

UNILATERAL SANCTIONS: AN EFFECTIVE FOREIGN POLICY TOOL IN MYANMAR?

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I. INTRODUCTION

Myanmar, also known as Burma, has experienced years of poor economic growth due in part to unilateral sanctions. Unilateral sanctions are those imposed on one country by another in hopes of

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achieving some change of policy in the country upon which the sanctions are imposed.¹ The sanctions are “unilateral” because one country, or several countries with little or no coordination among them, imposes the sanctions on a target country. The result is often a target country with poor living conditions that remains undeveloped, while the imposing country fails to achieve its goal, whatever it may be.

Unilateral sanctions have a simple objective. The imposing country implements the sanctions to cut off necessary resources to a target country in hopes that the target country will change one or more of its policies; however, this rarely happens.² For example, the U.S. imposed sanctions against Myanmar to address human rights violations.³ The goal was that the people of Myanmar would overthrow the Myanmar military regime and install a democratic government, or that the government would reform itself.⁴ However, a totalitarian government, such as the military government that ruled in Myanmar for over three decades,⁵ often has sufficient resources—either domestically or through relationships with other countries—to withstand sanctions and suppress the people, making democratic progress slow. The use of sanctions works better in democratic countries where citizens potentially have the opportunity to rise up and change policy.⁶ However, the U.S. mostly imposes sanctions on

1. Thihan Myo Nyun, *Feeling Good or Doing Good: Inefficacy of the U.S. Unilateral Sanctions: Against the Military Government of Burma/Myanmar*, 7 WASH. U. GLOBAL STUD. L. REV. 455, 464 (2008) (discussing the definition of economic sanctions). My analysis only focuses on economic sanctions such as trade and financial barriers. The article does not address military intervention, countermeasures, or coordinated measures that the United Nations mandates.

2. Daryl J. Levinson, *Collective Sanctions*, 56 STAN. L. REV. 345, 403 (2003) (discussing the use of international sanctions).

3. Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, § 570 110 Stat. 3009, 3009–116 (1996), available at <http://www.gpo.gov/fdsys/pkg/PLAW-104publ208/pdf/PLAW-104publ208.pdf>; see also Burma Freedom and Democracy Act of 1995, H.R. 2892, 104th Cong. § 2 (1996) (citing human rights violations as a rationale for sanctions).

4. See Burma Freedom and Democracy Act of 1995 § 3(a)(1).

5. Myanmar was taken over by military rule, led by General Ne Win, in 1962. The former British colony obtained independence in 1948 and was one of the richest countries in the region before the military took power. Sanctions were not imposed until the mid-1990s. The country did not start its path to democracy until the 2008 constitutional referendum. *Special Report: A Burmese Spring*, THE ECONOMIST, May 25, 2013, at 3–5; see also *infra* Part III.A.

6. South Africa is one example where the sanctions were effective based on the characteristics of the country. South Africa was a partial democracy. South Africa was already integrated into the world economy, and many members of the white middle class

undemocratic countries, like Myanmar, where citizens are unable to rise up and change policy.⁷ The purpose of this Paper is to look at the United States' use of unilateral sanctions in Myanmar and suggest ways of improving the use of sanctions as an effective foreign policy tool.

I start by looking at the instruments (or tools) that the U.S. has used when implementing sanctions against foreign countries. These include executive orders, statutes authorizing the President to use sanctions as a foreign policy tool, and country-specific statutes requiring the President to authorize sanctions.⁸ I also examine problems that the U.S. has encountered through its use of unilateral sanctions, including disputes with close allies such as the European Union.

