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First Do No Harm: Myanmar Trade Sanctions and Human Rights

Michael Ewing-Chow*

I. INTRODUCTION

¶1 One problem that has plagued international law has been the enforcement of human rights. There is no global supranational body to hold a state in breach of international human rights accountable for its action. Short of using force to initiate a regime change, the common options taken by international actors have been to either impose trade sanctions or to participate in engagement. Both these options have significant drawbacks.

¶2 One influential study on sanctions concludes from an analysis of more than a hundred cases that economic sanctions have only worked to some extent about a third of the time.¹ However, even this relatively positive assessment has been disputed on the grounds that the authors were overly generous in judging what were successful sanctions and in not properly separating the effects of sanctions from the impact of the threat or use of military force.² The study also does not clearly differentiate between sanctions imposed to affect relatively modest behavior modifications in a friendly state and those imposed to cause regime change in a rogue state. It has been suggested that sanctions are usually more effective in the former and less effective in the latter due to conflict expectations.³

¶3 Indeed, most trade sanctions aimed at regime change, as illustrated by the cases of Cuba and Iraq, have done little to hurt those who wield power and instead have led to the targeted regimes consolidating their positions.⁴ This is often the case since the targeted regimes are able to develop alternative means of circumventing the sanctions whereas legitimate private traders cannot do so. While some believe that sufficient hardship to the population of a country will result in an internal uprising causing a regime change, perhaps inspired by the American War of Independence, this is too simplistic a view that does not take into account the likelihood of such an event based on the history, culture and power differential of each country.⁵

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¹ GARY CLYDE HUFBAUER ET AL., *ECONOMIC SANCTIONS RECONSIDERED: HISTORY AND CURRENT POLICY* 93 (Institute for International Economics, 2d ed. 1990).

² See Robert A Pape, *Why Economic Sanctions Still Do Not Work*, 22 INT'L SEC. 90, 90, 136 (1997).

³ See DANIEL W. DREZNER, *THE SANCTIONS PARADOX: ECONOMIC STATECRAFT AND INTERNATIONAL RELATIONS* 307-309 (Cambridge Studies in International Relations ed., Cambridge University Press 1999).

⁴ See ERNEST H. PREEG, CENTER FOR STRATEGICE & INTERNATIONAL STUDIES, *FEELING GOOD OR DOING GOOD WITH SANCTIONS: UNILATERAL ECONOMIC SANCTIONS AND THE US NATIONAL INTEREST* 11-87 (1999).

⁵ *Id.* See also HOSSEIN G. A SKARI, ET AL., *ECONOMIC SANCTIONS: EXAMINING THEIR PHILOSOPHY AND EFFICACY* 1-30 (2003) (for a historical perspective on sanctions from the Peloponnesian War to the American Civil War).

¶4 Engagement on the other hand, for example, in the notable case of the Reagan administration's engagement of South Africa, has not fared any better. Often used as a disingenuous excuse for business to continue to trade with regimes, engagement rarely results in any concrete outcomes except to maintain the status quo at best and to enrich rogue regimes at worst.⁶

¶5 The same dilemma is faced by international actors when considering how to respond to the Myanmar situation - whether to sanction or to engage. The US has responded to the situation with sweeping sanctions and the EU with more specific sanctions. The regional countries have, however, kept up their policy of diplomacy and engagement. It is questionable whether these strategies comply with international obligations and perhaps more importantly, if they do any good.

II. A RECENT HISTORY OF MYANMAR

¶6 Myanmar was once one of the wealthiest countries in Southeast Asia and was believed to be on a fast track to development because of significant natural resources.⁷ However, in 1962 General Ne Win overthrew the elected civilian government and replaced it with a repressive military government. The military government isolated Myanmar from the international community and formed a centrally planned economy under the slogan "the Burmese way to socialism." Socialism led to the nationalization of all major foreign and domestically owned businesses and also of many smaller shops and stalls. Production soon declined under government control and towards the end of the 1960s the country, once Asia's largest rice exporter, was facing food deficits.⁸ Despite strong economic growth in the Southeast Asian region, Myanmar applied and was declared a Least Developed Country by the UN in 1987.⁹

¶7 The present ruling military junta, the State Peace and Development Council (SPDC)¹⁰, now led by General Than Shwe, has been criticized by much of the international community since the SPDC used force to respond to the demonstrations in 1988 and it refused to honor the results of the 1990 elections.¹¹ In those elections, the National League for Democracy (NLD) led by Aung San Suu Kyi received 62 percent of the votes cast, taking some 80 percent of the 485 seats contested.¹²

¶8 More recently, in May 2003 following an attack on Aung San Suu Kyi's motorcade and subsequent crackdown on the NLD, in which a number of people were killed, Aung San Suu Kyi was placed under house arrest.¹³

¶9 Then on October 19, 2004, Myanmar again became the focus of international attention with the sudden and unexpected removal of Prime Minister Khin Nyunt.¹⁴ The

⁶ PREEG, *supra* note 4, at 192-220.

⁷ See Robert H. Taylor, *Pathways to the Present, in MYANMAR, BEYOND POLITICS TO SOCIETAL IMPERATIVES* 1, 1-16 (Kyaw Yin Hlaing et al. eds., 2005) (for a history of Myanmar over the last century).

⁸ *Id.* at 17.

⁹ *Id.* at 20.

¹⁰ Previously known as State Law and Order Restoration Council (SLORC).

¹¹ N. Ganesan, *Myanmar's Foreign Relations, Reaching out to the World, in MYANMAR, BEYOND POLITICS TO SOCIETAL IMPERATIVES*, 32, 32-33 (Kyaw Yin Hlaing et al. eds., 2005).

¹² HUFBAUER, *supra* note 1, at 20.

¹³ Taylor, *supra* note 7, at 24.

¹⁴ Kate McGeown, *Khin Nyunt's Fall From Grace*, BBC News, Oct. 19, 2004, available at <http://news.bbc.co.uk/2/hi/asia-pacific/3756052.stm> (last visited April 15, 2007).

Prime Minister had played a leading role in negotiations with ethnic nationality groups as well as with Aung San Suu Kyi in the lead up to the National Convention.¹⁵ Khin Nyunt has been placed under house arrest allegedly for corruption and replaced by the more conservative Lt. Gen. (later General) Soe Win.¹⁶ The regime appears increasingly isolationist, as illustrated by its November 7, 2005 announcement of the sudden and abrupt relocation of its capital to the remote town of Pyinmana.¹⁷

¶10 Finally, in May 2006, despite UN Secretary-General Kofi Annan's appeal to General Than Shwe and the military government to release Aung San Suu Kyi,¹⁸ her house arrest was extended once again.¹⁹

¶11 The political problems of Myanmar are reflected in the wider problems faced by its people, with both a poor standard of living and poor economic prospects. Healthy life expectancy at birth is only 49.9 for males and 53.5 for females²⁰ and, although figures vary widely, per capita income for 2005 is estimated to be US\$145 at a realistic exchange rate.²¹

¶12 The military government has been accused of grave violations of basic human rights including forced labor, the use of child soldiers, forced relocation, summary executions, torture and the rape of women and girls, particularly of members of ethnic minorities.²² In addition the junta's policies and decisions have caused or exacerbated a host of ills for the entire Southeast Asian region, from large refugee outflows, to the spread of HIV/AIDS and other infectious diseases and the trafficking of drugs and human beings.²³

¹⁵ *Id.*

¹⁶ *Myanmar's Hardliners Extend Control After Shock PM Sacking*, AGENCE FRANCE PRESSE, Oct. 20, 2004, <http://www.burmanet.org/news/2004/10/20/agence-france-presse-myanmars-hardliners-extend-control-after-shock-p-m-sacking/#more-4521> (last visited April 16, 2007).

¹⁷ Aung Lwin Oo *Rangoon Moves Ministries to Pyinmana*, THE IRRAWADDY, Nov. 7, 2005, <http://www.burmanet.org/news/2005/11/07/irrawaddy-rangoon-moves-ministries-to-pyinmana-aung-lwin-oo/>.

¹⁸ Press Release, Secretary General, *Secretary-General appeals to Myanmar's government to release Aung San Suu Kyi*, U.N. Doc. SC/SM 10477, (May 26 2006), <http://www.un.org/News/Press/docs/2006/sgsm10477.doc.htm>.

¹⁹ *Burma Extends Suu Kyi's Detention*, BBC News, May 27 2006, available at <http://news.bbc.co.uk/1/hi/world/asia-pacific/5022626.stm>.

²⁰ World Health Organization, *Health Report on Myanmar*, (2002), available at <http://www.who.int/countries/mmr/en/> (see statistics chart in center of the webpage for life expectancy rates).

²¹ David I Steinberg, *Myanmar, The roots of the Economic Malaise, in MYANMAR, BEYOND POLITICS TO SOCIETAL IMPERATIVES*, 93 (Kyaw Yin Hlaing et al. eds., 2005).

²² *Human Rights in Burma: Where Are We Now and Where Are We Going: Joint Hearing Before the Subcomm. on Africa, Global Human Rights and International Operations and the Subcomm. on Asia and the Pacific of the H. Comm. on International Relations*, 109th Cong. 2 (2006) (statement of Tom Malinowski, Washington Advocacy Dir., Human Rights Watch) [hereinafter Malinowski statement], available at http://hrw.org/english/docs/2006/02/10/usint12658_txt.htm; *Human Rights in Burma: Where Are We Now and Where Are We Going : Joint Hearing Before the Subcomm. on Africa, Global Human Rights and International Operations and the Subcomm. on Asia and the Pacific of the H. Comm. on International Relations*, 109th Cong. 2 (2006) (statement of Barry F. Lowenkron, Ass. Sec. for Democracy, Human Rights and Labor, Secretary of State) [hereinafter Lowenkron statement] available at, <http://www.state.gov/g/drl/rls/rm/2006/60801.htm>; Amnesty Int'l, *AI Report 2006, Myanmar Overview* (2006), <http://web.amnesty.org/report2006/mmr-summary-eng>.

²³ Lowenkron statement, *supra* note 22.

III. THE RESPONSES

¶13 Soon after the military government responded to demonstrations with force in 1988, President George H.W. Bush revoked Myanmar's benefits under the Generalized System of Preferences (GSP)²⁴ ostensibly because of Myanmar's violations of internationally recognized workers' rights.²⁵ In 1990, the Customs and Trade Act of 1990 was passed by the US Senate and Congress, requiring the US President to impose economic sanctions against Myanmar or as the US prefers to call it, Burma,²⁶ "if specific conditions were not met, including progress on human rights and suppression of the outflow of narcotics".²⁷ Subsequently, on July 22, 1991, President Bush invoked the Customs and Trade Act and refused to renew the bilateral textile agreement with Myanmar that had expired on December 31, 1990.²⁸

¶14 On September 30, 1996, President Clinton signed the 1997 Foreign Operations Act,²⁹ which prohibits the US from giving any new assistance to Myanmar.³⁰ The Act gave the US President the discretion to prohibit individuals in the United States from initiating "new investments" in Myanmar.³¹ This was followed soon after by President Clinton's signing of an executive order implementing the provisions in the Foreign Operations Appropriations Bill on May 20, 1997, which prohibited new investment by US persons in Myanmar and barred any modification or expansion of existing trade commitments.³²

¶15 On March 31, 2003, the US State Department released its report "Burma: Country Reports on Human Rights Practices – 2002" which accused the ruling SPDC of very

²⁴ United States Council for International Business: Policy Advocacy, ("USCIB"), THE FORCED LABOR SITUATION IN BURMA: BRIEF HISTORY AND CURRENT DEVELOPMENTS [hereinafter THE FORCED LABOR SITUATION], <http://www.uscib.org/index.asp?documentID=1923> (last visited September 22 2006).

