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The First Casualty of U.S. Economic Warfare Against Cuba:

The International Rule of Law

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Introduction

In its most common form economic warfare aims to weaken a country's economy in order to reduce its military power. The regulations deployed by the U.S.

Department of the Treasury today in its various economic sanctions programs had their origins in the declared hostilities against the Kaiser's Germany in World War I. More controversially in terms of international law, economic warfare can also be used to compel a country to change its form of government or its behavior as is the case with the panoply of U.S. sanctions imposed on countries that include Venezuela, Iran, Syria, Russia, North Korea, China and a number of others.

With Cuba, the rationale for U.S. economic sanctions has shifted among varied objectives over time such as extracting compensation for nationalized U.S. corporate assets, to undermining Cuba's role as a Soviet Cold War ally, to producing political change in Cuba. With brief interruptions such as the Obama Administration's policy in 2015-16, U.S. economic sanctions on Cuba have been made more, rather than less, complex and stringent since their inception nearly sixty-five years ago.

The Trading with the Enemy Act authorizes the U.S. Treasury Department's regulations that constitute what is referred to as the “embargo” on Cuba. This embargo prohibits transactions by “U.S. persons” (including corporations), with Cuba and Cuban unless they are specifically authorized. Trade and investment are among the prohibited transactions. But the regulations go further by prohibiting non-U.S. nationals from engaging in certain trade and investment involving Cuba and its nationals.

Embargo v. Blockade

An embargo can be described as a bilateral affair where one nation forbids its nationals from doing business with another nation. A blockade is different - it obstructs and prevents third-country nationals from dealing with a targeted nation. A subject for another day is the compatibility with international law of the U.S. embargo on Cuba as it restricts U.S. nationals and companies. Today I deal only with the blockade aspect of the U.S. economic war on Cuba and address its violations of international law.

The Essential Element of International Law

The central underpinning of international law is sovereignty, which may be said to be the right of a nation to independently fashion its policies free of coercion and interference by other countries.

A sovereign nation state enforces its policies through the assertion of exclusive jurisdiction; that is, it alone legislates and creates the laws and regulations that implement its national policies. In the international sphere the matters over which a nation may assert jurisdiction are governed by public international law. The jurisdiction of a nation within its own territory is exclusive and any non-consensual external limitation of that jurisdiction (i.e. by another nation) constitutes a diminution of the affected nation's sovereignty, and therefore violates international law. The same may be said of attempts to disrupt the foreign policies of other nations which necessarily are sovereign in nature because only a nation possesses the authority to engage other nations in, for example, trade and investment through the execution of binding nation-to-nation agreements. (An example are the numerous bilateral agreements Cuba has executed with other countries to facilitate trade and investment. Spain is especially active in this area).

In summary, attempts to punish and frustrate a country's foreign policy decisions violate the sovereignty principle of international law.

How U.S. Economic Sanctions on Cuba Violate International Law when They are Directed at Third-Country Nationals.

As we have seen, a nation possesses the exclusive authority to regulate activity within its territory. But it has no inherent authority to legislate and regulate beyond its borders. Nevertheless the U.S. routinely does this when it comes to Cuba.

U.S. Export Laws

Because the U.S. insists without a statutory basis in listing Cuba as a state sponsor of terrorism, no item may be sold by a third-country national (e.g. Spain) to Cuba or Cubans if it contains more than a de minimis 10% or less U.S. content by value.

For example, if a Spanish wind turbine sells for $10,000 and a U.S. component of the turbine has a value of $1,000, then a Spanish national requires an export license from a U.S. government agency to sell the turbine to Cuba, even if it is designed and manufactured in Spain and 90% of its content is of non-U.S. origin. This punitive assertion of extraterritoriality by the U.S. is impermissible under international law because it denies to Spain the sovereign right to authorize its nationals to engage in export commerce with Cuba as an element of its foreign policy regarding that country.

Prohibitions on Use of the U.S. Dollar

Another assertion of U.S. extraterritoriality is the prohibition on the use of the U.S. dollar in transactions involving Cuba and Cubans. Notwithstanding the benefits to the U.S. of the dollar operating as the world's reserve currency, European banks have incurred civil penalties in the hundreds of millions - and even billions - of dollars for processing mundane Cuba-related international funds transfers denominated in U.S. dollars. The payments were made for ordinary international commercial transactions, e.g. wire transfers for food shipments to Cuba. But because the payments were in dollars, the banks were penalized savagely. This constitutes a restraint on trade that impinges on the rights inherent in international law for non-U.S. companies to engage in lawful trade with Cuba without brutal third-party interference. The result of the U.S. draconian penalties for the use of the U.S. dollar in Cuba-related transactions has been that banks now broadly refuse to handle any money transfers involving Cuba, even if denominated in Euros.

Blocking the Use of, and Inbound Investment in, Properties in Cuba

Title III of the Helms-Burton Act created a lawsuit right in U.S. courts for anyone who alleges someone is using a Cuban property to which they own the claim. Damages awards in one instance have been rendered in the hundreds of millions of dollars against cruise ship companies for allowing their passengers to walk upon a dock in Havana that was nationalized over sixty years ago. Ironically the awards are against U.S. cruise lines, but the warning to foreign companies is as stark as a gibbeted corpse at a medieval crossroads. The singular authority of a nation to exclusively regulate rights and interests in real property within its national territory is the most fundamental aspect of the national sovereignty principle of public international law. Title III violates that principle with childlike enthusiasm.

Does it Matter that the Extraterritorial Sanctions Imposed by the U.S.

on Cuba Violate International Law?

Clearly it matters to Cuba and affected third-country countries and their nationals, being, as they are, on the receiving end of the U.S. violations of international law. But does it matter to my country, the United States, and my compatriots? There is little evidence that it does, in the sense that it is a cause of concern. But it does matter in that what our Secretaries of State loudly proclaim to be an international

"rule of law" is not like a cafeteria from which you choose some items and ignore others. It is a delicate system ultimately dependent on voluntary compliance because, by-and-large, it lacks mechanisms of enforcement. (As is sometimes said, there is no international law jail in Geneva). It is a consensual system that rests on the fundamental obligation of good aith. Breach that obligation and in the words of Joni Mitchell “you [won’t] know what you’ve got until it’s gone.”