Next, I explore the effectiveness of sanctions that have been imposed on Myanmar and the resulting difficulties the country has experienced. The U.S.' use of unilateral sanctions has mostly proved ineffective and has often left affected citizens worse off by jeopardizing individual rights, destroying jobs, increasing hunger, and creating poor health conditions.⁹ The U.S. has recently begun easing sanctions on Myanmar after imposing them for over fifteen years.¹⁰ The easing of sanctions is a result of the Myanmar government initiating some democratic reforms and the U.S. changing its foreign policy.¹¹

Finally, I suggest an improved strategy for using unilateral

required foreign investment to maintain successful businesses. Finally, countries imposed sanctions that complemented internal resistance measures and had the support of South Africa's neighboring countries. These factors were not present in Myanmar. See MORTEN B. PEDERSEN, PROMOTING HUMAN RIGHTS IN BURMA 259-61 (2008).

7. Many countries have had sanctions imposed on them by the U.S. and other governments. Currently, seventeen countries have some sort of sanctions imposed. The most aggressive of these sanctions have been the sanctions imposed on Cuba, Iran, Myanmar, and North Korea. See *Sanctions Programs and Country Information*, U.S. DEP'T OF TREASURY OFFICE OF FOREIGN ASSET CONTROL, <http://www.treasury.gov/resource-center/sanctions/Programs/Pages/Programs.aspx> (last updated Feb. 20, 2014, 10:18 AM).

8. Nyun, *supra* note 1, at 469.

9. Amy Howlett, *Getting "Smart": Crafting Economic Sanctions that Respect all Human Rights*, 73 FORDHAM L. REV. 1199, 1200 (2004).

10. See OFFICE OF FOREIGN ASSET CONTROL, U.S. DEP'T OF TREASURY, GENERAL LICENSE NO. 16 (2012), available at <http://www.treasury.gov/resource-center/sanctions/Programs/Documents/burmagl16.pdf>.

11. See *Office of the Spokesperson: Administration Eases Financial and Investment Sanctions on Burma*, U.S. DEP'T OF STATE (July 11, 2012), <http://www.state.gov/r/pa/prs/ps/2012/07/194868.htm>.

sanctions known as constructive engagement. Constructive engagement uses sanctions that target *specific* individuals rather than the entire country, which the U.S. has begun to adopt in Myanmar.¹² The U.S. can foster development by working with key individuals in a country to promote the change desired while sanctioning those who stifle the desired result. Sanctions under constructive engagement improve conditions in the target country and provide its citizens with the resources necessary to demand change by providing access to worldwide markets and new ideas. This process addresses concerns that foreign allies have with current unilateral sanctions while also providing opportunities to foster cooperation with allies that will result in a more effective approach.

I will analyze constructive engagement by examining the recent easing of sanctions in Myanmar and related shift to a constructive engagement approach. I will also examine remedies available to private parties when U.S. investors violate law and human rights.¹³ Of course, each country is different and unilateral sanctions may sometimes be necessary. I argue, however, that the U.S. should first try constructive engagement approaches, which could have provided better results in Myanmar.

II. UNITED STATES' SANCTION MECHANISMS

The President of the United States is responsible for foreign relations.¹⁴ At one end of the spectrum, Congress has provided the President with a range of tools for completing U.S. goals abroad by enacting statutes¹⁵ that give the President broad authority in regulating commerce with foreign nations.¹⁶ In addition, the

12. See Howlett, *supra* note 9, at 1232. In addition to Myanmar, the United States targets sanctions with the Specially Designated Nationals list that prohibits U.S. citizens or corporations from conducting business with named individuals or corporations. *Specially Designated Nationals List*, OFFICE OF FOREIGN ASSET CONTROL (Feb. 14, 2014), <http://www.treasury.gov/resource-center/sanctions/SDN-List/Pages/default.aspx>.

13. Constructive engagement is often criticized as not being tough on a country or allowing investors to use current political situations for economic gain by disregarding human rights. Terry Atlas, *U.S. to Step Up Apartheid Talks*, CHICAGO TRIBUNE (Jan. 11, 1987), http://articles.chicagotribune.com/1987-01-11/news/8701030542_1_south-africa-constructive-engagement-anc (noting criticisms when the U.S. implemented constructive engagement policies against the South African apartheid regimes as being “too soft”).

