

Law and Development of Cuba under US-led Sanctions and its Implications for HR757

Soo-hyun Lee

This paper examines the law and development of Cuba under the duress of US sanctions, examining impacts and consequences of those sanctions as well as their socio-political and economic reasons. By configuring sanctions as the departure point of this analysis of Cuba's law and development, this paper provides an analysis of parallels that can be drawn to the North Korea Sanctions and Policy Enhancement Act of 2016, or "HR757." By identifying the similarities between HR757 and the sanctions placed against Cuba, this paper shows that the unpredictable impacts of the Cuba sanctions can be extrapolated to the Democratic People's Republic of Korea (DPRK).

The unique features of the Cuban revolutionary narrative during an equally extraordinary period in modern history christened the economic sanction of the Cold War era: targeted not at specific actions, but rather the personality of a State and its behaviour. The strong ideological language in these sanction mechanisms ignited equally ideological recalcitrance against them by Cuba. One can identify similar trends in the DPRK, though at significantly larger stakes with access to innovatively destructive instruments of war. The high stakes of this final front of the Cold War make it imperative to ensure that sanctions, as perhaps one of the final steps before military action, are informed rather than absolved by history.

Keywords: Cuba, DPRK, Sanctions, Law and Development, HR757

1. INTRODUCTION

Many comparisons have been drawn between the sanctions against Cuba and those applied to the Democratic People's Republic of Korea (DPRK).¹ This paper takes an alternative approach by examining the impacts of US-led sanctions against Cuba and their consequent impacts based on the development of Cuba and Fidel Castro's use of economic and legal reform in response to those sanctions during a period of rapid change. Understanding the historical, socio-political, and economic contexts in which the sanctions were executed can aid one's understanding of the impact and unintended consequences of the sanction on Cuba. While this paper does not attempt to make any historical comparison between the DPRK and Cuba, it does extend the argument that the ideologically based sanctions applied against Cuba had unanticipated "side effects" that warrant further study when examining sanctions against the DPRK. These side effects built on the ideological nature of the Cuba sanctions, which in turn fuelled the ideological justification of the economic and legal reform measures of the Castro Regime. While Cuba and the DPRK are remain fundamentally different, as are their divergent development pathways, reconciling these differences also remains beyond the scope of this exposition. Due to the ongoing nature of the sanction regime against the DPRK, this paper focuses specifically on *North Korea Sanctions and Policy Enhancement Act of 2016* (HR 757), the instrument that perhaps

¹ See, for instance, Whitty, Kim and Crick (2006).

sparked continued escalation of sanction intensity, arguing that it contains many of the same features as the Cuba sanctions and therefore may potentially have the same consequences.

By turning the focus of this analysis to the law and development of the Cuban State in its reflexivity to the economic aggression from the United States, this paper examines how taking a more integrative approach to the assessment of sanctions can be far more emblematic of the action's impacts. This paper specifically examines the law and development of Cuba from the start of the sanction in the 1960s to identify the Cuba-side factors that in many ways diverted from the efficacy of US sanctions. Furthermore, this paper also identifies some of the unanticipated impacts of those sanctions that also helped buffer the country against US actions by vindicating the Fidel Castro Administration's "rectification" programme.

2. HISTORICAL OVERVIEW OF THE MARXIST EXPERIMENT

A historical overview of modern Cuba may be divided into two eras: 1959 to 1990 and post-1990/1991. The fulcrum of this division is the so-called "Autumn of Nations," a pejorative for the collapse of the Eastern bloc and its widespread economic and political impacts. Two overarching trends are apparent in this narrative:

1. The challenge that the *Partido Comunista de Cuba* (PCC) faced in crystallizing institutional legitimacy in society after the Batista regime.
2. The economic breakwaters put in place to protect the socio-political ideals installed by the revolution and the modulation of these mechanisms to remain relevant in the face of globalization.

Castro's task was to capture the trade winds of globalization in order for Cuba's economy to flourish while setting anchor to the socialism that reversed the societal inequalities that inspired his cause. He did this by practicing rigorous policy engineering on the backdrop of the highly pliable socio-political state that Cuba found itself after the revolution, employing the presence of the continued threat posed by the United States.

This began in 1959, when old Cuban aristocratic society began to have their wealth and assets taken from them in a nationalization campaign by the newly installed revolutionary government, the PCC. The subsequent "golden exiles" that took place until 1960, which was when these threatened aristocrats sought refuge in the United States. This development was significant for two reasons: it eliminated the most influential opposition to Castro's revolutionary government within Cuba, which bolstered political stability (Wallenstein, 1986), and created a prominent anti-Castro community that played an important role in keeping the Cuban issue afloat in US electoral debates (Schwartzman, 2001), although at times in a disruptive manner.²

The Cuban economy was threatened by reciprocal action by the United States, which

² Cuban-American exile groups were also trained for paramilitary activities to destabilize the Castro regime. This group should be considered separate from the Cuban-American exile group as a whole, as they began to take on their own identity that espoused radicalism and terror even on the larger community. One instance was the murder of four Cuban-Americans who attempted to establish dialogue with Cuba in the 1970s (Anderson, 2005: 28-46). Tensions between the Cuban-American exile group and Cuba peaked again in 2000, with the dramatic events that unfolded surrounding the Elian Gonzalez affair.

faced domestic pressure from the newly-formed Cuban-American exile community whose assets were expropriated by the Castro government. Yet Cuba remained largely unperturbed by the threatening stance of the US after the Soviet Union offered Cuba highly lucrative preferential rates for petroleum in exchange for sugar, through which Cuba was able to secure 90% of its energy needs (Xianglin, 2007). In order to fully exploit this highly favourable arrangement, Cuba focused on developing those industries that produced sugar and other semi-processed goods. Policies like the Agrarian Reforms of 1963 diversified and expanded agro-industrial exports by incentivizing farmers to join large State farms aimed to increase output.³ By doing so, Cuba would be able to generate greater gains from trade based on its preferential trading entitlements in the Council for Mutual Economic Assistance, or Comecon (Monreal, 2002), which it joined in 1972, providing for the incubation of a highly lucrative export market.

These early years of Cuban economic growth (1959-1988) were crucial in providing the capital that Castro needed to create social services in such areas as education and health, which would grant him and the revolution popular legitimacy. As a result, in spite of the state of Cuba's economy, social services like education and healthcare services were free and open to all. This proved to be important because it both qualified Castro's revolutionary mission of "adherence to norms of fairness and justice" (Monreal, 2002) and laid the framework for Cuba's highly qualified workforce, which would play an important role in the economy. Furthermore, Cuba was able to create an idealistic, contrapositive form of capitalistic society during the halcyon days of economic neoliberalism.