²⁵ PETERSON INSTITUTE FOR INTERNATIONAL ECONOMICS, *US/EU/Japan v. Burma – Case 88-1 in CASE STUDIES IN SANCTIONS AND TERRORISM* (1988) <http://www.iie.com/research/topics/sanctions/myanmar.htm>

²⁶ In 1989, the military government officially changed the English version of the country's name from Burma to Myanmar, along with changes to the English versions of many place names in the country, such as its former capital city from Rangoon to Yangon. The official name of the country in the Burmese language, Myanmar, did not change. The renaming proved to be politically controversial. As the military government was not legitimately elected, some governments such as the US have contended that it did not have the authority to officially change the name in English and have continued to use the name Burma instead. The EU uses the term Burma/Myanmar. For the purposes of this paper, the official name Myanmar will be used solely as a convenience without any political connotations.

²⁷ <http://www.uscib.org/index.asp?documentID=1924> (last visited September 22 2006) (timeline of ILO and U.S. actions regarding Burma).

²⁸ THE FORCED LABOR SITUATION, *supra* note 24.

²⁹ Foreign Operations, Export Financing and Related Programs Appropriation Act 1997, § 570, 110 Stat. 3009-166 to 3009-167, (codified at Omnibus Consolidated Appropriations Act, § 101(c), 110 Stat. 3009-121 to 3009-172 (1997)) [hereinafter Cohen Feinstein Amendment].

³⁰ *Id.* § 570. (relief and anti-drug aid is excluded. In addition, the Act requires federal representatives of international financial institutions to vote against any proposed financial assistance to Burma, and limits the issuance of visas to Burmese officials).

³¹ "The Act defines 'new investment' as entry into a contract that would favor the 'economical development of resources in Burma,' or would provide ownership interests in or benefits from such development... but the term specifically excludes . . . 'entry into, performance of, or financing of a contract to sell or purchase goods, services or technology.'" Adrienne S. Khorasanee, *Sacrificing Burma to Save Free Trade: the Burma Freedom Act and the World Trade Organization*, 35 LOY. L.A. L. REV. 1295 (2002).

³² Foreign Appropriations Act, *supra* note 29.

serious human rights abuses including rape, torture and murder.³³ Two months later, on May 31, the SPDC placed the pro-democracy activist Aung San Suu Kyi in “protective custody.”

¶16 The US response to the report and the imprisonment of Aung San Suu Kyi was the Burmese Freedom and Democracy Act of 2003 (BFDA).³⁴ The BFDA was passed by the US House of Representatives on July 15 2003 by a vote of 418-2 and by the US Senate on 16 July 2003 by a vote of 94-1.³⁵

¶17 President George W. Bush signed the BFDA and issued an Executive Order implementing the legislation on July 29, 2003. The BFDA contains a clause allowing the US President to waive the application of any provision deemed contrary to “national security interests.”³⁶ To date, no waivers have been made.

¶18 The BFDA bans the importation of any goods produced, manufactured, grown or assembled in Myanmar,³⁷ requires the US treasury to direct US financial institutions to freeze assets in the United States of “those individuals who hold senior positions in the SPDC,”³⁸ and expands a ban on visas to the US for officials of the SPDC.³⁹ The BFDA states that the US will also block any application by Myanmar for soft loans from the IMF and the World Bank.⁴⁰

¶19 The BFDA provides that the ban will remain in effect until the US President determines and certifies to Congress that the Myanmar military government has made “substantial and measurable progress to end violations of internationally recognized human rights including rape.”⁴¹ To have the ban lifted, the BFDA requires that the US Secretary of State consult with the Secretary General of the International Labor Organization (ILO) and other relevant nongovernmental organizations and report to the appropriate congressional committees that the SPDC “no longer systematically violates workers’ rights, including the use of forced and child labor, and conscription of child-soldiers.”⁴²

¶20 The US President must also declare that the SPDC has made “measurable and substantial progress toward implementing a democratic government”, and before the US

³³ See US STATE DEPARTMENT, BUREAU OF DEMOCRACY, HUMAN RIGHTS, LABOR, BURMA: COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES (2002), <http://www.state.gov/g/drl/rls/hrrpt/2002/18237.htm> (last visited September 22 2006).

³⁴ Burmese Freedom and Democracy Act of 2003 [hereinafter Burmese Freedom Act], Pub. L. No. 108-61, §§ 1-9, 117 Stat. 864 (2003) (codified as 50 USC § 1701 (2000)).

³⁵ See USINFO.STATE.GOV, *Bush applauds Congress for passing Burmese Freedom and Democracy Act*, July 16, 2003, available at <http://usinfo.state.gov/usinfo/Archive/2003/Jul/16-496555.html> (last visited Sept. 22, 2006). (a previous bill for a Burmese Freedom and Democracy Act 1995 did not reach this stage).

³⁶ Burmese Freedom Act, *supra* note 34, § 3(b). The President may waive the provisions described in this section for any or all articles that are a product of Burma if the President determines and notifies the Committees on Appropriations, Finance, and Foreign Relations of the Senate and the Committees on Appropriations, International Relations and Ways and Means of the House of Representatives that to do so is in the national interest of the United States. Burmese Freedom Act, *supra* note 34, § 3(b).

³⁷ Burmese Freedom Act, *supra* note 34, § 3(a)(1) . (in particular, § 3(a)(2) contains restrictions on Burmese imports originating from parties connected to the SPDC, known Burmese narcotics traffickers, the Union of Myanmar Economics Holdings Incorporated (UMEHI), the Myanmar Economic Cooperation (MEC) and the Union Solidarity and Development Association (USDA)).

³⁸ *Id.* § 4.

³⁹ *Id.* § 6(a)(1).

⁴⁰ See Burmese Freedom Act, *supra* note 34, § 5.

⁴¹ *Id.* § 3(a)(3)(A).

⁴² *Id.* § 3(a)(3)(B).

President will do so, the SPDC is required to release all political prisoners, and allow freedoms of speech and press freedom, and freedom of association and religion.⁴³ In addition, the SPDC would have to reach an agreement with the NLD and other democratic forces in that country, including Burma's ethnic nationalities, "on the transfer of power to a civilian government accountable to the Burmese people through democratic elections under the rule of law."⁴⁴

¶21 The BFDA was set to expire on July 28, 2006. However, on August 1, 2006, President George W. Bush extended the BFDA for another 3 years.⁴⁵ The Presidential Press Release on the BFDA in 2003 explains that:

[a]mong other measures, the legislation bans the import of Burmese products. The executive order freezes the assets of senior Burmese officials and bans virtually all remittances to Burma. By denying these rulers the hard currency they use to fund their repression, we are providing strong incentives for democratic change and human rights in Burma.⁴⁶

¶22 It should be noted that in the debate on the bill, US senators stressed the need for a multilateral approach to sanctions on Myanmar but were content to approve the immediate unilateral sanctions found in the BFDA.⁴⁷

¶23 Unfortunately, during the last three years in which the unilateral trade sanctions by the US have been in place, the military government has entrenched itself even more, moved its capital from Rangoon to Pyinmana and continued with its lucrative (and partially black market) cross-border trade in timber, natural gas and gems. Meanwhile, the people in Myanmar have grown steadily poorer due to the sanctions. The US State Department estimates a loss of 60,000 jobs in the textile sector alone.⁴⁸ The US State Department reports also suggest that per capita incomes in Myanmar fell from US\$300 to US\$225 from 2003 to 2004,⁴⁹ a fall largely attributable to the BFDA. Unofficial estimates of the per capita income in 2005 suggest an even greater fall to US\$145 at a realistic exchange rate.⁵⁰

¶24 As Jeffrey Sachs points out:

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ Press Release, White House, *President Renews Burmese Freedom and Democracy Act of 2003*, Aug. 1, 2006, available at <http://www.whitehouse.gov/news/releases/2006/08/20060801.html>; see Burmese Freedom Act § 9(b)(3) (the Act itself sets a 3 year limit after which it should be reconsidered for an additional 3 year extension).

⁴⁶ Press Release, White House, Statement on Burmese Democracy Act, July 28, 2003, available at <http://www.whitehouse.gov/news/releases/2003/07/20030728-8>.

⁴⁷ See US Senate Debate on Burmese Freedom and Democracy Act, 144 CONG. REC. S7690-702 (daily ed. June 11, 2003) (particularly prudent are the statements of Senators Grassley and Baucus).

⁴⁸ US DEPT. OF STATE, REPORT ON US TRADE SANCTIONS AGAINST BURMA, (2004), available at <http://www.state.gov/p/eap/rls/rpt/32106.htm>.

⁴⁹ US DEPT. OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, BURMA: COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES - 2004 (2005), available at <http://www.state.gov/g/drl/rls/hrrpt/2004/41637.htm>; US DEPT. OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, BURMA: COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES - 2003, (2004), available at <http://www.state.gov/g/drl/rls/hrrpt/2003/27765.htm>

⁵⁰ See Steinberg, *supra* note 21.

[The sanctions] have systematically weakened the [Myanmar] economy by limiting trade, investment and foreign aid. Yet weakening a country's economy does not necessarily weaken a regime relative to its political opposition. Often, the impasse is merely deepened. Civil society and the political opposition suffer from brain drain, a squeeze on financial resources and reduced contacts with the outside world, while the regime is able to blame foreign meddling for policy mistakes. Hardliners on both sides, meanwhile, gain the upper hand over moderates, blocking changes that might otherwise be encouraged.⁵¹

¶25 While the strongest, if not the most measured, response to the actions of the Myanmar regime came from the US in the form of the BFDA sanctions, the European Union (EU) has also adopted a Common Position⁵² on Myanmar since October 1996. Apart from confirming existing sanctions such as an arms embargo⁵³ and the suspension of all defense cooperation and all non-humanitarian bilateral aid, the EU “introduced a visa ban on the members of the military regime, the members of the government, senior military and security officers and members of their families, as well as the suspension of high-level governmental visits to Burma/Myanmar.”⁵⁴

¶26 During 1997, the EU also revoked Burma’s benefits under the Generalized System of Preferences, affecting US \$30 million, or 5 percent, of Burmese exports.⁵⁵ On May 22, 2000, the EU imposed a freeze on assets held abroad by persons related to Burmese governmental functions, and banned the export of “equipment that might be used for internal repression or terrorism” to Burma.⁵⁶ Since then, EC Council Regulation 1081/2000 has since been amended several times to expand the list of people whose financial assets have been frozen in the EU.⁵⁷

¶27 The EU decided to suspend the implementation of further sanctions until October 29, 2003, pending substantial progress on key issues such as the start of a substantive dialogue with Aung San Suu Kyi and the NLD, the release of political prisoners and a reduction of violence and human rights violations.⁵⁸ However, after the events of May 31, 2003 and the placement of Aung San Suu Kyi under house arrest, the EU decided on June 16, 2003 to impose the new expanded sanctions, to target more persons linked to the economic or political activities of the SPDC by extending the visa ban and asset freeze, and by amending and strengthening the arms embargo.⁵⁹

¶28 The first multilateral response to the situation in Myanmar came in 1999 when the ILO passed a resolution highlighting the failure of the Myanmar regime’s continued widespread use of forced labor for work on infrastructure projects and as porters for the

⁵¹ Jeffrey Sachs, *Myanmar: Sanctions Won't Work*, THE FINANCIAL TIMES, July 27 2004.