14. U.S. CONST. art. II, § 2–3.

15. See *infra* Part II.A.

16. U.S. CONST. art. I, § 8, cl. 3.

President may actively engage with countries and negotiate treaties.¹⁷ At the other extreme, the President serves as the Commander and Chief of the armed forces and is capable of sending troops anywhere in the world.¹⁸ Somewhere between active engagement and military action, the President can impose economic sanctions on a country as a passive foreign relations tool.¹⁹ This section explores the statutory framework for sanctions, the package of sanctions that are generally imposed on a country, and problems with current policies.

A. *Statutory Framework for Sanctions*

The U.S. generally uses three types of economic sanctions: trade and economic sanctions administered by the Office of Foreign Asset Control within the Department of Treasury, export control sanctions administered by the Department of Commerce, and arms sanctions administered by the Department of State.²⁰ The President uses all three types of sanctions to affect policy change in a target country. Trade and economic sanctions cause the most concern because the sanctions often isolate a country economically.

Trade and economic sanctions, which comprise the majority of U.S. imposed sanctions, usually prohibit U.S. persons and corporations, including foreign subsidiaries of U.S. corporations, from doing business with target countries, target country governments, or entities controlled by target country governments.²¹ The U.S. will freeze assets and halt travel to the U.S. of senior government officials from the target country through the Specially Designated Nations (SDN) list.²² An import ban that prohibits U.S. companies from importing goods from a target country can also be imposed.²³ The President will often use any combination of these actions when imposing trade and economic sanctions.²⁴

17. U.S. CONST. art. II, § 2, cl. 2.

18. U.S. CONST. art. II, § 2, cl. 1.

19. *See infra* Part II.A.

20. William M. McGlone & Michael L. Burton, *Economic Sanctions and Export Controls*, 34 INT'L LAW 383, 383 (2000) (discussing the U.S. agencies responsible for international sanctions).

21. *See id.*

22. OFFICE OF FOREIGN ASSET CONTROL, U.S. DEP'T OF TREASURY, OVERVIEW OF BURMA SANCTIONS (2012).

23. 50 U.S.C. § 1702 (2012).

24. *See* Arthur B. Culvahouse, *A Practical Guide to International Sanctions Law and Lore: Mamas, Don't Let Your Children Grow up to be Sanction Lawyers*, 32 HOUS. J. INT'L L. 587, 590–93 (2010).

The President will also impose export sanctions in addition to trade and economic sanctions. Export sanctions generally prohibit exporting certain types of products to the target country.²⁵ Export sanctions can also remove the target country from the list of preferred trading partners, which otherwise gives a country the benefit of supplying goods to the U.S. Government.²⁶ These sanctions are particularly harmful because a target country no longer has access to the world's largest economy, the U.S.²⁷ When a country does not have access to the U.S. market, a country's citizens can lose jobs, creating unemployment and poor living conditions for what are normally the country's most vulnerable population. Many of the countries with sanctions imposed already have poor living conditions—the use of sanctions only increases the severity of these conditions.²⁸

The federal statutes grant the President the power to impose the various sanctions discussed above. Congress originally passed the Trading with the Enemy Act of 1917 (TWEA), which allowed the President to authorize unilateral sanctions.²⁹ The President used the TWEA to authorize most sanction programs until Congress enacted the International Emergency Economic Powers Act (IEEPA) in 1977.³⁰

Congress enacted the IEEPA to restrict the President's power in the TWEA to times of war and to use the IEEPA for times of peace.³¹ The President's power is restricted under the IEEPA by requiring the President to declare that a "national emergency" exists before imposing a sanction.³² The IEEPA defines a national emergency as "any unusual and extraordinary threat [that exists] to [the] national

25. McGlone & Burton, *supra* note 20, at 383.

26. *Id.*

27. *The World Factbook, United States*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/us.html> (last updated Jan. 28, 2014) (click on subheading "United States: Economy" on webpage).

