the SEMA allows Canada to enact regulations sanctioning a foreign country where an international body, like the UN Security Council, has asked the international community to do so, or if we determine that there has been a "grave breach of international peace and security" that "has resulted or is likely to result in a serious international crisis."

The regulation governing – sanctioning – Iran is called the *Special Economic Measures (Iran) Regulations*, SOR/2010-165. The Iran Regulations make clear that it is the second consideration that led to the sanctions: "the Governor in Council is of the opinion that *the situation in Iran constitutes a grave breach of international peace and security* that has resulted or is likely to result in a serious international crisis" (SEMA preamble, emphasis added).

So what does this have to do with the Harper government designating Iran a "state sponsor of terror"? In short: nothing. (I'll get to the implications of this designation below when I discuss diplomatic relations between Canada and the US). If Canada wants to lift sanctions on Iran, it can do so. If it wants to lift some of the sanctions in the Iran Regulations – for example those on financial services – while leaving others in place – such as the list of designated persons and entities – it may also do so. It certainly has taken this approach in the past, most recently perhaps with Burma (see *Special Economic Measures (Burma) Regulations*, SOR/2007-285). Contrary to what the CBC article implies, the designation of Iran as a state sponsor of terror does not legally limit the options under these Regulations.

But there nevertheless *is* a big problem here, and my sense is that this undocumented problem is why there has been a delay in moving forward with any sanctions-related actions on Iran – whether it be lifting them or doubling down. The problem goes as follows.

On the one hand, arguably Canada has a legal duty to lift its sanctions on Iran. First, no international body has demanded that Canada put sanctions on Iran as a result of its nuclear ambitions – indeed the UN has adopted the JCPOA, as discussed. Second, the Iran Regulations

relate the "grave breach of international peace and security" to Iran's nuclear ambitions; now that the international community has said that the Iran's nuclear ambitions are not an imminent threat to – let alone breach of – international peace and security, the justification for Canada's sanctions arguably falls away. Remember that these two criteria are the only two justifications upon which Canada can, it would seem, uphold its Iran sanctions regulations. With neither applicable at this time, the *raison d'etre* of the sanctions regime would no longer seem to apply unless Canada wishes to go it alone and claim that, despite the assertions of our closest allies and an IAEA monitoring regime in place, Iran's nuclear program has caused a breach of international peace. It's an argument that could be made, one supposes, but it certainly extends the discretionary terms of the SEMA well beyond what one would suppose was the intention.

On the other hand, as already mentioned, there are lots of valid reasons to maintain sanctions on Iran that are unrelated to its nuclear ambitions. As canvassed, these run the gamut from support for terrorism, to regional meddling, to human rights abuses and a ballistic missile program that evidence suggests shares information with North Korea. It is for this very reason that, just as the US was lifting sanctions on Iran as per the JCPOA agreement, it was levying new sanctions against Iranian entities that purportedly support its ballistic missiles program (see here). The US would surely love it if Canada did the same.

But, again, under the SEMA there must be a breach of international peace and security – wording that goes beyond a "threat" of a breach. Canada cannot designate Iranian persons or entities for threats to international peace and security, or for "mere" human rights abuses, or even for sponsorship of terrorism, unless we find that they rise to the level of a breach of "international peace and security". Moreover, even if one could argue that the totality of Iran's actions represent a breach of international peace and security, our Iran Regulations have not made this argument, but rather have tied the breach to Iran's nuclear program.

This real restriction on the scope of Canadian sanctions is a fundamental problem with Canada's SEMA that extends beyond the Iran Regulations. Successive governments have failed to tackle this problem and, in so doing, have truly limited the potential scope of Canada's sanctions regime. Now that might be applauded in some circles, but so long as Canada and our allies treat sanctions as a legitimate foreign policy tool, we should not simultaneously be undermining its potential.

There is another major problem with the SEMA, on which the government must surely be ruminating. While the US lifted its nuclear-related sanctions it also designated (sanctioned) others, including a company in the United Arab Emirates (UAE) (see here). But as per the Iran Regulations, section 4(1)(b)(i)-(iii), Canada can only designate a "foreign state", "person in that foreign state", or "national in that foreign state that does not ordinarily reside in Canada." A company incorporated in the UAE thus cannot be sanctioned by Canada, even if it is known to trade with and transship to Iran. Unless Canada can prove that goods shipped to the UAE are ultimately intended for or make it to Iran, something that is extraordinarily hard to prove in most cases, Canada cannot take action under the Iran Regulations. This in part explains why we have virtually no prosecutions under the SEMA despite widespread use of sanctions against numerous countries.

Until these holes in our legislation are fixed, our sanctions enforcement regime will be weak. Likewise, without legislative reform, Canada will not be able to remove nuclear-related sanctions as the US is doing while simultaneously keeping up with our allies to pressure the human rights abusers and other threats in the Iranian regime or elsewhere in the world. Without a broad re-

think of our sanctions policy and legislation, there does not seem to be a win-win solution here, and my sense is this is one of the issues causing pause for Canada's government.