⁵² EC Common Position 96/635/CSFP (European Union Common Position Paper).

⁵³ The arms embargo was imposed in 1990. *See Council Statement Concerning Burma*, THE HAGUE, July 29, 1991.

⁵⁴ http://europa.eu.int/comm/external_relations/myanmar/intro/ (website provides an overview of the EU’s Relations with Burma/ Myanmar) [hereinafter EU’s Relations].

⁵⁵ European Parliament Resolution on the Arrest of Aung San Suu Kyi in Burma, Eur. Parl. Doc. P5-TA Prov. 0272 (2003), <http://www.ibiblio.org/obl/docs/EUParliament2003-06-05.pdf>.

⁵⁶ Council Regulation (EC) No. 1081/2000 (European Union Council regulation document).

⁵⁷ *See* EU’s Relations, *supra* note 54.

⁵⁸ *Id.*

⁵⁹ Council Decision 2003/461/CFSP (European Union Council decision document).

army.⁶⁰ The 1999 ILO resolution provided for the cessation of technical cooperation with Myanmar and barring Myanmar from all meetings except those aimed at resolving the problem of Myanmar's lack of compliance with the ILO conventions it had ratified.⁶¹ Then in 2000, when Myanmar's regime completely failed to respond to the ILO's recommendations on the prevention of forced labor, the ILO for the first time in its history invoked Article 33 of its Constitution recommending that ILO members review their relations with Myanmar and take appropriate measures to ensure that Myanmar did not breach its obligations against forced labor.⁶² Apart from this measure which resulted in some reputation cost to the Myanmar government, no further concrete measures were adopted and the ILO continues to report that forced and compulsory labor remains prevalent in many areas of the country in circumstances of severe cruelty and brutality, particularly in the border areas inhabited by ethnic minorities in which there is a strong military presence.⁶³

¶29 The regional governments have been even more cautious in their approach. ASEAN, as a consensus building, non-interfering organization, has not reached a common position regarding Myanmar, despite the widespread feeling of its member countries that the group cannot continue to shield a country which has made little progress in catching up with the region, either politically or economically.⁶⁴ The only outcome of a host of diplomatic measures by ASEAN nations was that Myanmar was persuaded to forego the rotating chairmanship of ASEAN which it was supposed to have taken up in 2006.⁶⁵

¶30 Meanwhile, Myanmar's two giant neighbors, India and China, continue to jockey for influence over a state they both see as strategically important for them. Myanmar has become one of China's closest allies in Southeast Asia, a major recipient of Chinese military hardware and a potential springboard for projecting Chinese military power in the region.⁶⁶ This alliance has alarmed India, which in recent years has shifted its strategy away from supporting Myanmar's opposition movement towards cementing ties with the government and has offered Myanmar favorable trade relations and cooperation against ethnic insurgents along the Indo-Myanmar frontier.⁶⁷ Both countries have expressed concerns about the situation in Myanmar, yet are reluctant to interfere in the domestic affairs of a strategic ally. This has led to ASEAN's Secretary-General on March 31,

⁶⁰ ILO, *Resolution on the widespread use of forced labor in Myanmar*, 87th Session, Geneva 1999, available at <http://www.ilo.org/public/english/standards/re/m/ilc/ilc87/com-myan.htm>

⁶¹ *Id.*

⁶² Press Release, ILO, International Labour Conference adopts Resolution targeting forced labour in Myanmar (*Burma*), (June 14, 2000), available at <http://www.ilo.org/public/english/bureau/inf/pr/2000/27.htm>.

⁶³ International Labor Conference, 93rd session, 2005, *Report of the Committee of Experts on the Application of Conventions and Recommendations*, Report III (1A), 177-78 (2005), available at <http://www-ilo-mirror.cornell.edu/public/english/standards/re/m/ilc/ilc93/pdf/rep-iii-1a.pdf>.

⁶⁴ John McBeth, *Interview with ASEAN Secretary General Ong Keng Yong: Moving away from the family way*, THE STRAITS TIMES, February 24, 2006.

⁶⁵ *Myanmar Gives up 2006 ASEAN Chairmanship*, INTERNATIONAL HERALD TRIBUNE, July 26, 2005, <http://www.iht.com/articles/2005/07/26/asia/web.0726asean.php>.

⁶⁶ Ganesan, *supra* note 11, at 38.

⁶⁷ INDIAN INSTITUTE OF STRATEGIC STUDIES, *China's Ambitions in Myanmar India Steps Up Countermoves*, 6 IISS STRATEGIC COMMENTS 6 July 2000.

2006 to call upon them to use their considerable influence on the Myanmar regime.⁶⁸ To date, neither China nor India have done so.

¶31 It is therefore important to determine which approach should be preferred among the alternatives offered. These alternatives include the US sanctions in the form of the BFDA, the more measured EU sanctions or the engagement favored by the regional countries.

IV. TRADE SANCTIONS AND THE WTO

¶32 The sweeping nature of BFDA imposed sanctions constitutes a prima facie violation of US obligations under the World Trade Organization (WTO) because both the US and Myanmar are original members of the General Agreement on Tariffs and Trade (GATT).⁶⁹ The sanctions imposed by the EU being more measured and targeted only at financial assets held abroad by the SPDC and at the export of arms and “equipment that might be used for internal repression or terrorism” to Myanmar would, as discussed below, appear to be less likely a violation of its WTO obligations.⁷⁰

¶33 It should be recalled that the selective purchasing law of Massachusetts, the so-called Massachusetts Burma Law, was challenged under the WTO by the EU for nullification and Japan as a third party⁷¹ for violating the Agreement on Government Procurement (GPA).⁷² The EU argued that Massachusetts’ procurement policy had to conform to the WTO rules and that the Burma Law contravened the WTO procurement agreement by imposing conditions that were not essential to fulfill the contract (GPA Article VIII(b)), imposing qualifications based on political instead of economic considerations (GPA Article X), and allowing contracts to be awarded based on political instead of economic considerations (GPA Article XIII).⁷³ However, before a WTO panel could examine the dispute, the panel proceedings were suspended, because the Massachusetts Burma Law was held to be unconstitutional in a decision later upheld by the US Supreme Court.⁷⁴ Neither the EU nor Japan has challenged the BFDA despite it being even broader than the Massachusetts Burma Law and even more likely a breach of the GPA by discriminating against all goods of Myanmar origin. The reason for their

⁶⁸ *ASEAN Urges China, India to Persuade Burma to Move toward Democracy*, INDIA DAILY, March 31, 2006, <http://www.indiadaily.com/editorial/7722.asp>.

⁶⁹ General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 UNTS 194 as amended and incorporated into Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Annex 1A, Apr. 15, 1994, 33 ILM 1125 (1994).

⁷⁰ Council Regulation (EC) No1081/2000 of May 22 2000, 2000 O.J. (L. 122).

⁷¹ Note by the Secretariat, *United States – Measure Affecting Government Procurement*, WT/DS88 / WT/DS95, (Feb. 14, 2000). See Christopher McCrudden, *International Economic Law and the Pursuit of Human Rights: A Framework for Discussion of the Legality of ‘Selective Purchasing’ Laws under the WTO Government Procurement Agreement*, 2 J. INT’L ECON. L. 3, 3-48 (1999), (for a more complete analysis of the issue regarding selective purchasing).

⁷² Agreement on Government Procurement, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 4B, Legal Instruments—Results of the Uruguay Round, 1915 UNTS 103 (1994).

⁷³ Request for Consultations by the European Communities, *United States – Measure Affecting Government Procurement*, WT/DS/1, GPA/DS2/1 (June 26, 1997).

⁷⁴ *Crosby v Nat’l Foreign Trade Council*, 530 U.S. 363, 120 S.Ct. 2288 (2000). (the suit was brought by the National Foreign Trade Council, an association of U.S. companies doing business abroad, with whom the EU joined as an amicus).

reticence is not entirely clear although it may well be that neither of them want to appear to be supportive of the present military government.

¶34 Nonetheless, apart from the fact that the BFDA is likely to be in breach of the GPA and GATT Article XI prohibiting quantitative trade restrictions, the BFDA's discrimination against all goods of Myanmar origin is also clearly a breach of GATT Article I - the fundamental Most Favored Nation (MFN) principle. This MFN principle of non-discrimination requires that import and export measures not discriminate between like products⁷⁵ from other countries. A unilateral trade ban targeted at Myanmar will be a prima facie violation of this principle; it discriminates based on the country of origin of the goods.

A. *Process and Production Method*

¶35 While it might be argued that the discrimination is nevertheless based on origin-neutral criteria on the process and production method (PPM) of goods from Myanmar - namely that the goods are manufactured in a manner which violates labor or human rights, this traditional PPM argument has not been a persuasive one since the *Tuna/Dolphin* cases.⁷⁶ While neither *Tuna/Dolphin* cases dealt specifically with labor or human rights issues, the legal principles still are applicable to the present case.

¶36 In those cases, the PPM involved catching tuna by fishing without dolphin friendly precautions. When the US banned the imports of such dolphin unfriendly tuna, the GATT dispute settlement panels in both cases declared that this was a breach of GATT norms not to discriminate between like products based on how the products had been produced.⁷⁷ Environmentalists and other policy makers may find this objectionable because they want to impose sanctions for environmental protection reasons. However, permitting trade restrictions on the basis of policy concerns could allow protectionist policies to masquerade as environmental concerns.

¶37 This would also be the case for labor rights protection. It would be easy to argue that a labor right had been breached in order to legitimize a measure aimed more at protection of domestic jobs than addressing the violation of labor rights. Further in the case of the BFDA, it seems implausible that all products from Myanmar are produced in breach of labor or human rights.

B. *GATT Exceptions*

¶38 Although the BFDA is prima facie in breach of the GATT, a breach of a GATT obligation may be justified by one of the General Exceptions of Article XX or the Security Exception of Article XXI of the GATT.

⁷⁵ The WTO Appellate Body has set out general principles regarding 'like products' in Appellate Body Report. *See Japan-Taxes on Alcoholic Beverages*, WT/DS8/AB/R, (Oct.4, 1996). (it is not within the scope of this article to go into the details of the principles).

⁷⁶ First Submission of the United States to the Panel, *United States-Restrictions on the Imports of Tuna*, GATT B.I.S.D. (29th Supp.) at 155 (1993) (*unadopted*) (hereinafter *Tuna Dolphin I*); Report of the Panel, *United States - Restrictions on the Imports of Tuna*, DS29/R (June 16, 1994)(*unadopted*) (hereinafter *Tuna Dolphin II*).