28. Randall Peerenboom, *Beyond Universalism and Relativism: The Evolving Debates About "Values in Asia,"* 14 *IND. INT'L & COMP. L. REV.* 1, 43 (2003) (noting that "[i]n recent years, sanctions have fallen out of favor among many in the human rights community," because economic sanctions may worsen living conditions in the target country).

29. Trading with the Enemy Act of 1917, Pub. L. No. 65-91, 40 Stat. 411 (1917); Nyun, *supra* note 1, at 469.

30. International Emergency Economic Powers Act, 50 U.S.C. §§ 1701–1707 (2012).

31. Nyun, *supra* note 1, at 470.

32. 50 U.S.C. § 1702 (2012).

security, foreign policy, or economy of the United States.”³³ While the idea of requiring a national emergency to impose sanctions during times of peace restricts the President’s sanctioning power, this broad enumeration of circumstances for declaring a national emergency allows the President to authorize sanctions for almost any reason.³⁴ Congress may have recognized the broad authority that it provided the President and, as a check, authorized itself to terminate the sanctions by a resolution.³⁵ But, this provision has been held unconstitutional as a legislative veto.³⁶

When the President implements economic and trade sanctions, arms embargoes, and export sanctions, the U.S. has effectively cut off contact with the target country. In certain cases, Congress may also enact statutes specific to a particular country. Congress has usually enacted statutes when the President has failed to implement sanctions against a country. Congress has enacted specific sanction statutes in the case of Myanmar, for example.³⁷

The combination of sanctions under the TWEA, IEEPA, and country specific statutes create the relevant federal regulatory framework. Recently, states and cities have also implemented sanctions on target countries. These states or cities have deemed these target countries, including Myanmar, to be inappropriate business partners because the countries are undemocratic or violate basic human rights.³⁸ The Supreme Court, however, has struck down local sanctions under the preemption doctrine.³⁹

33. *Id.* § 1701.

34. See *Dames & Moore v. Regan*, 453 U.S. 654 (1981); Jason Luong, *Forcing Constraint: The Case for Amending the International Emergency Economic Powers Act*, 78 TEX. L. REV. 1181 (2000) (discussing the oversight problems and non-delegation doctrine with the IEEPA).

35. § 1706(b).

36. *I.N.S. v. Chadha*, 462 U.S. 919 (1983) (holding that a provision of the Immigration and Nationality Act authorizing a legislative veto is unconstitutional); *United States v. Romero-Fernandez*, 983 F.2d 195, 196 (11th Cir. 1993) (applying *Chadha* to the IEEPA).

37. *E.g.*, Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, § 570, 110 Stat. 3009, 3009-116 (1996); Burmese Freedom and Democracy Act of 2003, Pub. L. No. 108-61, 117 Stat. 864 (2003).

38. See, *e.g.*, MASS. GEN. LAWS. ch. 7, § 22M (1996); NEW YORK CITY, N.Y., LOCAL LAW 33 (1997).

39. *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363 (1999). In *Crosby*, Massachusetts had adopted a law that prohibited government agencies from purchasing goods from businesses doing business in Myanmar. *Id.* at 366. State economic sanctions may also be challenged on dormant commerce clause grounds and as an intrusion in federal foreign affairs. *Id.* at 370.

B. Problems with Economic and Trade Sanctions

Unilateral sanctions provide a range of tools for the U.S. but come at a cost. They have harmed U.S. interests in other policy objectives and have become an area of discontent among its close allies. To address these issues, revisions to current practices will be necessary.

The jurisdictional reach of U.S. sanctions has become a point of contention with European countries because those countries often take a different approach.⁴⁰ The U.S. applies unilateral sanctions to U.S. persons and companies, as well as foreign subsidiaries or foreign companies doing business in or with the U.S.⁴¹ The European Union and European countries have traditionally only applied sanctions to citizens or companies incorporated within its borders.⁴² The approach to jurisdiction in the U.S. is that jurisdiction may be asserted over any person or company that has a minimal relationship to the U.S.⁴³ Thus, this approach is much broader than in Europe because the U.S. is able to assert jurisdiction over foreign companies in cases where the events that gave rise to the claim took place outside of the U.S.