Cuba's ties with the Soviet Union, though providing the capital for essential infrastructural development, came at a price. The increasing Soviet presence in the Western hemisphere raised tension not only with the United States (CIA, 1963), but also with other Latin American States. The Organization of American States (OAS) collaborated with the United States in imposing a multilateral sanction and quarantine on Cuba in 1962 in response to the Cuban Missile Crisis. By the time Castro established the PCC in 1965, he realized the importance of normalizing diplomatic relationships to encourage cooperation and attract foreign investment. Diversifying sources of financing and investment was important for the Castro Government after learning the risks of overreliance on a single trade partner: by 1959, 68.9% of Cuba's trade portfolio consisted of US firms. While the negative feedback of the sanctions was largely nullified, with total trade was reduced by only 5% (Wallenstein, 1986), through support by Comecon and nations that discounted the sanctions, Cuba aimed at self-reliance. These diplomatic efforts were effective; by 1975, the OAS lifted its collective sanctions as Cuba continued to repair its international relations successfully. Castro knew that in order for revolutionary thinking to become intergenerational, economic and political structures had to be elastic enough to lay the foundations of a market mechanism (William, 1982) while maintaining socialist values, which included market socialism. This became the spirit of Castro's *modus operandi*, which would fully emerge as a mild form of perestroika at the start of the post-autumn era.

At the close of the 1980s, a shadow began to loom over Cuba—one that was cast by the political turmoil that was bubbling across the Eastern bloc leading up to the Revolutions of 1989. Understanding the highly impetuous situation that Cuba would face should the Eastern bloc fall, particularly after 30 years of pursuing an export-oriented growth strategy

³ By 1988, small farms represented 2.7% of the agricultural sector. These farms continued to operate until they were legalized in 1994 (Ritter, 1998: 69-70).

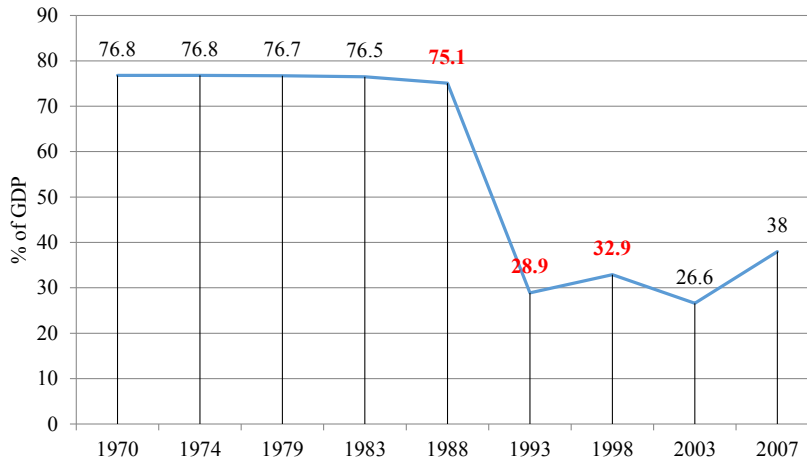


Figure 1. Trade (% of GDP) Cuba, Source: World Bank Databanks

that depended on preferential trade from Comecon and resulted in an extreme monoculture economy highly sensitive to external shock, Castro began to mobilize nationalism. He did so through calls for “socialism or death,” which was the rallying call during the Cuban Revolution, in order to buttress faith in Cuba’s one-party state and the values of its command economy (Xianglin, 2007). This was a necessary step for Castro to give the PCC the resilience that it needed to weather the upcoming storm that would result from the impending collapse of the Eastern bloc and the blow that it would deal to Cuban society. In order to bolster confidence in the socialist objectivity of the regime, Arnaldo Ochoa, who, at the time was the third most powerful official in command and had served at Castro’s side during the revolution, was put on a highly publicized trial in 1989 on charges of corruption (Uhlig, 1989). Ochoa was executed by firing squad in July, along with four other officials, adding to a series of corruption-related internal shakeups that lasted until August 1989 (Reuters, 1989). The extent of media coverage that these trials received was a clear message from the PCC that there were no exceptions in Cuban equality, even for the political elite.

By 1990, the “Autumn of Nations” eclipsed the Eastern bloc and the Soviet Union exhibited sure signs of collapse. The US successfully pressured the Soviet Union to cease its preferential trading agreement with Cuba, which resulted in a 75% decrease in imports and a 35% decrease in Cuba’s GDP (Xianglin, 2007). The significant drop in trade is portrayed in Figures 1 and 2. Cuba’s economy sustained critical damage with the loss of preferential trading with the Comecon, resulting in a “40 per cent reduction in levels of output per capita, caused by shortages of imported inputs of all kinds,” and a fiscal deficit that reached 42.3 per cent of GDP—as is portrayed by the steep slope present between 1990 and 2000 in Figure 2, showing the extent that Cuba depended on Comecon imports (Ritter, 1998). This marked the beginning of the second era of Cuba’s development and the start of Castro’s endeavour to steer the country away from collapse using policy reform.

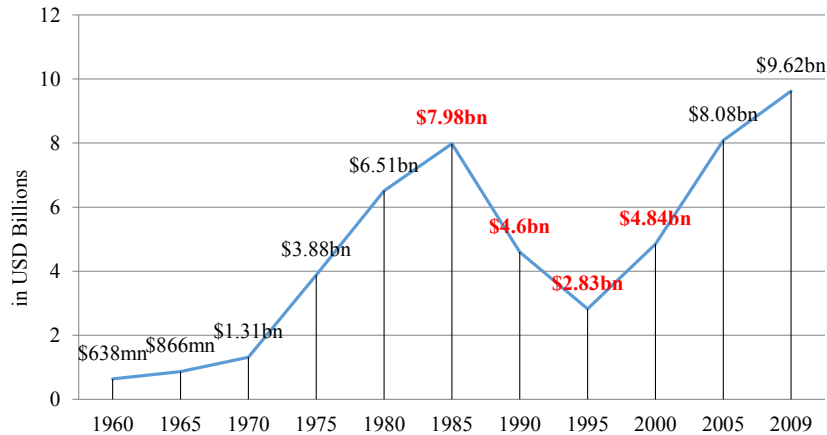


Figure 2. Merchandise imports (in USD) Cuba, Source: World Bank Databanks

3. IMPLEMENTATION OF LAW AND POLICY THROUGH CASTRO'S "RECTIFICATION"

With the fall of the Soviet Union, Cuba became the last bastion of the Comecon in the Western hemisphere – and a direct target of the new global hegemon. In response, Castro employed economic and legal reform measures as well as South-South diplomacy to insulate the resilience of the country's socioeconomic development. Indeed, Castro's policy engineering took off and blossomed in this era, experimenting with controlled market liberalization while maintaining the heavy hand of a paternalistic State in turbulent succession. This section examines the latter half of Cuba's modern history, which demonstrates how the sanctions placed against Cuba legitimized Castro's use of reform by making it a matter of security and national defence.