⁷⁷ *Id.*

1. The Specific Exceptions

¶39 The WTO Appellate Body has allowed PPMs to be implemented, albeit in a limited way, by way of the exceptions found in Article XX of the GATT. A two stage test is required. First, it has to be determined which specific exception of Article XX is applicable and second whether the requirements of the chapeau to Article XX is satisfied. The Appellate Body applied this two stage sequence of analysis in the *Shrimp/Turtle*⁷⁸ case. The first stage is more substantive and deals with whether the specific exception applies to exempt the PPM and the second stage is more procedural, whereby the manner in which the PPM is implemented is examined.⁷⁹ There is also some debate in the *Tuna/Dolphin* cases as to the extraterritorial application of Article XX. However, *Shrimp/Turtle* appears to have impliedly accepted that some extraterritorial measures can fall within the Article XX exceptions since both the Panel and the Appellate Body accepted that the measures to protect sea turtles which were outside of US territorial waters and could be covered by Article XX but for the failure of the US measure to pass the chapeau requirement.

¶40 Article XX does not provide an explicit labor rights or human rights exception. However, labor rights and human rights could be covered if the measures are necessary to protect public morals (paragraph a), necessary to protect human, animal or plant life or health (paragraph b) and/or relating to the products of prison labor (paragraph e).

¶41 It should be noted that while forming the stillborn International Trade Organization (ITO) specific reference to “fair labor standards”⁸⁰ was made in the ITO Havana Charter. However this Charter never came into force due to opposition from the US Congress for a variety of reasons.⁸¹ The failure to implement the labor rights provisions in the Havana Charter and the fact that Article XX(e) only contains prison labor exceptions could suggest that if Article XX had been designed to encompass sanctions with respect to labor rights, more explicit language would have been used to articulate such an exception.⁸² Could the exceptions, nevertheless, be extended to include labor rights?

¶42 Unfortunately, there is no GATT or WTO jurisprudence on the interpretation of the prison labor exception and until the recent *Offshore Gambling* case,⁸³ no guidance with regard to the public morals exception. The *Offshore Gambling* case was brought by Antigua and Barbuda against the US federal and state laws which were tantamount to a ban on the cross-border provision of internet gambling services. As this was a services

⁷⁸ Appellate Body Report, *United States-Import Prohibition of Certain Shrimp and Shrimp Products* (AB-1998-4), WT/DS58/AB/R (Oct. 12, 1998) [hereinafter Report of the Appellate Body on Import Prohibition].

⁷⁹ *Id.*

⁸⁰ United Nations Conference on Trade and Employment, *Final Act of the United Nations Conference on Trade and Employment: Havana Charter for an International Trade Organization*, Chapter II, art. 7 (Mar. 24, 1948).

⁸¹ WTO Secretariat, *Understanding the WTO – The GATT years from Havana to Marrakesh*, available at http://www.wto.org/English/thewto_e/whatis_e/tif_e/fact4_e.htm

⁸² Michael J Trebilcock and Robert Howse, *Trade Policy & Labor Standards*, 14 MINN. J. GLOBAL TRADE 261, 289-90 (2005).

⁸³ See Appellate Body Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R (Nov. 14, 2003) (adopted Apr. 7, 2005) [hereinafter Appellate Body Report on Supply of Gambling]; Panel Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R (adopted Nov. 10 2004) [hereinafter Panel Report on Supply of Betting Services].

case rather than a goods dispute, the US, invoked Article XIV(a) of the General Agreement on Trade in Services (GATS),⁸⁴ which like GATT Article XX(a), authorizes members, subject to certain conditions, to maintain restrictive trade measures necessary to protect public morals. Consistent with the previous GATT Article XX cases, the Appellate Body in the *Offshore Gambling* case found that while the US laws could be “necessary to protect public morals,” the manner in which the laws discriminated against foreign service suppliers by allowing domestic service suppliers to supply remote betting services for horse racing was contrary to the chapeau to GATS Article XIV.⁸⁵ The chapeau to GATS Article XIV is similar to the chapeau to GATT Article XX.

¶43 The *Offshore Gambling* case suggests that the public morals exception in GATT Article XX could be used to justify a trade restrictive measure but the case still does not clearly define what public morals means. The Panel in the case found that “the term ‘public morals’ denotes standards of right and wrong conduct maintained by or on behalf of a community or nation.”⁸⁶ It is undeniably difficult for any Panel or Appellate Body to circumscribe acceptable public morals but perhaps some guidance for the present discussion can be gleaned from the case. The Appellate Body accepted the notion that gambling was against the public morals of the US, despite evidence that domestic gambling was allowed and thus impliedly that no national consensus on the immorality of gambling existed. This suggests that so long as evidence that some (not all) public morality is offended, the exception could apply. If the public morality against gambling is so accepted, then measures taken to protect against universal human rights violations must be even more likely to be so accepted.⁸⁷

¶44 Indeed, Michael Trebilcock and Robert Howse have argued that the interpretation of the public morals exception found in Article XX(a) of GATT should not be frozen in time as human rights have evolved into a core element in public morality in many post-war societies and at the international level, public morals should be extended to universal human rights, including labors rights.⁸⁸ If so, the BFDA could then arguably come under the specific exception of Article XX(a) – the protection of the public morality outraged at human rights violations in the targeted state.

¶45 It remains to be seen if this argument will be accepted by WTO Panels or the Appellate Body. The concern that this new type of PPM argument could be used as a cover for protectionism would be just as true with respect to exceptions based on conceptions of public morality even when such conceptions are constrained by a requirement restricting public morals to universal human rights. However, unlike in the case of the traditional PPM argument, the requirement of necessity in the phrase “necessary to protect public morals” and the two stage test incorporating the chapeau

⁸⁴ General Agreement on Trade in Services, Apr. 15 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, Legal Instruments – Results of the Uruguay Round, 33 I.L.M. 1167 (1994).

⁸⁵ See Appellate Body Report on Supply of Gambling, *supra* note 83, ¶ 371.

⁸⁶ See Panel Report on Betting Services, *supra* note 83, ¶ 6.465.

⁸⁷ See Jeremy C. Marwell, *Trade and Morality: The WTO Public Morals Exception After Gambling*, 81 N.Y.U. L. Rev. 802 (2006) (for a discussion of the ambit of the public morals exception); see also Steve Charnovitz, *The Moral Exception in Trade Policy*, 38 VA. J. INT'L. L. 689 (1997); see also Christoph T. Feddersen, *Focusing on Substantive Law in International Economic Relations: The Public Morals of GATT's Article XX(a) and “Conventional” Rules of Interpretation*, 7 MINN. J. GLOBAL TRADE 75 (1998).

⁸⁸ Trebilcock and House, *supra* note 82, at 290.

creates two additional gates against concerns of protectionism creeping in by the back door. Both these gates will be explored below.

¶46 The human, animal or plant life or health exception found in Article XX(b) of the GATT could also be used to justify public health measures. This exception was for example used as a defense in the *EC Asbestos*⁸⁹ case to justify an import ban of asbestos containing substances to protect public health. Since *Shrimp/Turtle* impliedly accepts that Article XX can apply to extraterritorial protection, this exception could then cover measures against products produced in extremely dangerous working conditions,⁹⁰ or, when using a more expansive approach like the one suggested, just as suggested for the public morals exception, measures against products made by forced or child labor, because practices violating these rights could involve threats to workers' lives or health.⁹¹ This exception cannot cover a sanction regime as broad as the BFDA's ban on all products, regardless of how they are manufactured, because the health exception only offers a partial excuse for trade measures affecting labor and human rights.

¶47 It should be noted that both the public morals and the human, animal or plant life or health exceptions contain a necessity test as part of the text of Article XX. The Appellate Body interpreted "necessary" in the *EC-Asbestos* case as requiring the contracting party to use, among the measures "reasonably available", the measure which entails the least degree of inconsistency with other GATT provisions.⁹² This has been followed in the *Offshore Gambling* case where the Appellate Body decided that if the complaining party raises a WTO-consistent alternative measure that, in its view, the responding party should have taken, the responding party will be required to demonstrate why its challenged measure nevertheless remains "necessary" in the light of that alternative.⁹³ Although this interpretation is less restrictive than in previous cases it is still questionable whether a unilateral import restriction entails the least degree of inconsistency with other GATT provisions to achieve the goal of promoting human rights in Myanmar. It will be hard for the BFDA to satisfy the necessity condition because only the availability and not the effectiveness or feasibility of the measures at issue counts, and there are many other policy options the US could have implemented.

¶48 Apart from finding a specific exception that applies, the even bigger hurdle the BFDA would have to clear is satisfying the requirements of the chapeau of Article XX. The text of the chapeau states that a measure must not be applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade. The Appellate Body noted in *United States- Gasoline*⁹⁴ that the purpose and object of the chapeau generally is to prevent the abuse of the exceptions.

⁸⁹ Appellate Body Report, *European Communities - Measures Affecting Asbestos and Asbestos-Containing Products* (AB- 2000 11), WT/DS135/AB/R (Feb. 16, 2001) (adopted March 12 2001) [hereinafter Appellate Body Report on Asbestos].

⁹⁰ Budrun Monika Zagel, *WTO & Human rights: Examining Linkages and Suggesting Convergence*, in 2 IDLO VOICES OF DEVELOPMENT JURISTS PAPER SERIES Vol 2 No. 2, 13 2005).

⁹¹ Robert Howse, *The World Trade Organization and the Protection of Workers' Rights*, 3 J. SMALL & EMERGING BUS. L. 131 (1999).

⁹² Appellate Body Report on Asbestos, *supra* note 89, ¶¶ 171-172.

⁹³ See Appellate Body Report on Supply of Gambling, *supra* note 83, ¶¶ 306-11.

⁹⁴ Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline* (AB- 1996-1), WT/DS2/AB/R (Apr. 22, 1996) (adopted Apr. 29 1996).

¶49 In the *Shrimp/Turtle* case the Appellate Body made clear that the chapeau acts as a balancing principle to mediate between the right of a member to invoke a Article XX exception and its obligation to respect the rights of other members and is thus a qualification making the exemptions “limited and conditional”, an expression of the principle of good faith in international law and a safeguard against abuses.⁹⁵ To allow a member to misuse or abuse its right to invoke an exception would be effectively to allow that member to degrade its own treaty obligations as well as to devalue the treaty rights of other members. The chapeau therefore acts as an important check against protectionist or other abusive implementation of trade bans under the guise of labor rights and human rights concerns.⁹⁶

¶50 One of three requirements must be satisfied under the text of the chapeau in order for Article XX to be inapplicable: whether the measure is “a means of unjustifiable discrimination” or “a means of arbitrary discrimination,” and if not, whether the measure is “a disguised restriction on international trade.” In *Shrimp/Turtle*, the Appellate Body, after finding that the measure at issue was a means of unjustifiable and arbitrary discrimination between countries where the same conditions prevail, decided that it was not necessary to examine also whether the measure was applied in a manner that constitutes a disguised restriction on international trade.⁹⁷

¶51 It is unlikely that the BFDA would be held to be a measure that arbitrarily discriminates between members as the term “arbitrarily discriminates” has been interpreted to require that the standard applied be a fair standard. The Appellate Body, found in *Shrimp/Turtle* that the measure at issue did not meet the requirements of the chapeau of Article XX relating to arbitrary discrimination because it imposed “a single, rigid and unbending requirement” to adopt “essentially the same” policies and enforcement practices as those applied to, and enforced on, domestic shrimp trawlers in the US and that there were no good reasons for other equivalent standards not to be recognized.⁹⁸ In the BFDA’s case, the standards being applied are unlikely to be held to be too arbitrary as they relate to universal human rights and fundamental labor rights.