The U.S. has implemented sanctions against Cuba, Iran, and Libya that included sanctions against foreign individuals and companies, all of which the European Union contested.⁴⁴ The sanctions against Iran and Libya imposed fines against foreign persons that had some connection to the U.S. and who supported the development of petroleum resources in those countries.⁴⁵ The European Union responded against these acts with protests, proceedings at the World Trade Organization, and adopting a regulation that was binding for all European Union member states.⁴⁶

The European Union regulation prohibits entities within the European Union from complying with U.S. sanctions and bars

40. Harvard Law Review Association, *Responding to Extraterritorial Legislation: The European Union and Secondary Sanctions*, 124 HARV. L. REV. 1246, 1247–50 (2011).

41. Charles Breckinridge, *Sanction First, Ask Questions Later: The Shortsighted Treatment of Iran Under the Iran and Libya Sanctions Act of 1996*, 88 GEO. L.J. 2439, 2454 (2000) (discussing U.S. and European theory on jurisdiction).

42. *Id.* at 2454.

43. *Id.* at 2455.

44. Harvard Law Review Association, *supra* note 40, at 1248.

45. *Id.* at 1249.

46. Council Regulation 2271/96, 1996 O.J. (L 309) 1 (EC); Harvard Law Review Association, *supra* note 40, at 1249.

European Union courts from recognizing judgments imposed for violating the U.S. sanctions.⁴⁷ The European Union regulation also allows entities to recover costs from the U.S. parent company's—or other responsible party's—imposition of sanctions.⁴⁸ This response from the European Union resulted in an international conflict between a close ally and trading partner, which strained diplomatic relations and created new negative externalities for U.S. businesses from lost trade and additional litigation. The U.S. ultimately decided that the costs were not worth the price, and the President suspended application of the extraterritorial aspects of the sanctions.⁴⁹

The costs of imposing sanctions have also been great to U.S. companies. Conflicts surrounding sanctions have led to a loss of trade with U.S. companies because target countries find alternative trading partners. Foreign companies hesitate to work with U.S. companies in the service economy because they fear that the U.S. could either exert jurisdiction or impose sanctions that will end the business relationship.⁵⁰ Similarly, these foreign entities find alternatives to U.S. suppliers, banks, purchasers, and government services.⁵¹ These alternatives have resulted in products being redesigned to replace U.S. components, which results in a loss of foreign market share for U.S. firms.⁵² Thus, sanctions have a negative impact on an already sluggish U.S. economy because foreign businesses are encouraged to find alternatives to U.S. companies.

The use of sanctions, which are often seen as a passive foreign policy tool, has also hurt the U.S. superpower status. Countries have started to turn to China over the U.S. for strategic investment.⁵³ Further, the U.S. has lost clout with its allies over its passive actions in Syria.⁵⁴ In order to maintain and promote a healthy domestic

47. Council Regulation 2271/96, art. 5, 1996 O.J. (L 309) 1 (EC).

48. *Id.* art. 6.

49. Harvard Law Review Association, *supra* note 40, at 1249.

50. Breckinridge, *supra* note 41, at 2460.

51. *Id.* at 2462.

52. *Id.* at 2463.

53. *The United States in Central Asia*, THE ECONOMIST (Dec. 7, 2013), <http://www.economist.com/news/asia/21591242-america-winding-down-its-presence-claims-it-wont-fade-away-going-going?zid=306&ah=1b164dbd43b0cb27ba0d4c3b12a5e227> (noting America's shrinking international aid budget and that “[u]nlike the Americans, China puts its money where its mouth is.”).

54. *The Practice of Foreign Policy: Another Morning in America*, THE ECONOMIST (Nov. 23, 2013), <http://www.economist.com/news/special-report/21590107-do-list-worlds-superpower-another-morning-america?zid=308&ah=e21d923f9b263c5548d5615da3d30f4d>.

economy and maintain relations with close allies, new ways of encouraging countries to change are necessary.