3.1. Economic Modifications

The collapse of the Soviet Union had dramatic, long-lasting economic effects on Cuba. By 1991, economic assistance from Comecon and the lucrative petroleum subsidies that Cuba received from the Eastern bloc were discontinued, resulting in a 50% drop in petroleum import capacity between 1989 and 1993. This left only 20% of Cuban industrial facilities in operation (Schwartzman, 2001). By 1993, there were reports of individuals living for 18 hours a day without electricity (Anderson, 2005). From 1990, Castro declared that the country would enter a "Special Period in Time of Peace" (*viz.* "Special Period in Peacetime," heretofore "Special Period") in response to the economic challenges that were ahead. During this period, the government practiced import-substitution industrialization, which Castro would refine over this period through "rectification."

Economic policy focused on mobilizing industry towards domestic food production, attracting international tourism, and developing biotechnology and medical equipment to move away from primary commodity exports and towards value-added manufactured goods and services (Monreal, 2002). The State also put in place austerity measures to compensate

for food and energy shortages (Xianglin, 2007). Yet the most difficult of these reform measures would be Castro's controlled opening for the entry of foreign capital, liberalizing certain sectors of the economy to foreign investors.⁴ This period of "rectification" was distinguished from the *perestroika* (or *perestroika tropical*) in that it responded only to those areas that needed "revision" (Schwartzman, 2001), meaning that rather than sweeping reforms, liberalizing structural changes were slight and even rescinded after a period of time. The underlying value of rectification during the Special Period was to provide an economic lifeline by opening the economy insofar as such liberalization did not cause substantial damage to the pillars of Cuban socialism. In this case, it allowed the use of US dollars to encourage trade, operation of private enterprise, and permitting tourism (Anderson, 2005), and continues to play a significant role in Cuba's economy.

New markets like tourism helped generate the foreign capital inflows to help offset the losses from the sugar industry and provided the employment that Cuba needed to recover from its post-autumn economic crisis. They also offered a pathway to the "development of industrial activities and services technologically more advanced and more remunerative for the country" (Monreal, 2002). Foreign companies in tourism and travel have shown increasing interest in Cuba after foreign investment was permitted in 1995. In order to nurture this sector, teaching centres forming a network called FORMATUR were created, training 16,000 workers per year to staff Cuba's blooming tourism industry (Orlando and Gaspar, 2002).

Many of the changes made to Cuba's economy occurred from 1993 to 1995 and initial signs of their positive influence on the economy began to show in 1994 to 1996, when the GDP grew for the first time since 1990. However, shortages continued on everyday strata, with power outages and water shortages occurring in residences and institutions (Anderson, 2005). Important readjustments included the legalization of self-employment in certain industries⁵ to reduce unemployment, legalization of US currency possession⁶ in response to illegal circulation,⁷ the start of sharecropping and collectives as opposed to State farms to generate employment and additional revenue by selling surplus to the State (reducing the number of State farms by 51.3% in six years) and allowing for the sale of goods that exceeded federal quotas.⁸ Important to note, however, is that these measures oftentimes legalized market activities that were already being practiced (Ritter, 1998).

⁴ Foreign investment was additionally permitted in 1995 by way of Decree No. 77, the law of Foreign Investment, which "opened all economic sectors except national defense, health, education to foreign capital, allowing foreigners to maintain individually owned businesses and buy real estate in Cuba"

⁵ In 1998, Decree No 187 further removed government involvement in private businesses by allowing more autonomous internal management.

⁶ By 1995, Cubans were allowed to purchase foreign currency at floating rates.

⁷ This subsequently permitted Cubans to shop at dollar stores, where they were able to purchase items that were unavailable to them otherwise. Many of these economic alterations "merely decriminalized what large numbers of people were already doing." One particularly noteworthy development was the role of the black market, which became essential in supplementing "the shrinking amount available through the ration system." Individuals or families responded to shortages through "rent-seeking," which was when a Cuban citizen would purchase basic goods sold in the peso economy, which, as a part of the rationing system, offered basic goods at "prices that were low relative to the average monthly income," and then resold them in the dollar economy to tourists for a significantly higher amount (Ritter, 76-77).

⁸ In accordance with Decree No. 191 (1994).

With the presence of individual enterprise, a new tax system was introduced in 1994 as well as a restructured social welfare that it could be financed by business tax revenue. These measures contributed to Cuba being able to lower its fiscal deficit and confront excess liquidity. Additionally, foreign investors entered the Cuba market with the creation of a foreign currency bonds system in 1994. These reforms also resulted in the Mexican telecommunications company Grupos Domos purchasing 49% of Cuba's national telephone company, investing USD1.5bn.⁹ In order to better manage national finances with the introduction of new private and foreign actors, Cuba established the Central Bank of Cuba (Xianglin, 2007).

However, Castro began to observe a troubling trend in society. Increasing liberalization responded to shortages that the State could not fill as well as caused large income gaps, particularly in the dollar economy, generating an "individualism" that was "not a source of socialist *conciencia*." The State responded to this development by imposing debilitating taxes on private sellers, who then had to compete rather hopelessly against State-subsidized firms. The firm restrictions placed on these businesses, such as the size of the business, inability to access credit and a market limited to individual consumers forced them into "some type of illegality, such as procuring their inputs through lower-cost and illicit channels or understating their revenues" (Ritter, 1998). Castro's reforms thus "zig-zagged" (Perez-Stable, 1999) between rectifying the state of socialism of Cuba and permitting market-oriented reforms of the economy. This approach became representative of Castro's style of policy engineering, permitting market liberalizations insofar as they did not threaten his socialist ideals.