¶52 It is unlikely that the BFDA would be seen as a “disguised restriction on international trade” or as an ulterior motive of protectionism because the measure is so clearly aimed against labor and human rights abuses. Exports from Myanmar to the US were mainly textile and teak wood products and only amounted to US\$275.7 million in 2003 before the sanctions.⁹⁹ The fact that the US does not compete with Myanmar in either textile or teak wood production argues strongly against the measure being a disguised restriction.

¶53 More difficult is whether the BFDA is a means of unjustifiable discrimination under the chapeau. As part of the process of determining whether the measure had been applied in a manner that constituted a means of “unjustifiable discrimination,” the

⁹⁵ MITSUO MATSUSHITA ET AL., THE WORLD TRADE ORGANIZATION: LAW, PRACTICE, AND POLICY 455 (2003).

⁹⁶ Trebilcock and Howse, *supra* note 82, at 290.

⁹⁷ Report of the Appellate Body on Import Prohibition, *supra* note 78, ¶ 121.

⁹⁸ Appellate Body Report, United States – Import Prohibition of Certain Shrimp and Shrimp Products Recourse to Article 21.5 DSU by Malaysia, (AB-2001-4), WT/DS58/AB/RW, ¶ 140 (adopted on November 21 2001)[hereinafter Appellate Body Report on Shrimp Products].

⁹⁹ US Census Report on Trade, available <http://www.census.gov/foreign-trade/statistics/product/enduse/exports/c5460.html>.

Appellate Body in the *US – Shrimp (Article 21.5)* case suggested that “serious, across-the-board negotiations with the objective of concluding bilateral or multilateral agreements for the protection and conservation of sea turtles” should have been conducted before the unilateral sanctions were initiated.¹⁰⁰ The Appellate Body concluded that because the US negotiated seriously with some Members, but not with other Members, including the appellees, the measure was discriminatory and unjustifiable.¹⁰¹ The US had an obligation to make serious good faith efforts to reach an agreement before resorting to unilateral measures.¹⁰²

¶54 If so, then the fact that the US did not negotiate with Myanmar nor other members of the WTO before imposing its trade sanctions on all Myanmar products, would suggest, following the *Shrimp/Turtle* requirement of good faith negotiations, that the measure could be a means of unjustifiable discrimination. This argument may be strengthened by the fact that while the abuses of human and labor rights in Myanmar are severe, they are by no means the only violations of human and labor rights occurring in the world today. For the measure to fulfil the chapeau requirement against unjustifiable discrimination, serious negotiations should be conducted with all countries with similar labor rights and human rights compliance problems and the sanctions should be applied to all of them below the compliance standards set by the US.¹⁰³

2. The Security Exception

¶55 The security exception of GATT Article XXI provides a more likely exception for trade sanctions. Article XXI(b)(iii) states that nothing in the GATT shall be construed to prevent any contracting party from taking action which it considers necessary for the protection of its essential security interests taken in time of war or other emergency in international relations. Article XXI(c) states that nothing in the GATT shall be construed to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

¶56 Article XXI(b)(iii) potentially authorizes trade sanctions taken by a member “necessary for the protection of its essential security interest” taken in “time of war” or “other emergency in international relations.” While war is a term of art under customary international law, the phrase ‘emergency in international relations’ is not. Again, there is scant GATT or WTO jurisprudence in this area. In the *Nicaragua Sugar* case¹⁰⁴ and the related *Trade Measures Affecting Nicaragua* case,¹⁰⁵ both dealing with US trade sanctions against Nicaragua in response to the Nicaraguan government’s support of subversive activities in the region, the US refused to invoke Article XXI(b)(iii) as the US maintained that its dispute with Nicaragua was not subject to GATT disciplines.

¶57 From the plain meaning of the phrase, “emergency in international relations” requires a certain degree of seriousness and would thus apply to international situations

¹⁰⁰ Appellate Body Report on *Shrimp Products*, *supra* note 98, ¶ 17.

¹⁰¹ *Id.* ¶ 121.

¹⁰² Panel Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products Recourse to Article 21.5 DSU by Malaysia*, WT/DS58/RW, at para 5.67 (adopted June 15, 2001).

¹⁰³ Zagel, *supra* note 90, at 14.

¹⁰⁴ *United States – Import of Sugar from Nicaragua*, March 13, 1984, GATT BISD (31st Supp) (unadopted) (Mar. 13, 1984).

¹⁰⁵ Report of the Panel, *United States – Trade Measures Affecting Nicaragua*, L/6053 (13 October 1986)(unadopted).

that could pose a threat of future armed conflict. However, “emergency in international relations” could also refer to an economic, social or political situation.¹⁰⁶ The US could perhaps argue that the situation in Myanmar is serious enough due to the gross human rights violations and the flow of illegal narcotics from Myanmar, to justify the BFDA. The US would have to argue that the measures are “necessary” and in their “essential security interest.” As neither of these terms have been interpreted by any GATT or WTO cases in the context of Article XXI, this argument is fraught with ambiguity which makes the success of invoking this exception uncertain.¹⁰⁷

¶58 The interpretation of the term “necessary,” given in the *EC-Asbestos* and *Offshore Gambling* cases as discussed above, may also limit measures to only those measures “reasonably available.” If so, regardless of the leeway given to the interpretation of the phrase “emergency in international relations,” if alternative WTO-compliant measures were available, the US would have to prove that despite those alternatives, the BFDA was necessary. This would be difficult to do.

¶59 Nonetheless, some authors have suggested that Article XXI is a non-justiciable provision.¹⁰⁸ Other authors have pointed out this view is untenable because GATT rules are not designed to be self-judging and unilateral action is specifically excluded in the WTO’s Dispute Settlement Understanding (DSU).¹⁰⁹ Some other authors have argued that Article XXI(b)(iii) should be interpreted to allow countermeasures in the form of trade sanctions that are proportioned to an illegal act committed by the target state and are designed to secure compliance with international legal norms.¹¹⁰

¶60 The right to countermeasures by non-injured states or third party states is controversial though the famous dictum of the International Court of Justice (ICJ) in the *Barcelona Traction* case¹¹¹ did suggest that there are norms that all states have an interest and obligation to protect regardless of whether they suffered direct injury as obligations *erga omnes*. Indeed, some scholars have argued that some fundamental human rights have gained the status of *jus cogens*.¹¹² However, the ambit of these *jus cogens* norms remain debatable. While some scholars have singled out the Universal Declaration of Human Rights (UDHR)¹¹³ as having customary international law status due to its almost total and universal acceptance by states evidencing *opinio juris*,¹¹⁴ it is not entirely clear whether even some of the norms of the UDHR are *jus cogens*.

¹⁰⁶ MATSUSHITA ET AL., *supra* note 95, at 221-223.

¹⁰⁷ Craig Forcese, *Globalizing Decency: Responsible Engagement in an Era of Economic Integration*, 5 *Yale Hum. Rts. & Dev. L. J.* 47, 47-8 (2002).

¹⁰⁸ Richard Sutherland Whitt, *The Politics of Procedure: An Examination of the GATT Dispute Settlement Panel and the Article XXI Defense in the Context of the US Embargo of Nicaragua*, 19 *LAW & POL’Y INT’L BUS* 604, 616 (1987).

¹⁰⁹ Michael J Hahn, *Vital Interests and the Law of GATT: An Analysis of GATT’s Security Exception*, 12 *MICH. J. INT’L. L.* 558, 558-567 (1991).

¹¹⁰ *See* Whitt, *supra* note 108, at 613.

¹¹¹ *Barcelona Traction, Light and Power Company Limited, Second Phase (Belgium v. Spain)*, 1970 I.C.J. 3, at 32 (Feb. 5).

¹¹² *See, e.g.*, THOMAS BUERGENTHAL, *INTERNATIONAL HUMAN RIGHTS* 29-38 (1995); MICHAEL J. TREBILCOCK & ROBERT HOWSE, *THE REGULATION OF INTERNATIONAL TRADE* 581 (3d ed. 2005).

¹¹³ *Universal Declaration of Human Rights*, G.A. Res 217A at 71, U.N. GAOR, 3d Sess. 1st plen. Mtg., U.N. Doc A/810 (Dec. 10, 1948).

¹¹⁴ *See generally* Mary Ann Glendon, *Knowing the Universal Declaration of Human Rights*, 73 *NOTRE DAME L. REV.* 1153 (1998).

¶61 Even so, the right to countermeasures to redress an egregious breach of a *jus cogens* and fundamental human right is not an unfettered one - it is circumscribed by the restraint of proportionality and must be designed to secure compliance.¹¹⁵ Martin Koskenniemi argues that the failure of states to explain their measures by defining which norms as *erga omnes* obligations need to be protected and how those norms are protected by the measure or sanction taken creates a danger of abuse of discretion by states.¹¹⁶ While cases in the past, dealing with direct damage to the state instituting the countermeasure, seem to examine proportionality by examining the quantitative relationship between the breach and the response,¹¹⁷ Enzo Cannizzaro suggests that in a plurality of instruments and tools of self-redress available to states, emphasis must be given to the function each measure taken fulfils.¹¹⁸ While this argument is based on customary international law and not WTO obligations, it should be noted that this is similar in principle to the interpretation given to the phrase “necessary” in the *EC-Asbestos* and *Offshore Gambling* cases.

¶62 This must be especially so for cases where no clear direct damage has been suffered and instead the measure is taken to promote compliance with a norm. The appropriateness of the measure must be compared not to the quantity of damage suffered but instead with the results the measures are intended to achieve. If the measure does not or is unlikely to achieve the results it is intended to achieve it should be seen as a measure lacking in proportionality. In cases where the measure also causes collateral damage without achieving results, the proportionality of the measure must be called even more into question. This would seem to be the case for the BFDA with its sweeping measures, vague and broad objectives and the apparently severe economic harm caused to the civilian population of Myanmar.

It could also be argued that a state quite apart from Article XXI(b)(iii) has a right to countermeasures based on customary international law and that if such countermeasures are indeed based on customary international law, then they exist in addition to the WTO exceptions. Therefore, an argument could then be made that when such customary international law based countermeasures are taken by a non-injured state to protect a *jus cogens* or preemptory norm, that because a treaty in conflict with the preemptory norm is void,¹¹⁹ the WTO disciplines cannot constrain the right to such a countermeasure.

¶63 It is not within the scope of this paper to elaborate at length on this interesting conundrum but it suffices to say that countermeasures even in customary international law are also subject to the restriction of proportionality.¹²⁰ If so, then the same arguments regarding the use of countermeasures under Article XXI(b)(iii) would also apply to

¹¹⁵ JAMES CRAWFORD, *THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES* 283 (2003).