III. MYANMAR SANCTIONS

U.S. policy towards Myanmar was ineffective until 2012, when the U.S. acknowledged that market forces could result in quicker changes in Myanmar and began to ease sanctions under a constructive engagement approach.⁵⁵ The U.S.' and other countries'⁵⁶ primary motivations behind the use of sanctions are the military dictatorship regime and human rights violations that exist in Myanmar.⁵⁷ But, as mentioned above, the U.S. has recently begun relaxing sanctions after fifteen years of imposition.⁵⁸ U.S. government officials have cited Myanmar's ruling party's commitment to increase democracy and advance human rights as reasons for easing the sanctions.⁵⁹ However, there is little proof that sanctions actually led to the Myanmar government's sudden change.⁶⁰ If sanctions were a consideration, a collective engagement approach still would have provided quicker results with minimal harm, as opposed to the fifteen years of suffering that sanctions created.

A. Events Leading to United States' Sanctions on Myanmar

Before discussing the specific sanctions imposed on Myanmar, it is important to understand the historical context that resulted in

55. U.S. DEP'T OF STATE, *supra* note 11.

56. The United States was not the only country to impose sanctions on Myanmar. However, United States' sanctions were arguably more comprehensive and were imposed for a longer period of time. Other countries that imposed sanctions against Myanmar included: Australia, Canada, and the European Union. See Annie Lowrey, *U.S. Sanctions on Myanmar Formally Eased*, N.Y. TIMES (July 11, 2012), http://www.nytimes.com/2012/07/12/world/asia/us-sanctions-on-myanmar-formally-eased.html?_r=0; Shibani Mahtani, *Sanctions Lifted Against Myanmar*, WALL ST. J. (Apr. 22, 2013), <http://online.wsj.com/article/SB10001424127887323735604578438632149787290.html> (noting the relaxation of sanctions by the European Union); .

57. Burmese Freedom and Democracy Act of 2003, H.R. 2330, 108th Cong. § 2 (2003) (stating congressional findings condemning human rights violations and failure to recognize democratic elections).

58. Anne Lowrey, *U.S. Sanctions on Myanmar Formally Eased*, N.Y. TIMES, July 12, 2012, at A8 (discussing the U.S. easing of sanctions).

59. *Id.*

60. There is a lot of speculation about what led to the government's sudden changes. My theories include: concern about the dominance of Chinese investments; the need for better infrastructure; exclusion from the Association of Southeast Asian Nations integration; and interest in increasing foreign direct investment by neighboring countries.

sanctions. The goal of U.S. sanctions imposed on Myanmar was to install a democratic government and improve human rights.⁶¹ Myanmar has a very unique and diverse history that has resulted in challenges to its path to democracy, as well as years of isolation.

Myanmar was originally known as Burma during the British colonial era.⁶² The citizens were opposed to remaining a British colony and gained independence from the British on January 4, 1948.⁶³ The leader of the independence movement was General Aung San, who was the father of Aung San Suu Kyi, a human rights activist, Nobel Peace Prize laureate, parliamentarian, and Chairperson for the National League of Democracy—the major opposition party.⁶⁴ General Aung San was assassinated prior to the country gaining independence, leaving Myanmar without a strong individual leader to push the country towards a democratic government.⁶⁵

After independence, the Anti-Fascist People's Freedom League (AFPFL) won parliamentary elections and assumed control of the country, during which time chaos broke out among various ethnic groups.⁶⁶ This led to military leaders arguing that the democratic government could not effectively manage the country and that strong leadership was necessary. Thus, in 1958, the AFPFL collapsed and a military caretaker government took over.⁶⁷

In 1962, General Ne Win and his Burma Socialist Programme Party (BSPP) usurped power.⁶⁸ The BSPP feared the importation of western culture; believing that isolation would keep the BSPP in power, the BSPP instituted self-imposed international isolation for twenty-six years, multiplying the effects of economic sanctions.⁶⁹ This isolation reduced international trade and social contacts with the outside world.⁷⁰ Additionally, government officials lacked the expertise and education to operate the country, which resulted in

61. Burmese Freedom and Democracy Act of 2003, H.R. 2330, 108th Cong. § 2 (2003).

62. *The World Factbook, Burma*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/bm.html> (last updated Jan. 28, 2014).