Yet in spite of Castro's efforts, the Cuban economy found little buffer against external shock. The marked decrease in tourism and circulation of foreign currency in the spectre of the September 11 attacks on the United States had a large impact. Cuba's sugar industry sustained substantial damage that resulted in a spike in unemployment and a reallocation of sugar manufacturing infrastructure that fell into disuse. In order to pull up a sagging agricultural sector, Cuba instituted the Law of Agricultural Production and Credit and Services Cooperatives, increasing revenue retention of collective farms from 50% to 75% (Xianglin, 2007). However, this only made more evident the substantial permeation of US currency in Cuba—a fact that Castro found troubling. As a result, in 2004, Castro banned the use of US currency in commercial transactions, requiring that any such transaction required first an exchange into the peso, which would exact a 10% tax. From 2005 to 2010, even after Fidel passed the reign of power to his brother, Cuba continued to take steps towards a market-oriented economy. In 2008, the sale of personal electronics was authorized including mobile phones, and a reorientation of 500,000 State workers in order to encourage non-state employment in 2010.

3.2. Sociopolitical Modifications

Castro did not test the boundaries of market socialism without first putting in place social safeguards to protect the legitimacy of his regime, which was branded as synonymous with the ideals of socialism. One illustration of this is economic and market reform aimed at liberalization and diversification accompanied by "political and ideological education" to ensure a "tightly interwoven patriotic discourse with economic reform" that would uphold

⁹ The Italian company Stet replaced Grupos Domos in 1997.

the principles of socialism. In effect, structural changes to the market would take place after “massive popular discussions” to ensure the viability of such reforms (Xianglin, 2007). By allowing citizens to participate in assemblies of popular power during market reform, the government reinforced its public image. This was first practiced in 1992, when the constitution was amended to allow for the direct election of national and local representatives and then again in 1993-1994, where “workers, unions, and assemblies discussed the crisis and its solutions” (Schwartzman, 2001). These popular assemblies oftentimes had positive effects in responding to the economic crisis while fortifying the legitimacy of government. It sought to implant the sentiment that resolving shortages was a shared responsibility¹⁰ that permeated all of society as a form of camaraderie.¹¹

Economic shortages, however, disillusioned segments of the population from 1992-1995. One-third of the votes cast during the first election in 1992 for national and provincial assemblies of popular power were either defaced or left blank, which was interpreted as statements against the government. Notable, however, is that while there was dissent, the associations and organizations active in Cuba did “not propose an end to one-party rule but demand[ed] a new form of relationship between the party and society” (Dilla, 2002). As a nod towards the importance of popular support, the government held a second election employing more comprehensive measures of compelling the electorate to cast a valid vote. 99% of the electorate cast a vote with 7.2% of the votes cast being invalid (Perez-Stable, 1999). Nevertheless, 1994 to 1997 was a tumultuous time for the Castro regime: 33,000 Cubans decided to leave in 1994, the revolutionary government experienced its first protest in 1995 and by 1997 the “postrevolution high” of popular support that the PPC enjoyed dropped to 80% (Schwartzman, 2001). In response to these two events, however, Castro did not put up explicit resistance. Those who wished to leave Cuba in 1994 were allowed to do so. The anti-government rallies in 1995 were protected by government security contingents and the day of the protest, August 5, was proclaimed a day of “great revolutionary victory” (Eckstein, 2000). Although the government responded forcefully to acts of dissent that involved the United States,¹² the passive nature of these responses were indicative of vindication that the government sought through popular support.

Even through the most trying times for Cuba, Castro ensured that social services would still be in place, encouraging the public to prioritize the needs of women and children and allocating resources to their needs. The health system, in particular, developed significantly during these times, though aforementioned South-South trade relations were most likely a

¹⁰ According to Ritter (1998), this feeling of *amiguismo* (“friend-ism”) and *sociolismo* (“partner-ism”) became an important facet of social life, particularly during interactions within the economy. (72)

¹¹ This sense of camaraderie also led to the creation of NGOs, which have become more active from the beginning to the middle of the 1990s, when project funds reached USD 42mn in areas of “alternative energy, community development, the environment, popular education, women and institutional development” (Dilla, 2002: 20). Social organizations in Cuba are either seen as “conveyor belts” for the state in the classic, vertically centralized model of social organization,” such as the Cuban Workers’ Central, CTC, which boasts “millions of members,” or smaller associations of professionals or other activities. These organizations are able to exercise certain decision-making powers within those areas that they are relevant, thereby exhibiting a certain “autonomy dynamic at the grassroots level” (Dilla, 17-18).

¹² In 2003, arrested 75 advocates for democracy and executes three men who attempted to flee the country (Xianglin, 103).

large factor in this decision. In 1995, there were 4,000 medical students per year and national health was on par with developed countries at a tenth to a twentieth of the price (Veeken, 1995). By focusing on preventive rather than curative medicine, Cuba was able to maximize the utility of available supplies in the effort to improve national health.

Internationally, Cuba continued to normalize its diplomatic relations with other countries. Lacking the support that it received from the Eastern bloc, Cuba embarked on a number of initiatives to strengthen its foreign relations. In 1994, Cuba joined the Association of Caribbean States; re-established diplomatic ties with the Dominican Republic, Haiti and Spain in 1998; sought to restore its credit with Japan by negotiated the terms of its existing loans; and in 2009 signed a strategic partnership with Russia. In 2008, Cuba signed onto the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Its normalization efforts led to the lifting of EU diplomatic sanctions on Cuba in 2008 and earned it eligibility to re-join the Organization of American States after being barred from membership for half a century. Cuba's garnering for international credibility was a culmination of the relative stability that the country enjoyed from the late 1990's.

4. US-LED SANCTIONS ON CUBA

One element that managed to stay consistent in Cuba's revolutionary change, almost anachronistically so, was the nature of the US sanction. This section analyzes the role of the sanctions in the historical narrative provided in this paper. The objective of this analysis is to establish the connection between the sanction and its effects on the transformation of Cuba as segue into the conclusion that the sanctions in fact helped empower and even justify the reform measures of the Castro Regime.

The consistent role that the US played throughout Cuba's transformation began in 1960, during the Eisenhower administration. At the time, the US sought to punish Cuba for expropriation of US property that occurred in Cuba after the revolution that led to the golden exiles. This motivation changed colours during the Cold War, the collapse of the Soviet Union and the September 11 attacks on the United States. However, one leitmotif is present among these changing motivations: the US insists that the Cuba must adopt a Western market economy (Anderson, 2005). Deconstruction of this language might render a broader theme: a non-democratic State within the Western hemisphere would not be permissible (Hufbauer *et al.*, 2009). This relationship between Cuba and the United States was very clearly established when in response to the 1960 sanction, Fidel Castro declared Cuba a Marxist-Leninist State the following year. The immediate response by the United States was to sever diplomatic ties the same year.