¹¹⁶ Martin Koskenniemi, *Solidarity Measures: State Responsibility as a New International Order?*, 71 *BRIT. Y.B. INT'L. L.* 337, 348-350 (2001).

¹¹⁷ *See, e.g.*, 54 *I.L.R.* 304 (Dec. 9) (case concerning the Air Services Agreement on March 27, 1946); 1997 *I.C.J.* 7 (Sept. 25) (cases concerning the Gacikovo-Nagymaros Project).

¹¹⁸ *See* Enzo Cannizzaro, *The Role of Proportionality in the Law of International Countermeasures*, 12 *EUR. J. INT'L. L.* 889 (2001).

¹¹⁹ *See* Vienna Convention on the Law of Treaties 1155 *U.N.T.S.* 331, 8 *I.L.M.* 679, at 53 (1969) (entered into force Jan. 27, 1980).

¹²⁰ *Responsibility of States for Internationally Wrongful Acts*, G.A. Res. 56/83, at 53, , Supp. No. 10, *U.N. Doc. A/56/10* (Dec. 12, 2001).

countermeasures taken in customary international law. If a range of different alternatives are available as responses to a breach of a preemptory norm, then the alternatives must be weighed for their proportionality. As the BFDA lacks proportionality because its host of broad measures are not specifically directed at the wrongs the BFDA seeks to redress, even in customary international law, the BFDA cannot be justified as a countermeasure.

¶164 Unlike the vagueness of Article XXI(b)(iii), the exception of Article XXI(c) is significantly clearer - a resolution of the UN Security Council resolution is needed. The UN Security Council has, for example, imposed economic sanctions that specifically targeted gross violations of human rights against Haiti, Rwanda and Congo.¹²¹ These sanctions would normally violate the GATT, were it not for the exception of Article XXI(c) GATT.

¶165 The UN Security Council has not passed similar resolutions with regard to Myanmar yet. Thus, members will not be able to invoke this exception to justify trade sanctions against Myanmar. It should, however, be noted that on December 16, 2005, UN Under Secretary General Gambari with Secretary General Annan participating, briefed the Security Council for the first time on Myanmar.¹²² While the US will continue to press hard for further UN Security Council discussion and for such a resolution against Myanmar,¹²³ the US must face China, a permanent member on the Security Council. Since China sees Myanmar as a vital strategic ally, China is likely to veto any such resolution.

¶166 With respect to the more measured EU sanctions which freeze financial assets of the SPDC and limit the supply of arms to Myanmar, this author contends that the freezing of assets is not a *per se* breach of WTO obligations and even if it were, it could be seen as a proportional countermeasure under Article XX(b)(iii) as it is specifically targeted at punishing the SPDC in the hope that that punishment will incentivize them to improve their human rights record. The arms embargo to Myanmar can also be justified under Article XXI(b)(ii) which allows a state to impose trade limitations when it relates to “the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment.”

¶167 The low priority given by the US to its GATT obligations in the two *Nicaragua* cases and the continuing low priority given by the US to its WTO obligations in relation to the way the US shaped its Myanmar policy and the BFDA is regrettable. It is probably true that the risk of the BFDA being challenged is small and that even if Myanmar were to successfully challenge the BFDA, that any ruling will most likely result in non-compliance by the US leaving Myanmar with only retaliation as an impractical recourse due to the small amount of US exports to Myanmar. It is interesting to note, however, that US exports to Burma rose from US\$6.9 million to US\$11.6 million from 2003 to 2004 whereas because of the BFDA, official Myanmar exports to the US fell in the same period from US\$275.7 million to zero.¹²⁴ Nonetheless, the value of a ruling is not to be measured in purely financial terms alone. Ideally, compensation and retaliation are

¹²¹ See UN Office of the Spokesman for the Secretary-General, Use of Sanctions Under Chapter VII of the UN Charter, <http://ochaonline.un.org/webpage.asp?Page=901> (last visited April 26, 2007).

¹²² See U.N. SECURITY COUNCIL, SECURITY COUNCIL REPORT : UPDATE REPORT NO. 6 (May 26, 2006).

¹²³ See Malinowski, *supra* note 22; Lownkron, *supra* note 22 (both Malinowski and Lownkron are cited to demonstrate the political will of the US to push for change in Myanmar).

¹²⁴ See US Census Report on Trade, *supra* note 99.

supposed to be temporary measures and any ruling carries some moral weight as to the legitimacy or illegitimacy of the measure. It is also worth remembering that other WTO members may also potentially challenge the BFDA for nullification as the EU did the Massachusetts Burma Law.

¶68 Additionally, with the difficulties of the Doha Round, the WTO system may be unable to deal with an additional new controversy involving unilateral trade sanctions to protect human rights. As submitted above, it is likely that the BFDA will not be compliant with WTO obligations and if brought to task over the BFDA, regardless of whether the US chooses to comply with the ruling, the US will essentially be faced with the problem of either backtracking on the BFDA or, as in the *Nicaragua* cases, declaring that trade sanctions to promote human rights are non-justiciable. The former would result in a loss of standing by the US government domestically and the latter could create potential loopholes that may be exploited by those with protectionist agendas.

V. THE SOCIAL CLAUSE

¶69 Nonetheless, the fact that the BFDA appears to be non-compliant with the WTO obligations of the US does not answer the question as to whether it would be desirable to have a specific trade and human or labor rights link - a Social Clause - so that sanctions and other trade measures targeted against the violations of such rights are in compliance with WTO obligations. Rules could then be negotiated and established which could also thereby constrain such an exception. Unfortunately, the regulatory regimes governing trade and human or labor rights have historically developed and co-existed in “splendid isolation”, as self-contained regimes without being attuned to one another.¹²⁵

¶70 Within the WTO there is strong resistance to any formal linkage between trade and labor rights. The developing nations are fearful that such a Social Clause could provide a legitimate mask for protectionist agendas. This fear was succinctly encapsulated in 1994 by the then Malaysian Prime Minister Mahathir Mohammad, who shared his suspicions that:

Western governments openly propose to eliminate the competitive edge of East Asia. The recent proposal for a world-wide minimum wage is a blatant example. Westerners know that this is the sole comparative advantage of developing countries. All other comparative advantages (technology, capital, rich domestic markets, legal frameworks, management and marketing networks) are with the developed states. It is obvious that the professed concern about workers’ welfare is motivated by selfish interest. Sanctimonious pronouncements on humanitarian, democratic and environmental issues are likely to be motivated by a similar selfish desire to put as many obstacles as possible in the way of anyone attempting to catch up and compete with the West.¹²⁶

¹²⁵ Friedl Weiss, Trade and Labor I in THE WORLD TRADE ORGANIZATION: LEGAL, ECONOMIC AND POLITICAL ANALYSIS, 2, at 575 (2005).

¹²⁶ Mahathir Mohammad, East Asia Will Find Its Own Roads to Democracy, INTERNATIONAL HERALD TRIBUNE, May 17 1994.

¶71 Such sentiments resulted in the push by the developing nations for the declaration that emerged from the 1996 WTO Singapore Ministerial Conference.¹²⁷ In this declaration, the following statement was made, “We renew our commitment to the observance of internationally recognized core labor standards. The ILO is the competent body to set and deal with these standards, and we affirm the support for its work in promoting them.”¹²⁸

¶72 The 2001 Doha Ministerial Declaration reaffirms this statement.¹²⁹ And so the matter now stands – there is no explicit link, no Social Clause. However, despite these declarations, the issue of a trade and labor linkage however seems unlikely to go away,¹³⁰ because the opinions about whether there should be a linkage remain divided. In the absence of any consensus on an express Social Clause, future WTO cases may conceivably expand GATT Articles XX and XXI, as discussed above, to create a de facto implied Social Clause circumscribed by the requirement of necessity and the chapeau in the former and proportionality in that latter.

VI. ETHICS AND TRADE

¶73 Proponents of an express Social Clause within the WTO argue that a state should be allowed to prohibit the import of products produced with forced labor or to interrupt economic relations with countries that commit severe human rights violations, in order to avoid supporting the repressing regime.¹³¹ Dismissing the 1996 Singapore Ministerial Declaration, they point out that the ILO has had indifferent success in eliminating labor rights violations.¹³² Indeed, compliance with ILO norms depends on a combination of public identification, embarrassment and shaming (a mild stick) and technical assistance to promote compliance (a mild carrot); thus it is not as effective in fostering compliance as the WTO with its ability to authorize trade sanctions.¹³³ This argument does not rely on the old argument that trade causes exploitive labor practices, but merely views the trade system as a convenient tool to enforce labor rights.¹³⁴

¶74 It is clear that certain core labor standards can be characterized as human rights. These rights are stated in the UDHR, the subsequent International Covenant on Civil and Political Rights¹³⁵ and the International Covenant on Economic, Social and Cultural Rights.¹³⁶ The 1998 ILO Declaration of Fundamental Principles and Rights at Work¹³⁷

¹²⁷ Virginia A Leary, *The WTO and the Social Clause: Post-Singapore*, 8 EUR. J. INT’L. L. 118 (1997).

¹²⁸ World Trade Organization, *Singapore Ministerial Declaration of 18 December 1996*, WT/MIN(96)/DEC, at 2 (adopted December 13 1996).

¹²⁹ World Trade Organization, *Ministerial Declaration of 14 November 2001*, WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2002), art. 8 at 2 (2002).

¹³⁰ TREBILCOCK & HOWSE, *supra* note 82.

¹³¹ Zagel, *supra* note 90, at 22-23.

¹³² Charles Pearson, *Labor Standards in THE WORLD TRADE ORGANIZATION: LEGAL, ECONOMIC AND POLITICAL ANALYSIS 2*, 127 (2005).

¹³³ TREBILCOCK & HOWSE, *supra* note 82, at 274.

¹³⁴ Pearson, *supra* note 132.

¹³⁵ *International Covenant on Civil and Political Rights*, 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 UNTS 171, (entered into force March 23 1976).

¹³⁶ *International Covenant on Economic, Social and Cultural Rights*, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 UNTS 3, (entered into force January 3 1976).

