


Sanctions easing as a sign of non-hostility

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I. Introduction

In this Policy Forum, Leon V. Sigal writes that “The DPRK has long sought an easing of U.S. and ‘U.S.-led’ sanctions as a sign that Washington is moving away from what Pyongyang calls the U.S. ‘hostile policy.’” Sigal argues that “financial sanctions are likely to be difficult to undo piecemeal” and that “sanctions-easing would best focus initially on humanitarian aid and the relaxation of licensing requirements, where the president has leeway and the likelihood of pushback from Congress is lower.”

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II. Policy Forum by Leon V. Sigal

The DPRK has long sought an easing of U.S. and “U.S.-led” sanctions as a sign that Washington is moving away from what Pyongyang calls the U.S. “hostile policy.” Similarly, the DPRK has never sought food or other humanitarian assistance simply for its own sake, but as a sign of non-hostility. As Pyongyang has said many times, its deterrent is not “for sale” – its relationship with Washington is the issue. Relaxation of sanctions would symbolize an easing of enmity, although it might not fully satisfy DPRK demands for fundamental change in its relationship with the United States.

Nor would it necessarily spur economic growth. First, despite stepped-up sanctions, the DPRK’s trade, investment, and GDP have been growing modestly over the past decade. Second, more substantial increases in the DPRK’s trade and GDP would require a large infusion of foreign investment to promote production, which depends on outsiders’ perceptions of the economic climate in the DPRK, not just a relaxation of sanctions.

Some sanctions are easier to relax than others. While all sanctions would be lifted as part of a comprehensive settlement, financial sanctions are likely to be difficult to undo piecemeal.

A history of sanctions imposed and eased

U.S. sanctions date back to the Korean War when it imposed wide-ranging sanctions on the DPRK under the Trading with the Enemy Act (TWEA), as well as the Export Administration Act and the Defense Production Act. TWEA sanctions, with some modifications, were later incorporated into National Emergencies Act of 1976 and the International Emergencies Powers Act of 1977, which had to be renewed annually by the president. Congress has enacted additional sanctions on the DPRK and DPRK entities on various grounds – that the DPRK was not only a danger to national security, was a Marxist-Leninist state was involved in proliferation of weapons technology, was a non-nuclear state that tested a nuclear weapons, was a state sponsor of terrorism, and was engaged in illicit activities. Presidents have used their executive authority to impose still more sanctions.

The DPRK has called for an end to U.S. sanctions for many years. It also demanded an easing of

sanctions in negotiations. In the Agreed Framework of October 1994, the United States pledged to “move toward full normalization of political and economic relations,” specifically to “reduce barriers to trade and investment, including restrictions on telecom services and financial transactions.” President Clinton did ease sanctions to permit some financial transactions and telecommunications exports, the importation of magnesite, and participation of U.S. firms in the light-water reactor project. Yet most sanctions remained in place.

In 2000, in belated response to a 1999 DPRK moratorium on missile tests, President Clinton further relaxed sanctions under the Trading with the Enemy Act, the Export Administration Act and the Defense Production Act. Some items that had previously required a license then became eligible for export; others that automatically were denied licenses became subject to review on a case-by-case basis.^[1]

In 2000 Kim Jong-il himself told a group of South Korean journalists accompanying Kim Dae-jung to Pyongyang for the first ever North-South summit meeting, “We can’t put up with the draconian economic sanctions the United States has imposed on us. Our economy is in a state of collapse and many of our people are dying of starvation, you know?”^[2]

During talks with Assistant Secretary of State James Kelly in October 2002, Kang Sok-ju listed the lifting of sanctions as a quid pro quo for denuclearization.^[3] A Foreign Ministry statement later that month disclosed this:

[T]he DPRK made itself very clear to the special envoy of the U.S. President that the DPRK was entitled to possess not only nuclear weapon but any type of weapon more powerful than that so as to defend its sovereignty and right to existence from the ever-growing nuclear threat by the U.S. ... Nevertheless, the DPRK, with greatest magnanimity, clarified that it was ready to seek a negotiated settlement of this issue on the following three conditions: Firstly, if the U.S. recognizes the DPRK’s sovereignty, secondly, if it assures the DPRK of nonaggression and thirdly, if the U.S. does not *hinder the economic development of the DPRK*.^[4]

Before the second round of six-party talks, according to the DPRK Foreign Ministry spokesman, in lieu of a package solution the DPRK proposed “measures such as the U.S. delisting the DPRK as a ‘terrorism sponsor,’ lift[ing] of the political, economic and military sanctions and blockade and energy aid including the supply of heavy fuel oil and electricity by the U.S. and neighboring countries ... in exchange for the DPRK’s freeze of nuclear activities. This would lay a foundation for furthering the six-way talks. What is clear is that in no case the DPRK would freeze its nuclear activities unless it is rewarded.” ^[5]