The US sanction was virtually unilateral with an exception of the brief time that the US acted in coalition with the OAS in 1962 in response to the Cuban Missile Crisis. The US-OAS quarantine and sanction can reasonably seen as the most effective period of the sanction's lifetime, during which time institutional cooperation prevented backsliding and ensured a "robust coalition" (Drezner, 2000) with a concrete objective against the presence of Soviet materiel in the Western hemisphere. However, the OAS, after lifting sanctions in 1975, eventually added to Cuba's capacity to find alternative markets.

From the Cuban Missile Crisis to September 11, the United States remained highly alert to any opportunity to tighten sanctions. Once Cuba began its internationalism, for instance,

the Ronald Regan administration responded by not only tightening sanctions, but also starting *Radio Martí*, named after José Julián Martí Pérez, the ideological role model of Fidel Castro. In 1992, the US moved to capitalize on another opportunity provided by the fall of the Eastern bloc by introducing one of two key pieces of legislation in the framework of the US sanction: the *US Cuban Democracy Act of 1991*, or more commonly known as the Torricelli Act. Although there were countries and companies that discounted the US sanction before this law was ratified, such as Spain, which engaged in a bilateral trade agreement with Cuba in 1963 (Schwartzman, 2001), there was fairly little open opposition to the sanctions. The Torricelli Act, however, had two effects: it not only catalyzed recalcitrance in those countries whose economic interests were threatened, but also set a nearly worldwide trend of either opposing US sanctions against Cuba¹³ or ignoring them entirely (Anderson, 2005). Article 1706(a) of the Torricelli Act, which provided for the prohibition of “all foreign subsidiaries of US companies from trading with Cuba” (Wong, 1994). through such measures as prohibiting vessels from conducting trade in the United States within 180 days after departing from Cuba, excited particular enquiry in terms of its legality.¹⁴ Opposition to the Torricelli Act was demonstrated by a United Nations General Assembly Resolution passed that same year, with only Israel and Romania joining the US camp (Hufbauer *et al.*, 2001).

The US sprung at another opportunity to take action against the Castro Administration in 1996, when two civilian aircrafts operated by the Cuban-American exile group, “Brothers to the Rescue,” were shot down upon entering Cuban airspace. In response, the Clinton Administration passed the *Cuban Liberty and Democratic Solidarity Act of 1996*, more commonly referred to as the Helms-Burton Act. This was the second piece of key legislation within the framework of the US sanction, and just as its predecessor, the Torricelli Act, the Helms-Burton Act sparked substantial multilateral legal confrontation, garnered relatively minimal support,¹⁵ and sparked a massive nationalistic rally in Havana (Perez-Stable, 1999). Both Torricelli and Helms-Burton sought to restrict trade with Cuba that involved content produced in the US. The Helms-Burton Act further stipulated visa restrictions for bilateral travel, which was poised to threaten Cuba’s burgeoning tourism industry, but had fairly mild, if not contradictory, effects. The Helms-Burton Act also attempted to repossess nationalized property that was formerly held by US citizens during the Batista regime, which the Cuban National Assembly passed off as the “aspiration to return property to Batista’s followers and the old ruling class” (Anderson, 2005).

In 2002, after September 11 and the dramatic unfolding of the Elian Gonzalez affair,¹⁶ the Bush administration in 2003 established a Commission for Assistance to a Free Cuba (CAFC), chaired by then Secretary of State Condoleezza Rice, to plan Cuba’s transition to democracy. This Commission later announced the “Initiative for a New Cuba,” which offered incentives, such as loosening sanctions, in exchange for political and economic reforms that

¹³ By 2006, the UN General Assembly passed its 15th resolution against the embargo.

¹⁴ The UK and Canada barred US subsidiaries located in their countries from complying with the Torricelli Act.

¹⁵ Conversely, the bill was advocated by those entities whose economic interests were furthered, such as the Bacardi-Martini company based on potential competition with Havana Club rum (Schwartzman, 137). The Bacardi-Martini company successfully filed a claim against a French venture for Havana Club rum (Anderson, 36).

¹⁶ Banet-Weiser (2003) captures this drama in “Elian Gonzalez and ‘The Purpose of America’: Nation, Family, and the Child-Citizen.”

basically called for the conclusion of the Castro regime. For instance, the May 2004 report by the Commission for Assistance to a Free Cuba called for deregulated prices, privatization, property rights and other “free market mechanisms.” These conditions were widely criticized as being “clearly hegemonic” and “annexationist,” sparking anti-US demonstrations that attracted a throng of 1.2 million strong broke out in Havana on 14 May 2004, echoing the demonstrations that occurred after the Helms-Burton Act.

Nevertheless, the sanction remained highly porous; by April 2004, “400 US-based agricultural trade representatives met with Cuban business coordinators in Havana and signed contracts for US\$100 million” (Anderson, 2005). This reflected a strong domestic element within the United States that opposed the sanctions, particularly in rice production,¹⁷ whose economic interests were being deferred by such ideological vestiges of the Cold War. The domestic financial burden of the sanction has been another flashpoint in questioning the sanction. The costs of the sanction caused a “modest welfare loss to [the] sender” according to an index prepared by the Peterson Institute of International Economics, which was its second highest rating out of four.¹⁸

In 2006, however, the Commission prepared another report exhumed by what it identified as “clear signs the regime is using money provided by the Chavez government in Venezuela to reactivate its networks in the hemisphere to subvert democratic governments,” which was a basis for recommending stronger enforcement of the sanction (CAFC, 2006). The Bush Administration then announced that it was “willing to consult with Congress on ways to lift the sanction if Cuba is prepared to free political prisoners, respect human rights, permit the creation of independent organizations, and create a mechanism and pathway toward free and fair elections” (Hufbauer *et al.*, 2001).

The evolution of the sanction and Castro’s countermeasures serve as valuable precedent for understanding the nature of unilateral sanctions, one that may indeed shed light on similar actions elsewhere in the world. This lesson is one that involves understanding the impacts of sanctions during a period of revolutionary transition as well as a cult-of-identity, both of which Castro was able to use to his advantage.