¹³⁷ International Labour Organization, *Declaration of Fundamental Principles and Rights at Work*, 86th Session, Geneva, June 1998 [hereinafter *ILO Declaration*],

identifies four universally accepted workplace human rights as core labor rights, namely; (a) freedom of association and the effective recognition of the right to collective bargaining; (b) the elimination of all forms of forced or compulsory labor; (c) the effective abolition of child labor; and (d) the elimination of discrimination in respect of employment and occupation. All members of the ILO, including Myanmar,¹³⁸ have the obligation stemming from mere membership in the ILO to respect, promote and realize these principles.¹³⁹

¶75 Since this 1998 ILO Declaration was adopted unanimously, the old objection often expressed by developing countries that they are not obliged to respect these rights because they only reflect the cultural values of the developed countries cannot be made. “As all nations have a stake in the observation of universal human rights and by extension core labor standards, merely doing nothing in the face of violations of those rights is by definition, inconsistent with those rights.”¹⁴⁰

¶76 There is, however, a problem with defining the scope of these core labor standards. Should child labor be defined only in a term of a minimum age, or should one also take into account the working conditions? What constitutes forced labor? The open ended content of even these core labor rights makes it difficult to define what actual violations should be dealt with by the WTO (if indeed it should deal with them at all). Further, if one argues that there should be a link because doing nothing is inconsistent with those rights, one would expect that the effect of measures taken to have a positive influence on the human rights situation in the targeted country. However, experience has shown that trade related labor rights measures aimed at promoting labor rights often do not have their intended effect.¹⁴¹

¶77 The Harkin Bill is one notable example. In 1993, US Senator Tom Harkin introduced a bill, the Child Labor Deterrence Act, which if enacted, would have prohibited the import into the US of minerals obtained or manufactured goods produced by child labor.¹⁴² The mere threat of trade sanctions implied in this bill induced employers in the Bangladesh garment industry to lay off tens of thousands of children, mostly girls.¹⁴³ An ILO survey based on a sample of children laid off found that these had turned to other, in many cases more hazardous activities such as prostitution, and that none of them had returned to school.¹⁴⁴ The recognition of the consequences of such sanctions led to a rethinking of the strategy to involve the provision of alternatives which in the case of child labor in Bangladesh involved stipend payment and education schemes for expelled child garment workers.¹⁴⁵

¶78 In the case of Myanmar, the US sanctions have also largely missed their target. The military government does not own or control the garment export industry, which accounts

<http://www.ilo.org/dyn/declaris/DECLARATIONWEB.INDEXPAGE> (last visited April 1, 2007).

¹³⁸ <http://www.ilo.org/public/english/standards/re/m/country.htm> (this webpage contains a list of all of the International Labour Organization’s members. The ILO has 178 member countries, Myanmar is one of them).

¹³⁹ ILO Declaration, *supra* note 137.

¹⁴⁰ TREBILCOCK AND HOWSE, *supra* note 82, at 272.

¹⁴¹ Zagel, *supra* note 90, at 24.

¹⁴² ILO, *Workshop No 2 – Globalization, Liberalization and Child Labor* (1997), available at <http://www.ilo.org/public/english/comp/child/conf/amsterdam/workshop2.htm>

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

for about 85 percent of the US imports from Myanmar.¹⁴⁶ The industry is dominated by local, generally small, privately owned companies which are estimated to form 88 percent of the industry.¹⁴⁷ These small privately owned companies employ 72 percent of the workers and produce 62 percent of the exports.¹⁴⁸ The rest of the industry is divided between joint ventures (between SPDC-linked companies and foreign investors) as well as fully foreign-owned companies. Even so, military's income from garment exports to the US in 2002, including taxes and revenue sharing from joint ventures was estimated at less than US\$10 million.¹⁴⁹ Even without factoring in the regime's alleged involvement in the drug trade, this is insignificant when compared to their more lucrative businesses in natural gas, wood exports and gems.¹⁵⁰

¶79 While the losses from the BFDA for the military government are, thus, limited, the BFDA has caused the civilian population severe hardship. Preliminary reports on the effects of the BFDA indicate that the sanctions have already resulted in an estimated 40,000 layoffs in the garment industry and some reports predict that 100,000 Burmese, mainly women working in the garment industry, stand to lose their job as a result of the sanctions.¹⁵¹ Some women who have already lost their jobs have been forced into prostitution out of economic necessity and the need to support their families.¹⁵² With the lack of an anti-HIV/AIDS health strategy in Myanmar, many of these women will eventually contract and die of HIV/AIDS.¹⁵³

¶80 As former US President Jimmy Carter observed, "We must also strive to correct the injustice of economic sanctions that seek to penalize abusive leaders but all too often inflict punishment on those who are already suffering from the abuse."¹⁵⁴

VII. THE SOUTH AFRICAN FALLACY

¶81 However, proponents of sanctions often cite the example of South Africa and the end of apartheid to demonstrate the effectiveness of sanctions in improving situations of human rights abuses. US Senator Mitch McConnell, for example, has stated that: "Sanctions worked in South Africa and they will in Burma too."¹⁵⁵ Such a view is overly

¹⁴⁶ INTERNATIONAL CRISIS GROUP, *MYANMAR: SANCTIONS, ENGAGEMENT OR ANOTHER WAY FORWARD?* ICG ASIA REPORT NO. 78, 19 (April 26 2004); *See also* Toshihiro Kudo, *The Impact of United States Sanctions on the Myanmar Garment Industry*, (Inst. of Developing Economies Discussion Paper No. 42, 2005), available at http://www.ide.go.jp/English/Publish/Dp/pdf/042_kudo.pdf.

¹⁴⁷ International Crisis Group, *supra* note 146, at 19.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *See* KHIN MAUNG KYI, ET AL., *ECONOMIC DEVELOPMENT OF BURMA: A VISION AND A STRATEGY*, 67 (2000) (author relies on the Statistical Yearbook 1997, Union of Myanmar to show that Industry (of which textile is only one of many industries) contributed to only 10% of the economy of Myanmar whereas Agriculture, Forest, Mines and Energy contributed cumulatively to 40.3% of the economy).

¹⁵¹ *See* US STATE DEPARTMENT, BUREAU OF EAST ASIAN AND PACIFIC AFFAIRS, *REPORT ON CONDITIONS IN BURMA AND U.S. POLICY TOWARD BURMA FOR THE PERIOD MARCH 28, 2003 - SEPTEMBER 27, 2003*, (2003) available at, <http://www.state.gov/p/eap/rls/rpt/burma/25650.htm>

¹⁵² Kyaw Yin Hlaing, National Bureau of Asian Research, *Will Western Sanctions Bring Down the House*, in *RECONCILING BURMA/MYANMAR: ESSAYS ON US RELATIONS WITH BURMA* (J. Badgley, ed., 2004).

¹⁵³ *Id.*

¹⁵⁴ Jimmy Carter, Former U.S. President, Nobel Laureate, Nobel Lecture (Dec. 10 2002), available at, http://nobelprize.org/nobel_prizes/peace/laureates/2002/carter-lecture.html.

¹⁵⁵ Michael Schuman, *Going Nowhere*, TIME, Jan. 30 2006, at 32.

simplistic and fails to adequately compare the situation in South Africa at the end of the apartheid regime and that of present day Myanmar.

¶82 Admittedly, there are similarities between the situation in apartheid South Africa and the present situation in Myanmar. In both, the stated aim of the US sanctions was to improve the situation of the people and end human rights abuses by targeting a small but powerful minority in order to force that group to relinquish control to the majority. In both situations, the US sought to balance the concerns of successfully effecting change, whilst avoiding harm to those that the sanctions intended to assist.¹⁵⁶ In both situations, it could be argued that the US interest was to balance the concerns of successfully effecting change, while avoiding harm to those that the sanctions were intended to assist.

¶83 Despite these similarities the analogy between the military government in Myanmar and the apartheid South African government is misleading because of four vital differences.¹⁵⁷ The first difference is the absence of civil society and democratic institutions in Myanmar. While South Africa under apartheid was not a democracy, there was a democratic framework and in 1992 the white voters were able to bring the apartheid system to an end, when 68 percent voted in favor of the creation of a multiracial democracy in a referendum.¹⁵⁸ While there was a unicameral people's assembly under a one party rule from 1974 to 1988 in Myanmar, in reality, there has been no fully functioning parliament since the 1962 military takeover and no prospect of one in the foreseeable future.¹⁵⁹ It is also unlikely that any significant percentage of the military government will vote for such a regime change.

¶84 Strong internal pressure for political change in South Africa helped to end apartheid including an underground resistance movement aligned with the African National Congress, an open and broad-based opposition movement led by high profile figures such as Bishop Desmond Tutu, and union leader Cyril Ramaphosa, as well as a substantial group of white liberals and businessman.¹⁶⁰ In Myanmar, despite the fact that most people resent the military government, there is little active opposition due to brutal repression and perhaps the stoic influence of Buddhism.¹⁶¹

¶85 A second difference is that when apartheid became a major international concern, South Africa was already heavily integrated in the international community and foreign investment and trade was crucial for the government.¹⁶² The government came under strong pressure from domestic business which acted as a mediator for international sanctions and greatly added to their impact.¹⁶³ These conditions are absent in Myanmar and most large companies in Myanmar with links to the global economy are either

¹⁵⁶ In 1986 the US congress imposed sanctions on South Africa. *See generally* Comprehensive Anti-Apartheid Act of 1986, 22 U.S.C. § 5001 (1986). (the Comprehensive Anti-Apartheid Act (CAAA) 1986 imposed a range of measures, including banning all imports of agricultural products (section 319), imports of iron, steel (section 320) and coal (section 309). The Act also prohibited new investments by US firms (section 310) and imposed an oil embargo (section 321)).

¹⁵⁷ International Crisis Group, *supra* note 146 at 20.

¹⁵⁸ BBC *On this Day*, 1992:18 Mar 1992: *South Africa votes for change*, (the "On This Day" section of the BBC website allows webviewers to search for historical events by a specific date since 1950.) *available at* http://news.bbc.co.uk/onthisday/hi/dates/stories/march/18/newsid_2524000/2524695.stm

¹⁵⁹ Taylor, *supra* note 7, at 20-25.

¹⁶⁰ International Crisis Group, *supra* note 146, at 21.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

controlled by the military or owe their position to military patronage.¹⁶⁴ A liberal middle class of merchants does not exist in Myanmar as a counter influence to the hard line military government.

¶86 Third, the white leaders of South Africa proved pragmatic - they chose to accept majority rule instead of living in a society of ever increasing repression and fear.¹⁶⁵ The military in Myanmar appear to feel that they have achieved their primary objectives of maintaining national sovereignty and unity. They are less responsive to international pressure and isolate themselves from the international community. The move of the capital to the remote town of Pyinmana illustrates their isolationist inclinations.¹⁶⁶ Sanctions may therefore even be helping sustain military rule by isolating Myanmar further.

¶87 Finally, the sanctions imposed on South Africa were substantially supported by all its neighbours, as well as its main Western trading partners.¹⁶⁷ By contrast there is no universal condemnation of Myanmar's military government and the international community's response towards Myanmar is far from uniform, having varied from different sanctions to engagement. The military government has been able to compensate for the impact of the sanctions on the economy by focusing on its cross-border trade with India and China.¹⁶⁸ China now has over US\$400 million of annual trade with Myanmar and this is likely to triple by 2008, while India is a growing potential market which aims to contain China's influence in Myanmar by fostering closer bilateral ties.¹⁶⁹

¶88 It is highly questionable whether the BFDA will be an effective policy tool at all because of these differences. It is also unlikely that the EU sanctions will also effect much change except to prevent the military government from locating their financial assets in the EU.

VIII. ENGAGEMENT

¶89 When Myanmar's regime overturned the results of democratic elections won by Aung San Suu Kyi and her NLD party in May 1990, ASEAN came under criticism from the US and the EU for its commercial links with Myanmar.¹⁷⁰ ASEAN responded by adopting a policy of "constructive engagement" at its annual ministerial meeting in Kuala Lumpur the following year.¹⁷¹ This policy was designed to secure Myanmar's membership in ASEAN by the year 2000, to ward off US and EU pressures, and to justify the continuation of commercial relations. ASEAN's policy of constructive engagement was also prompted by the fear that an isolated Myanmar would move closer towards China.¹⁷²

¹⁶⁴ *Id.* at 20.