63. *Id.*

64. Nyun, *supra* note 1, at 473; *see also Special Report: A Burmese Spring*, *supra* note 5, at 1.

65. Nyun, *supra* note 1, at 473.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.* at 474.

70. *Id.*

economic depression. By 1987, the United Nations declared Myanmar one of the least developed countries in the world.⁷¹

Isolation resulted in the world community paying little attention to Myanmar.⁷² This changed after the military gunned down protesters advocating for democratic reform in 1988, placed democracy activist Aung San Suu Kyi under house arrest in 1989, and jailed other anti-military political activists.⁷³ While the military suppressed demonstrations, democratic elections and political parties were allowed to proceed in 1990.⁷⁴ Aung San Suu Kyi's party, the National League for Democracy, won the election in a landslide, receiving sixty percent of parliamentary seats against the military-backed party, now referred to as the National Unity Party, which received ten percent of the parliamentary seats.⁷⁵ The National Unity Party invalidated the elections to maintain power and jailed additional political protesters, many of whom were members the National League for Democracy political party.⁷⁶ The U.S. then imposed economic sanctions on Myanmar because of several factors: the National Unity Party's failure to abide by democratic elections, the military government's use of forced labor, the persecution of Muslims, and the forced relocation of civilians.⁷⁷

Recently, Myanmar's government has changed some of its more controversial positions on elections and political prisoners. In 2012, the government released several political prisoners and held bi-elections in the parliament.⁷⁸ The National League for Democracy, including democracy leader Aung San Suu Kyi, won 43 of the 47

71. *Least Developed Countries: LDC Factsheets, Myanmar*, UNITED NATIONS DEV. POLICY AND ANALYSIS DIV., http://www.un.org/en/development/desa/policy/cdp/ldc/profile/country_129.shtml (last visited Feb. 16, 2014).

72. Myanmar is a unique case. Economic sanctions often result in isolation, and Myanmar had already self-imposed isolation. However, as noted below, individuals still felt the effects of sanctions.

73. Nyun, *supra* note 1, at 475; Derek Tonkin, *The 1990 Elections in Myanmar: Broken Promises or a Failure of Communication?*, CONTEMPORARY SOUTHEAST ASIA: J. INT'L & STRATEGIC AFF., Apr. 2007, at 34.

74. Tonkin, *supra* note 73, at 34.

75. *Id.* at 476.

76. *Id.*

77. Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, § 570, 110 Stat. 3009, 3009-116 (1996); *see also* Burma Freedom and Democracy Act of 1995, H.R. 2892, 104th Cong. § 2 (1996).

78. *Burma: Rights Abuses Endanger Reform*, HUMAN RIGHTS WATCH (Feb. 1, 2013), <http://www.hrw.org/news/2013/02/01/burma-rights-abuses-endanger-reform>.

seats.⁷⁹ The next general election is scheduled for 2015.⁸⁰ A provision in the Myanmar Constitution prohibits Aung San Suu Kyi from becoming Myanmar's president, and it is still unclear whether the government will amend the constitution to allow her to run for the office.⁸¹

B. Original Sanctions Imposed on Myanmar and Their Ineffectiveness

In the 1990s, the U.S. imposed several sanctions against Myanmar that culminated in the Omnibus Consolidated Appropriations Act of 1997, which Congress enacted in 1996 to authorize the President to bar new investment in Myanmar and prohibit professionals from facilitating any transaction that a U.S. citizen could not complete.⁸² The U.S. also suspended humanitarian aid, ended diplomatic relations, imposed an arms embargo, imposed a ban on imports, and ended Myanmar's preferred trading status.⁸³ Later, Congress enacted the Burmese Freedom and Democracy Act of 2003, which mandated sanctions and allowed the President to lift them only upon finding measurable progress toward democratic government, the release of political prisoners, freedom of speech and the press, freedom of association, and permitting the peaceful exercise of religion.⁸⁴ When combined, all of the above-mentioned sanctions stifled Myanmar's citizens and inhibited them from demanding change, the exact opposite of the U.S.' goals.