5. THE RESULT OF THE SANCTION IN CASTRO’S CUBA

The fomenting tensions raised by the Cold War placed post-coup d’état Cuba in a unique position after the Batista regime in that it found itself in the centre of an ideological competition between the United States and the Soviet Union. By imposing a sanction against Cuba in 1960 and then severing diplomatic ties in 1961, the US made explicit its unwillingness to negotiate. The sanction had no clear objective except that it was both expressive and punitive in nature—the sender imposed sanctions in order to “express his feelings when the receiver has broken fundamental S [sender] norms, which S regards as fundamental also to other nations” (Wallenstein, 1986). In this particular arrangement, this fundamental norm was the Cold War-era democracy at the height of its anti-Soviet sentiment.

After Cuba affiliated itself with the Soviet Union and the Eastern bloc and continued this relationship for around 30 years, this ideological antagonism not only became an intrinsic

¹⁷ By 1951, the largest importer of US rice was Cuba (Schwartzman, 137)

¹⁸ “Cost to sender is an index from 1 to 4. 1 = net gain to sender, 2 = little effect on sender, 3 = modest welfare loss to sender, 4 = major loss to sender.” (Hufbauer *et al.*, 2001: 115-116)

dimension of the sanction, but also a source of self-powering dynamism. In other words, the US actively searched for ways to legitimize the sanction and the sanction became an end within itself. One way that it sought legitimacy was in recruiting foreign partners to make the sanction more than symbolically multilateral, which was shown to have been unsuccessful with the exception of the quarantine operated with the OAS. The stark comparison in effectiveness is apparent in the dramatic jump of merchandise imports in USD from 1962 to 1977, during the US-OAS sanction and quarantine, when this amount fluctuated between USD760mn to USD1.4bn, and in 1973, the year after the OAS lifted collective sanctions, when this value jumped 30% and continue to increase by 50% over the following three years to 4.7mn by 1977 according to World Development Indicators.

Lacking the legitimacy required to organize further multilateral sanctions, the US continued its unilateral campaign marked by an intrinsic antagonism that manifested itself through not only the sanction, but also such events as the Bay of Pigs invasion in 1961 and Radio *Marti*. In addition, the Cuban-American exile community continued to act against Castro, a drama that climaxed during the Gonzalez affair. These influences pushed the Castro regime into a “state of siege.”

The state of siege theory was originally used to describe the challenges presented by the ecclesiastical changes that occurred after the Council of Trent (1545-1563), which led to the post-Tridentine reformations and practices of the Roman Catholic Church. The church, which was normally able to respond to such trends as modernization with “prudent assimilation and intellectual adaptability,” “adopted the mentality and characteristic activity of a state of siege” in response to the reforms demanded by Martin Luther. This activity was defined as an abnormal attitude of defence that qualified the “dislocation of life involved in a city beset by an enemy” (Fenton, 1945).

This abnormal attitude of defence was observable in Cuba during its process of rectification and the special period, when Castro phrased reforms as necessary to protect the country and its revolution. As observable in the economic modifications that took place during the special period, which not only vacillated between economic liberalizations and restrictions, but also severed the operational connection between the legal system and actual socioeconomic need. This necessitated the systemization of an alternative legal system that was contrary to the formal system in place. This abnormal attitude of defence set up against an enemy found justification in the actions of the United States, whose “preparation of a series of interventionist policies that focused on the emergent civil society as a possible subversive antisystemic.” The teleological rhetoric in such language as “transition” and a “New Cuba” along with the funding of “small opposition groups on the island” and the financing of “extreme-right groups” provided the context for Castro to “establish political filters and ‘padlocks’ to protect national independence and prevent US intervention” (Dilla, 2002) even it meant subverting the rule of law. The defences that were subsequently erected were in inward-looking political measures that set off mild forms of destabilization in certain areas of society, which sensationalized the omnipresence of US antagonism.

Yet this abnormal defence did not come without its sacrifices. Domestic NGOs, which usually strengthen civil society, were enlisted as carefully controlled expressions of this new reality. Organizations that empowered social movements, like labour unions, became conveyor belts of Castroism. While allowed to operate as means to reduce unemployment, private enterprise was situated not only in a predatory business environment, but also in competition with state enterprises. The inability to compete resulted in private businesses seen merely as a means of short-term revenue as opposed to long-term investment, savings,

and the development of relevant human capital (Ritter, 1998).

Market liberalizations were sold to party cadre as necessary steps to protect socialism under the constant threats of shortages, while at the same time strict austerity measures were based on the belief that they “nicely fulfill the prophecy that Marx denounced as the inexorable tendency of nineteenth-century capitalism: the dissolution of community where money is not the community” (Dilla, 2002). Furthermore, market liberalization was associated with the looming imperialistic designs of the United States (Perez-Stable, 1999), whose sanction remained perhaps one of the most consistent attributes of daily life both when Cuba experienced economic decline after the collapse of the Eastern bloc and thereafter with continued attempts to cripple the country’s development.

6. HR 757

HR 757 and the Cuba sanctions were similar insofar as they were targeted sanctions that represented a form of regression to earlier forms of sanctions that took place in the early 1990s. These were primarily meant to change the behaviour of the target as opposed to penalize certain activities. While specific events were identified as triggering both HR757 and the Cuba sanctions, this paper showed the nature or significant of the event was not as important as the opportunity to strengthen the sanction. Furthermore, regardless of whether or not they are successful in evoking their intended end-state of changing the behaviour of the State, as was seen in the case of Cuba, sanction actions were deemed successful as an “exercises of power” to identify targets in the international order (Francesco, 2013).

HR 757 is unique in that it brings back to the table all the legal and moral questions about sanctions that were posed during and after the 20th Century. The overall breadth of HR 757 has largely been unseen in other US Congress legislation or executive orders (EO) and can be seen as the crowning jewel for the Office of Foreign Assets Control (OFAC) given its rather larger-than-life performance record. While EOs have always had a dramatic flavour about them considering its capacity to bypass standard legislative procedures, such expansive legislation passed by Congress was a far more normal sight before and during the Cold War, when communism sufficiently warranted sanctions. More recent legislation has shown a predilection for leaner, more targeted sanctions given the considerable criticism that such measures have been receiving over the past decade.

Including the three most common sanction triggers—non-proliferation, terrorism, and human rights violations—HR 757 identifies 10 triggers applicable to North Korea.