¹⁶⁵ *Id.* at 21.

¹⁶⁶ Burma Net News, *supra* note 17.

¹⁶⁷ *Id.*

¹⁶⁸ Anna E. Johansson, *A Silent Emergency Persists: The Limited Efficacy of U.S. Investment Sanctions on Burma*, 9 PAC. RIM L. & POL'Y J. 317, 339-340 (2000); Schuman, *supra* note 158 at 26.

¹⁶⁹ Ravi Velloor, *Indian Leader Cosies Up To Myanmar Junta*, THE STRAITS TIMES, March 9 2006, at 14.

¹⁷⁰ *Myanmar Gives Up 2006 ASEAN Championship*, *supra* note 65.

¹⁷¹ Robin Ramcharan, *ASEAN and Non-Interference: A Principle Maintained*, 22 CONTEMP. SOUTHEAST ASIA 60, 66-67 (2000).

¹⁷² *Id.* at 65.

¶90 While political realism was more the motivating factor for ASEAN, there were some in ASEAN who truly believed that engagement rather than sanctions would move the Myanmar government towards a more liberal position.¹⁷³ Often, “transitions from autocratic rule in countries with established markets and private property are usually seen to stem from endogenous forces in which the ascendant middle class or bourgeoisie plays an important contributory role.”¹⁷⁴ As Barrington Moore in his work on the origins of dictatorship and democracy tersely put it, “No bourgeois, no democracy.”¹⁷⁵ Indeed, exogenous factors in transitions to democracy and markets are deemed by many writers to have played a minor role. Though not denying external influences any role in regime change, Guillermo O'Donnell and Philippe Schmitter regard as “fruitless” the search for “some international factor or context [which causes] regimes to collapse.”¹⁷⁶

¶91 Unfortunately, engagement, constructive or otherwise, has not worked in Myanmar either. Opponents of trade sanctions aimed at promoting human rights argue that trade sanctions hinder economic development that leads to higher income, which in turn produces a positive effect on the standard of living and enjoyment of human rights.¹⁷⁷ However, this chain of events assumes that workers will be able capture a significant share of their increased productivity through the natural operation of the labor market. In Myanmar this does not happen. In spite of trade with the ASEAN countries, India and China, the civilian population of Myanmar has remained poor and apart from a few more privately owned sectors like the textile industry, it is the military government that really gains significant profits from external trade.¹⁷⁸

¶92 Indeed, if a regime wants to stay in power and is threatened by the emergence of a liberal middle class, apparent economic openness, absent any institutional change, will have no effect, because the regime will simply seek to control trade, free enterprise and that developing middle class. This has been the case with Myanmar. It may be that measured engagement in certain more privately owned sectors such as the textile industry may allow some trickle down to the civilian population. However, such targeted engagement may result in the military government expanding its control to include those sectors. Therefore, such engagement would have to be dynamic and tied to certain codes (such as the Sullivan Principles¹⁷⁹) which could act as disincentives for the military government to do so.

¶93 Finally, proponents of engagement also point to the success of engagement with China arguing that trade has brought China further into the international order, thereby making it a more responsible actor.¹⁸⁰ They expect trade to empower more internationalist and cooperative elements within Beijing.¹⁸¹ However, engagement has not significantly

¹⁷³ *Id.*

¹⁷⁴ David Lane, *The Transformation of Russia: The Role of the Political Elite*, 48 EUR.-ASIA STUD. 535 (1996).

¹⁷⁵ BARRINGTON MOORE, JR., SOCIAL ORIGINS OF DICTATORSHIP AND DEMOCRACY 418 (1967).

¹⁷⁶ GUILLERMO O'DONNELL & PHILIPPE C. SCHMITTER, TRANSITIONS FROM AUTHORITARIAN RULE: TENTATIVE CONCLUSIONS ABOUT UNCERTAIN DEMOCRACIES 18 (1986).

¹⁷⁷ *Id.* at 23.

¹⁷⁸ Schuman, *supra* note 155, at 31.

¹⁷⁹ Global Sullivan Principles, <http://www.globalsullivanprinciples.org/principles.htm> (last visited Feb. 27 2007).

¹⁸⁰ *See* WEAVING THE NET: CONDITIONAL ENGAGEMENT WITH CHINA (James Shinn, ed., 1996); SHAPING CHINA'S FUTURE IN WORLD AFFAIRS: THE ROLE OF THE UNITED STATES (Sutter & Choi, eds. 1996).

¹⁸¹ *Id.*

modified China's behavior towards Tibet or in its treatment of human rights activists both of which were key demands made by proponents of sanctions against China.¹⁸² Yet, some comfort can be drawn by observers of the rise of a large middle class in China due to the willingness of the Chinese government to allow free enterprise and freer trade. It still remains to be seen if Moore's dictum will prove true for China. Regardless, for the reasons discussed above, the social and political situation in China is very different from that in Myanmar and it is unlikely that *laissez faire* engagement alone will result in a regime change in Myanmar.

IX. CONCLUSION

¶94 Pope John Paul II, in his address to the Vatican Diplomatic Corp in 1995 summed up his views of sanctions as follows:

'In today's interdependent world, a whole network of exchanges is forcing nations to live together, whether they like it or not. But there is a need to pass from simply living together to partnership. Isolation is no longer appropriate. The embargo in particular, clearly defined by law, is an instrument which needs to be used with great discernment, and it must be subjected to strict legal and ethical criteria. It is a means of exerting pressure on governments which have violated the international code of good conduct and of causing them to reconsider their choices. But in a sense it is also an act of force and, as certain cases of the present moment demonstrate, it inflicts grave hardships upon the people of the countries at which it is aimed. I often receive appeals for help from individuals suffering from confinement and extreme poverty. Here I would like to remind you who are diplomats that, before imposing such measures, it is always imperative to foresee the humanitarian consequences of sanctions, without failing to respect the just proportion that such measures should have in relation to the very evil which they are meant to remedy.'¹⁸³

¶95 So, if trade sanctions are not working to promote human rights and engagement has been a failure as well in Myanmar, can nothing be done about the Myanmar problem? The issue is not whether something can be done but rather what each actor wants to do about the Myanmar problem.

¶96 Exogenous factors are less likely to influence a change from autocracy to democracy. Trade sanctions have not been successful in causing regime change absent the appropriate endogenous situation. Despite this, the US, in particular, continues to use heavy handed trade sanctions ostensibly to cause regime change. This suggests either simplistic thinking among the policy makers or a pandering to ill informed voices for domestic political gain. These sweeping sanctions are also more likely to be non-compliant with the WTO obligations of the US.

¹⁸² *Id.*

¹⁸³ Pope John Paul II, Annual Address to the Diplomatic Corp, (Jan. 9, 1995), <http://www.ewtn.com/library/PAPALDOC/JP2DIPCP.htm>

¶97 On the other hand, the engagement approach is naïve if it believes that trade alone will create a liberal middle class which could then result in regime change. Reckless engagement has too often been an excuse for business as usual. Such a cavalier approach may also be inconsistent with the need to protect human rights.

¶98 An alternative to the binary problem of sanctions or engagement has been offered in the form of ‘smart’ sanctions¹⁸⁴ - measured responses specifically tailored to maximize the target’s regime cost of non-compliance while minimizing the suffering of the target’s population.¹⁸⁵ However, even proponents admit that smart sanctions can still cause harm to the target’s population such as when an arms embargo increases the cost of arms procurement resulting in a diversion of funds from public goods.¹⁸⁶ Further, as some scholars point out, sanctions with specifically tailored demands may have worked to change the behavior of friendly states but they have not been successful in bringing about regime change in authoritarian regimes due to differing conflict expectations.¹⁸⁷

¶99 Nevertheless, recalling that pre-existing WTO obligations should circumscribe trade sanctions, that the Myanmar regime should be publicly denounced and that some behavioral cost should be imposed on the regime but also bearing in mind the need to minimize harm to the civilian population, the EU sanctions are probably ‘smarter’ sanctions than the BFDA. That an arms embargo may have unforeseen circumstances does not change the fact that targeted sanctions cause less harm than one that bans all imports from Myanmar and this is less likely to be unjustifiably discriminatory or disproportional.

¶100 Regardless, since no strategy can completely anticipate all the results of a particular measure, what is important is that international actors should swiftly reverse their course if a strategy is not working, is causing unintended harm and if that strategy looks unlikely to work even in the long run. The EU, for example, retracted the flight ban it imposed on Yugoslavia when it realized that the ban incurred more costs for the Yugoslav opposition than it did for the Milosevic regime.¹⁸⁸ The US should similarly reconsider the BFDA. A possible option would be to use the ‘national security interest’ waiver authority found in Section (3)(b) of the BFDA to modify the sanctions on all products and to target specific products more directly linked to the SPDC or to follow the EU lead and target only the offshore funds and movement of SPDC members. As UN Secretary General Kofi Annan said, “[I]t is not enough merely to make sanctions “smarter”. The challenge is to achieve consensus about the precise and specific aims of the sanctions, adjust the instruments accordingly and then provide the necessary means.”¹⁸⁹

¶101 The way forward is to navigate the path between the hypocrisy of ineffective and sweeping trade sanctions aimed at regime change but which instead merely impoverishes the civilian population and the naivety of laissez fair engagement which only enriches an autocratic regime. Perhaps dynamic smart sanctions and smart engagements can be

¹⁸⁴ See SMART SANCTIONS: TARGETING ECONOMIC STATECRAFT (David Cortright & George A. Lopez eds., 2002).

¹⁸⁵ See Amy Howlett, *Getting ‘Smart’: Crafting Economic Sanctions That Respect All Human Rights*, 73 Fordham L. Rev. 1199 (2004).

¹⁸⁶ SMART SANCTIONS: TARGETING ECONOMIC STATECRAFT, *supra* note 184, at 126.

¹⁸⁷ See Drezner, *supra* note 3, at 307-09.

¹⁸⁸ Cortright & Lopez, *supra* note 184, at 102.

¹⁸⁹ Kofi Annan, Secretary-General Reviews Lessons Learned During ‘Sanctions Decade’ In Remarks to International Peace Academy, SG/SM/7360, <http://www.un.org/sc/committees/sanctions/sgstatement.htm>

calibrated for each situation taking into account the particular conditions of each situation.¹⁹⁰ Regardless, the main concern of international actors seeking to address international ills should be, in the famous dictum of Hippocrates, to ‘[first] do no harm’¹⁹¹ and if harm is caused then to swiftly redress that mistake.¹⁹²

¹⁹⁰ See DAVID CORTRIGHT & GEORGE A. LOPEZ, *THE SANCTIONS DECADE: ACCESSING UN STRATEGIES IN THE 1990S* 221-49 (2000); MEGHAN L. O’ SULLIVAN, *SHREWD SANCTIONS: STATECRAFT AND STATE SPONSORS OF TERRORISM* 287-98 (2003).

¹⁹¹ HIPPOCRATES, *OF THE EPIDEMICS*, Bk I, Sect 5, (Francis Adams, trans.) *available at*, <http://classics.mit.edu/Hippocrates/epidemics.1.i.html>.

¹⁹² See CORTRIGHT & LOPEZ, *supra* note 190 at 239-49; O’Sullivan, *supra* note 190 at 299-320.