The fourth round of six-party talks yielded a joint statement in September 2005 that, among other things, committed the United States and the DPRK to “take steps to normalize their relations subject to their respective bilateral policies.” As the six-party talks were finalizing this agreement, the U.S. Treasury Department imposed new “financial measures.” The ostensible target was Banco Delta Asia, a bank in Macao that it accused of money-laundering and barred from transacting business with U.S. financial institutions under Section 311 of the USA PATRIOT Act. The reputational risk to BDA had an immediate effect: a run on the bank prompting Macao authorities to shut it down, freezing DPRK accounts. The Treasury’s aim extended beyond BDA and possible illicit activities by Pyongyang to deny DPRK access to financial institutions everywhere. In July 2009 Undersecretary of the Treasury Stuart Levey made public what he had been telling bankers around the world:

The bottom line is that because of this kind of deceptive conduct that North Korea engages in that obscures the nature of their transactions, *it’s virtually impossible to distinguish between legitimate and illegitimate North Korean business*. In the financial world, transparency is a

fundamental value. ... And North Korea acts in a way that is intended to be opaque. And so it's for that reason that this has a powerful effect not only with governments, but with the private sector, and particularly banks around the world that have every incentive to protect themselves from this kind of illicit activity. They don't want to get involved in illicit transactions, whether it's a nuclear transaction, a missile transaction, whether it's a transaction that involves the provision of luxury goods to North Korea, which is a violation of the Security Council resolutions. They don't want to get involved in those transactions, both because they're good corporate citizens, but also because they are very protective of their own reputations.[6]

The U.S. action against BDA led the DPRK to boycott six-party talks and warn of "countermeasures." A Foreign Ministry spokesman noted in February 2006, "We attach importance to the lift of the financial sanctions against us because this issue serves as a yardstick showing whether the U.S. is willing to drop its hostile policy towards the DPRK as it had committed itself in the joint statement adopted at the six-party talks or not." [7] In announcing the DPRK's first nuclear test, the Foreign Ministry spokesman noted, "The U.S. extreme threat of a nuclear war and sanctions and pressure compel the DPRK to conduct a nuclear test, an essential process for bolstering [its] nuclear deterrent." [8] Its first nuclear test in October 2006 led the U.N. Security Council to adopt resolution 1718, forbidding the trade in or transfer of arms, nuclear and missile technology and sale of luxury goods to the DPRK, authorized inspection of suspect shipping, and barred financial transactions that could facilitate the DPRK's nuclear and missile programs.

U.S. willingness to open bilateral talks on the repatriation of blocked DPRK funds in BDA accounts led to resumption of six-party talks, but negotiator Kim Gye-gwan made its position clear on the eve of the sixth round: "If the Banco Delta Asia financial sanctions are not completely lifted, we are not going to stop our nuclear development program." [9] With the return of the DPRK funds in BDA, implementation of the September 2005 joint declaration did resume. Yet U.S. Treasury "financial measures" remained in place, impeding DPRK access to global banking.

In response to the start of disablement of DPRK nuclear facilities at Yongbyon, President George W. Bush removed restrictions based on the Trading with the Enemy Act on June 26, 2008, the same day that he certified delisting of North Korea as a state sponsor of terrorism. That very day, however, he restored many, though not all of these restrictions by invoking the National Emergencies Act and the International Emergency Economic Powers Act to declare the North a threat to national security because of "the current existence and risk of the proliferation of weapons-usable fissile material on the Korean Peninsula." [10] (That executive order would have lapsed in a year, had President Obama not renewed and expanded it in 2010, 2011 and since.) Moreover, despite delisting the DPRK as a state sponsor of terrorism, the Commerce Department maintained anti-terrorism sanctions. [11] The DPRK Foreign Ministry spokesman noted the limits of the U.S. action at the time: "The measure taken by the U.S. to lift the major sanctions which it has applied against the DPRK, listing it as an enemy state for more than half a century, should lead to totally withdrawing its hostile policy toward the DPRK in all fields in the future. Only then can the denuclearization process make smooth progress along its orbit." [12]

The DPRK's second nuclear test in May 2009 prompted Security Council resolution 1874, which tightened implementation of financial sanctions and established a Panel of experts to oversee and extend the sanctions. On January 11, 2010, the Foreign Ministry spokesman put sanctions front-and-center as a "barrier of mistrust," adding, "The removal of the barrier of such discrimination and distrust as sanctions may soon lead to the opening of the six-party talks." [13]

In an important statement of current DPRK policy, the Foreign Ministry stated in its August 31, 2012 memorandum:

The U.S. economic sanctions against the DPRK are an important tool for the pursuit of its long-standing hostile policy towards the DPRK. The U.S. curtails trade with the DPRK and imposes all sorts of economic sanctions on such accusations that DPRK threatens regional stability, does not cooperate with the U.S. in its anti-terrorism efforts, engage in proliferation of weapons of mass destruction and that the DPRK is communist state, nonmarket economy, etc. In particular, *economic sanctions imposed on the DPRK before the rise of the nuclear issue* have nothing to do with the nuclear issue and merely reflect the U.S. hostile concept towards the DPRK. Having defined the DPRK as a "Marxist-Leninist state with a communist government," the U.S. has long maintained sanctions against the DPRK. The U.S. began to apply the Trading with the Enemy Act to the DPRK from December 1950. A few days later, the U.S. Department of the Treasury issued Foreign Assets Control Regulations to forbid any financial transactions involving, or on behalf of, the DPRK.[\[14\]](#)

In distinguishing nuclear-related sanctions, those imposed unilaterally as well as those authorized by the Security Council, the DPRK seems to be suggesting that easing of U.S. sanctions imposed prior to 1988 would initially suffice.

Prospects for further sanctions easing

Presidents have used their legislative leeway to relax some sanctions. In 1989 President George H.W. Bush eased travel restrictions to permit academic, cultural, and sports exchanges and, pursuant to legislation enacted in 1988, permitted the export and import of informational material, which allowed news organizations to open bureaus in the North. Administrative regulations under the Export Administration Act were also eased to allow the donation of goods on a case-by-case basis to meet "basic human needs" in the North and were relaxed still further in response to the flooding and famine in the North in 1995, 1996, and 1997.[\[15\]](#) President Obama has himself relaxed some sanctions as part of the ongoing negotiations with Iran on its nuclear program.

While relaxation of sanctions is an essential step toward "full political and economic normalization," it cannot always be done at the stroke of a president's pen. In some cases, the president has the discretion to do so if he deems it "essential to the national security of the United States" or cites other exceptional grounds. In other cases, legal impediments stand in the way. These can take several forms. The Nuclear Nonproliferation Act (or "Glenn amendment") for instance, limits the president's power to waive some sanctions without legislation. In still other cases, Congress requires the president to notify it before exercising that power, giving it time to block the waiver with legislation. Still other sanctions cannot be eased without U.N. Security Council action.

Seldom does legislation spell out what actions by the DPRK will lead to relaxation of sanctions, although some sanctions do expire unless renewed by Congress.

Complicating sanctions easing still further is the layer upon layer of sanctions enacted by Congress. Some of these legislative actions impede the president's waiver authority while others do not. The DPRK is under sanction not only for its proliferation-related activities, but also for regional clashes, terrorism, undemocratic governance, management of its economy, and illicit activities such as narcotics trafficking, counterfeiting goods and currency and smuggling bulk cash. As a Congressional Research Service study notes, "Each of these forms of objectionable behavior likely would be grounds, under current law, for restricting trade, aid, arms sales, and access to assets even if the national emergency were to be revoked."[\[16\]](#)

Proliferation-related sanctions under the Arms Export Control Act, the Atomic Energy Act, and the Export-Import Bank Act of 1945 are the most stringent and least flexible. Some cannot be eased without Congressional legislation. Together, they bar any assistance to the DPRK other than

humanitarian aid.

Financial sanctions enacted in the USA PATRIOT Act of 2001 have a built-in inflexibility that inhibits partial relaxation. Under Section 301, any bank that does business with certain DPRK entities can be denied correspondent relations with U.S. financial institutions, which in effect can put the bank out of business. To avoid that risk, any bank, domestic or foreign, would require a legal waiver from both the Department of Justice and Department of the Treasury before conducting the transaction. Yet if one bank is granted such a waiver, other banks may well demand equal treatment, which make those departments reluctant to issue any waiver at all. That seems to have been the case with the BDA, which used a convoluted procedure involving the Federal Reserve Bank of New York, the Russian central bank, and a Russian bank to repatriate North Korean funds frozen by the Macao Monetary Authority. As one of the architects of the financial sanctions acknowledges, “[T]he Treasury representatives did not want to signal that there would be automatic safe harbors against regulatory action for any jurisdiction of institution involved. ... [I]t was up to the State Department to fund banks willing to do risky business.”[\[17\]](#) The consequence is that a partial easing of financial sanctions is difficult.

Sanctions imposed by the U.N. Security Council cannot be undone without Security Council action. That may require a vote by the Council, or in some cases, by statement from the Security Council President. U.S. support would be needed, which would not likely be forthcoming without DPRK action to undo the missile or nuclear activities that occasioned the sanctions. Other sanctions, such as South Korea’s May 24 measures or those imposed by Japan, can be relaxed by their own unilateral action. Multilateral action facilitate that. ASEAN’s support for sanctions-easing with Myanmar might serve as a precedent.[\[18\]](#)

In conclusion, sanctions-easing would best focus initially on humanitarian aid and the relaxation of licensing requirements, where the president has leeway and the likelihood of pushback from Congress is lower. Use of the president’s waiver authority was part of the gradual improvement in relations with Vietnam and Myanmar and will almost certainly be the case in the future with Iran or Cuba.

III. References and Notes

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