Iran as a State Sponsor of Terror and Canadian-Iranian Diplomatic Relations

On 7 September 2012 Canada shuttered its Embassy in Iran, "PNG'd" Iranian diplomats (the colloquial diplomatic term used to say that they were issued "persona non grata" papers and required to leave the country), and listed Iran as a state sponsor of terror under the *Justice for Victims of Terrorism Act*, SC 2012, c 1 (JVTA) (see here).

As I see it there is nothing here that sets up a "booby-trap" or legal barrier to re-establishing diplomatic relations. In fact, from the legal perspective, there's a relatively easy fix: all the Liberals have to do is un-designate Iran as a state sponsor of terror and they can re-establish diplomatic relations. There will be legal complexities and headaches here, sure, particularly as relates to any (presumably grandfathered) civil actions under the JVTA, but changes of laws often require complex solutions.

This solution does seem to come with a major political rub however. The Harper government had a reasonable justification for designating Iran as a state sponsor of terror. Under Canada's *Criminal Code*, RSC 1985, c C-46, both the al-Qods Force and Hezbollah are listed terrorist entities. Hezbollah has been responsible for attacks in Lebanon and Israel and, most recently, egregious violations in support of the Assad regime in Syria. More to the point, the Qods force is not just supported by Iran, it is an elite part of the Iranian regime itself. Some might recall that Qods force General Qasem Soleimani made waves this summer as a major influence peddler in Iraq as Iran took the fight to ISIS (see for example here). The upshot here is that Iran is fairly clearly a state sponsor of terror, at least according to our *Criminal Code*. The Harper government's designation is thus justifiable, even if Canada regularly ignores designating would-be state sponsors of terror to avoid tricky diplomatic repercussions.

The end result is that, for Canada to re-establish relations after un-designating Iran, the government will either have to say that these groups are not terrorist entities – a hard and politically divisive argument to make – or that Iran is not sponsoring these groups, an assertion that would belie all available evidence. From a political and messaging perspective, undoing Iran's designation would surely take some politically astute communications at the very least.

So, if Canada determines that the political repercussions of un-designating Iran are too weighty, or that there is not sufficient justification to un-designate Iran as a state sponsor of terror, what are the repercussions? So far as I can see, there are at least two crucial issues standing in the way of re-establishing diplomatic relations, though there may well be more.

The first and most obvious is that Iran remains designated under the JVTA. With Iran still designated, any lawsuits will continue, new suits will be possible, and Iranian diplomats and politicians will be loath to enter Canada for fear of it exercising its jurisdiction and getting caught up in the legal system.

The second issue relates to the re-opening of the Iranian Embassy in Canada and Canadian Embassy in Iran. Again, this can easily be done – legally – if Canada un-designates Iran as a state sponsor of terror. However, with Iran designated, there is a possible legal and political

impediment to re-establishing relations. The issue goes as follows: politically or legally can we, or do we wish to, have open diplomatic relations with designated state sponsors of terrorism? Can or should Canada host the Embassy and diplomatic personnel of a known – and legislated – sponsor of terrorism, particularly when our *Criminal Code* contains offences for sponsoring terrorism? I invite comment here, but my sense is that legally and politically, without backtracking on the designation, normalizing relations and re-opening the embassies will be very near impossible.

Conclusions

Contrary to recent media attention, there are no legal obstacles to re-establishing relations with Iran that cannot be overcome, though the designation of Iran as a state sponsor of terror certainly made things politically difficult. Likewise, designating Iran as a state sponsor of terror does not limit our ability to act on the sanctions file. Rather, our inability to act on the sanctions file – to remove existing sanctions while simultaneously introducing new sanctions on ballistic missile developers and supporters of terrorism – is limited by past failures to act on the sanctions file and Canada's continuing unwillingness to update its legislation to address the heart of the matter.

The most likely outcome is that some sanctions on Iran will be removed while others will remain in place; a compromise that gives a bone to Canadian business while maintaining sanctions against a regime Canada does not fully trust. But this is a compromise with relatively little benefit for anyone, at least in the short term. Some sanctions will remain in place, making business between Iran and Canada complex, confusing, and legally risky. Businesses don't fully lose, but they don't win either, particularly considering most will have to understand the US sanctions as well and there will not be uniformity between the two countries' regimes. At the same time, the sanctions that remain in place will have limited impact in that they will not necessarily target those that need to be targeted, they will not be harmonized with and reinforced by the sanctions of our allies, and legal enforcement against those who would challenge them will remain difficult.

I leave the tricky issue of re-establishing diplomatic relations to the political and diplomatic experts, along with the Department of Justice lawyers dealing with terrorism and the JVTA. However, on the sanctions side, things are much clearer: the legislation needs a rethink, and with it so does Canadian sanctions policy, practice and enforcement. Without tackling the real source of our limitations on this file, whatever Canada chooses to do with Iran sanctions will be another temporary, half-hearted fix.