1. Proliferation
2. Transfer of sensitive nuclear and missile technology to state sponsors of terrorism
3. Illicit activities
4. Military provocation
5. Human rights violations
6. Violation of UN Security Council Resolutions
7. Financial aid and abetment to criminal actions
8. Technical support to and execution of cybercrime
9. Imminent threat to the US, its allies, and the global financial system, non-proliferation mechanism, and the people of North Korea
10. Terrorism

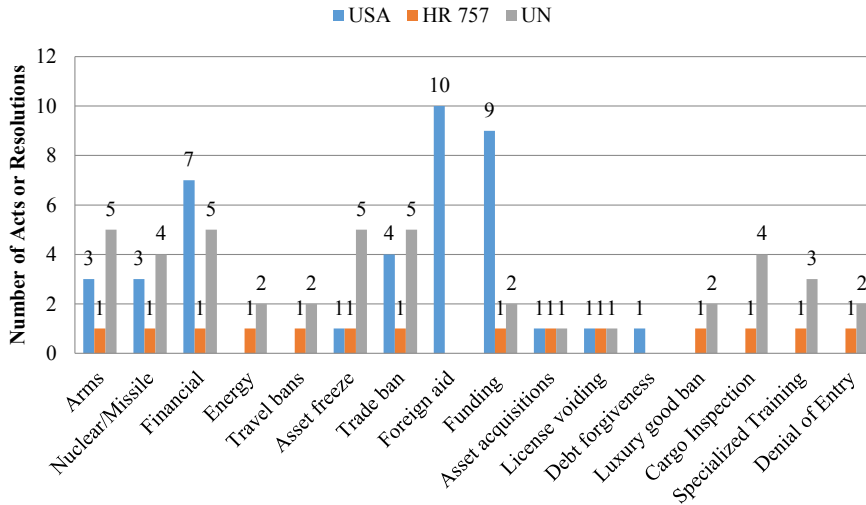


Figure 3. Sanction Targets

In identifying these 10 triggers, HR 757 identifies four purposes in §2(b), of which the second is particularly poignant: “diplomatic leverage to negotiate necessary changes in the conduct of the Government of North Korea.” In accomplishing this objective, §104 casts a wide net in its designations of persons, including many of the provisions in past legislation such as including individuals who are engaged in financial transactions with North Korea or states that provide any form of military equipment or assistance (Antiterrorism and Effective Death Penalty Act of 1996 §§321, 325-326) and foreign persons providing assistance to North Korea’s WMD programmes (Iran, North Korea, and Syria Nonproliferation Act of 2000). HR 757 also grants the President the power to further designate any persons “pursuant to an applicable United Nations Security Council resolution” that has been shown to do any of the following in relation to or on behalf of the North Korean government and its officials:

1. Support, sponsor, or assist
2. Bribe, embezzle, or misappropriate

Those individuals or states designated under HR 757 are also recipient to a far more comprehensive set of targets than the Congress-passed bills of the past. As such, HR 757 is not so much a departure from previous Acts, but rather a convergence with UNSC Resolutions in terms of the breadth of target actions.

While HR 757 is in many ways in line with the Resolutions of the UNSC, the implementation of these measures to entities within the jurisdiction of the United States requires additional deliberation. This is necessitated by two unique characteristics of HR 757. The first is that the broad range of designations presented in the Act impacts not only actors in connexion with the North Korean regime, but also entities that are several steps down the supply chain based on negligence of due diligence as stated in *inter alia* §101(2)-(3).

The second reason is that HR 757 emphasizes the necessity of multilateral sanctions in a number of ways. In addition to matters of due diligence, the language in HR 757 also calls upon “financial institutions worldwide” to “think carefully about the risks of doing any North

Korea-related business,” empowering the Financial Action Task Force to uphold the integrity of the international financial system in the sanction actions identified in the Act. Included in this due diligence requirement is “sharing information about activities, transactions, and property” that could undermine the purposes of the sanction (§201a(1)(A)(ii), (2)(B), b(3)).

The European Union and China are identified as having especially crucial roles in protecting the international financial system on the basis that the former is one of the two principal reserve currencies and that the latter being North Korea’s “principal trading partner.” The interpretation of such language is yet to be seen by other states, whether that is in reluctant compliance or any level of disregarding HR 757 such as in monitoring requirements or target actions. Sanctions against Cuba rendered similar results with the Torricelli Act, which was shown to have caused considerable recalcitrance, particularly in those countries whose economics interests were threatened in some way. This Act also included the inclusion of subsidiaries of any US company engaged in trade with Cuba into designation under Article 1706(a), though notably in the UK and Canada, US subsidiaries were barred from such compliance.

In order to proverbially up the ante, the United States in HR 757 expressed its willingness to offer technical assistance to countries in their endeavour to implement UN sanctions against North Korea, as well as assist in the measures to “increase outreach to the people of North Korea” (§202a(5)-(6), c(1)-(6)). The use of such technical assistance in the past for the purposes of rallying governments against a single target state has been seen before, perhaps starting with the Point Four Programme, which was aimed at lesser developed countries to resist recruitment by the Soviet Union by providing technological training or materials as aid.

While HR 757 is altogether quite bold, insofar as congressional legislation goes, US powers to designate sanction targets down supply chains or employ a rather broad interpretation of national interests is not without precedent. The International Emergency Economic Powers Act (IEEPA), for instance, had already given power to the Office of Foreign Assets Control (OFAC) to employ economic sanctions in situations when US national interests are threatened. These interests both domestically and abroad have shown to be interpreted and expanded through the issuance of Executive Orders. For instance, EO 13687 and the “destructive, coercive cyber-related actions during November and December 2014” therefore further added the cyber element to US jurisdiction. These EOs make it into legislative procedures through judicial interpretation. The OFAC and the constitutionality of relevant EOs that empower the use of sanctions, for instance, was set in precedence through *Propper v. Clark* 337 US 472, 481 (1949).

While the question of US jurisdiction regarding sanctions against North Korea found conciliation through the USA Patriot Act §311, which identified North Korea as being a state sponsor of terrorism, the question of jurisdiction in relation to entities that are increasingly distant from North Korea requires closer scrutiny. In addition to matters of jurisdiction, there are several questions concerning legality that must be more carefully assessed.

While the development of Cuba and North Korea widely diverge, unilateral, ideologically-based sanctions can ultimately generate the same consequences. Having more specific sanction triggers and targets have made the smart in “smart sanctions” a misnomer when such sanctions are, at the core, driven by teleological cause: imposition of a sanction has become the goal in and of itself. This was the case in Cuba and, as this paper argues, has become the case for the DPRK. There are, however, two primary differences to note: (1) the magnitude of military threat that the DPRK poses to the United States with weapons of mass destruction and (2) the use of secondary sanctions. While the first is beyond the scope of this

paper, the second merits further examination.

Generally accepted as being considerably more extensive than other US Congress legislation or executive orders, HR 757 has had a larger total impact through secondary sanctions that target DPRK supply chains and associations.¹⁹ Yet rather than the increased number of sanction triggers in HR 757 and its coherence with UN multilateral sanctions, what is important to focus on is what has not changed. Just as the Cuba sanction began to lose its functionality as it became increasingly ideological under the Cold War stalwarts of days passed, sanctions against the DPRK are also being weighed down by the same good-versus-evil ethic. The cause for concern here is that following one such a path will only further empower the DPRK regime to justify to its population the necessities of resistance and the importance of self-defence. While the DPRK developing ICBMs is reminiscent of the low-hanging insanity behind the mutually-assured-destruction strategy of the Cold War era, to the DPRK leadership under the influence of a besieged fortress mentality, it may indeed seem like that there is no alternative.

HR 757 and its legislative foundations are laden with this sort of teleological rhetoric. Its purpose as written in Section 2(b), for instance, states that it seeks to gain “diplomatic leverage to negotiate necessary changes in the conduct of the Government of North Korea.” This purpose is justified by a sanction target that has been attached to the DPRK under the umbrella of antiterrorism from as far back as *Antiterrorism and Effective Death Penalty Act* of 1996 (§§321, 325-326) or even broader categorizations in, *inter alia*, the *Trading with the Enemy Act* of 1950. This further strengthened after the 9/11 attacks with the *USA Patriot Act* (§311), which identifies North Korea as being a State sponsor of terrorism and thus casts a broad basis for taking aggressive actions against it.

Furthermore, the broad range of designations made available in HR 757 for secondary sanctions, such as targeting those who are connected to the supply chain of a DPRK enterprise, can potentially be a dangerous trend if not supplemented with an accurate means of limiting that scope. For instance, secondary sanctions applied through the *Torricelli Act* had overly inclusive designations that threatened economic interest of not only the enterprises of the allied nations, but also American businesses as well. This was a major cause of recalcitrance against the sanction, which heightened the incentive to find loopholes. In addition, another question raised by highly delimited sanction designations is whether they are in accordance with the principles of discrimination and proportionality. The first is whether unilateral or even multilateral sanctions are able to discriminate its targets in ways that is adequately sophisticated? The second is whether the material injury (such as financial) imposed on those designated by secondary targets is proportional to the magnitude of their violation of the sanction instrument – such as a contribution to the DPRK nuclear programme in the case of HR 757.

One may look to the way in which Japanese citizens are influenced by sanctions targeting the DPRK in assessing the extent to which such sanctions adequately observe discrimination and proportionality. In implementing UN Security Council Resolution 2270 through legislation,²⁰ a wide range of restrictions were introduced. Actions include revoking licenses, rights to transfer stock, and prevents employment of individuals with a Japanese bank account by designated institutions. This law also expands designations to include any institutions with

¹⁹ §101(2) to 101(3).

²⁰ *Kokurenn Anpouriketsugi Dai2270gou-no Jissi-no tame-no Kinnyu kannren Sochi-ni tsuite* (‘Financial Measures for the Implementation of UN Security Council Resolution 2270’)

any investment from North Korea or North Korean enterprises including shared liabilities, equity, or controlling power. Furthermore, this Act also permitted the application of Japanese criminal law to individuals suspected of having such commercial relations with designated institutions or individuals and makes mandatory the reporting of any such activity.

Yet these Acts expressly include a non-derogation element involving payments or transfers that are made for the satisfaction of fundamental human needs. This is especially important in Japan considering the fact that there are Koreans born in Japan who choose to adopt North Korean citizenship while still maintaining many of the rights that Japanese have as permanent residents. It is not difficult to imagine that suspicions of complicity by these individuals in sanction triggers is significantly higher purely on the basis of their citizenship or even ethnicity for those individuals who choose to maintain their Japanese citizenship but live in a community of North Korean citizens in Japan. The application of the principle of discrimination in such circumstances undergoes considerable obfuscation, especially with the broadening of designation measures. This obfuscation of legal principle has already shown to have a social impact Japan, as ethnic Korean residents been required to sign pledges in April 2016 to not travel to the DPRK or when in May 2016 a South Korean professor in Kyoto was blacklisted (Shim, 2016).

These socioeconomic consequences posed by secondary sanctions on the DPRK would have been a more convoluted task in application to Cuba. The level of economic integration between the United States and Latin America would have inevitably posed larger opportunity costs to such actions should they begin to involve regional trading partners. Furthermore, the integration of the Cuban community into the United States that began with the Golden Exiles would have further complicated matters of broadening trigger actions to targets that were US citizens and/or operating commercially within the US. This was a much smaller threat concerning the DPRK, though as this subsection showed some of that burden is now being shouldered by countries like Japan, with large diasporic communities – many of which still pledge allegiance to the DPRK.

7. CONCLUSION

As this paper attempted to show, examining the context in which Cuba responded to US sanctions reflects broader lessons in application to HR757 as it is essentially a more comprehensive sanction applied to similar circumstances. The policy implications of such a lesson are profound: simply increasing the magnitude of a sanction can render limited impact if they are applied irrespective of structural elements of the target country. As the case of Cuba showed, they may in fact result in a strengthening of an ideological imperative to resist, given the ideological nature of the sanction itself. While the national development of Cuba and the DPRK have radically diverged after the fall of the Soviet Union, this does not discount the value of learning from the history of their law and development. The design of economic sanctions benefit from examining the interaction of these forces, as this paper attempted to do. While such “side effects” of HR 757 and more recent actions through the United Nations are yet to be seen from an institutional standpoint, the rigour of secondary sanctions have shown to mystify the scope of secondary targets, with such overzealous application resulting in extending side effects from institutional to ones that affect individual livelihoods.

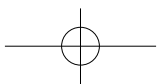
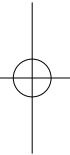
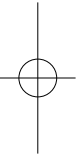
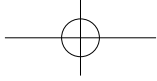
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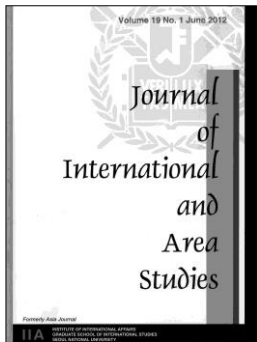
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Soo-hyun Lee, Research Associate, International Law and Dispute Settlement Programme, The Asan Institute for Policy Studies, 11 Gyeonghuigung Iga-gil Jongno-gu, Seoul, 03178 Korea, Tel: +82-2-3701-7342, E-mail: leesoo Hyun@asaninst.org, soohyun.lee@protonmail.com



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