79. *Id.*

80. Thomas Fuller, *A Myanmar in Transition Says Little of Past Abuses*, N.Y. TIMES (June 14, 2013), http://www.nytimes.com/2013/06/15/world/asia/a-myanmar-in-transition-says-little-of-past-abuses.html?pagewanted=all&_r=0.

81. Constitution of the Republic of Myanmar May 29, 2008, ch. III, art. 59(f) (prohibiting the candidate, parents, spouse, or children of the candidate from holding citizenship of another country). Aung San Suu Kyi's two children hold British citizenship. Jonah Fisher, *Will Aung San Suu Key Ever Become President of Burma?*, BBC (Feb. 5, 2014), <http://www.bbc.co.uk/news/world-asia-26043931>.

82. Omnibus Consolidated Appropriations Act, 1997 § 570.

83. Nyun, *supra* note 1, at 480.

84. Pub. L. No. 108-61, § 2, 117 Stat. 864 (2003). In addition to the above-mentioned sanctions, the U.S. has issued various executive orders to target specific individuals and types of investments. The U.S. also enacted the Tom Lantos Block Burmese Junta's Anti-Democratic Efforts Act of 2008 to impose additional sanctions on individuals and prohibit the importation of jadeite or rubies mined in Myanmar. OFFICE OF FOREIGN ASSET CONTROL, U.S. DEP'T OF TREASURY, BURMA SANCTIONS PROGRAM 3 (2014), *available at* <http://www.treasury.gov/resource-center/sanctions/Documents/burma.pdf>.

One specific goal was to promote democracy.⁸⁵ The U.S. cut ties with the military-government of Myanmar and recognized the National League for Democracy, as opposed to the National Unity Party, as the legitimate representative of the Myanmar people.⁸⁶ This made negotiations with the government difficult because the military regime believed it was the legitimate representatives of the Myanmar people. Further, the sanctions promoted inaction by prohibiting U.S. citizens from conducting business with Myanmar. U.S. citizens were in a position to demand change in exchange for investing in the country and providing technical expertise.

The primary strain on Myanmar from sanctions is economic, which reduces the potential for Myanmar's citizens to demand a strong democracy. A strong economy results in capital to educate the population, good jobs, and could result in other governments and foreign investors demanding changes. If the Myanmar economy started to grow, the prospect of losing foreign capital could help persuade Myanmar to democratically reform and improve human rights. However, Myanmar, with the exception of some regional support, has been without significant foreign investment for two decades, which makes creating the type of strong economy required for change nearly impossible.⁸⁷

Sanctions have also resulted in poor working conditions in Myanmar. The government was forced to raise revenues to survive because of the stagnant economy. Although Myanmar has a wealth of natural resources,⁸⁸ the government did not have the means to exploit those resources; thus, forced labor was used, furthering human rights violations.⁸⁹ In 2003, after President Bush signed a total ban on imports of Myanmar goods, a UN report stated that Myanmar lost 30,000 textile jobs between June and November 2003 and up to 100,000 stood to lose their jobs.⁹⁰ Many of these people went hungry,

85. Pub. L. No. 108-61, § 3(3)(B), 117 Stat. 864 (2003) (requiring the government to make "measurable and substantial progress toward implementing a democratic government . . .").

86. *Id.* § 2.

87. Nyun, *supra* note 1, at 486.

88. DAVID STEINBERG, BURMA/MYANMAR: WHAT EVERYONE NEEDS TO KNOW 56 (2d ed. 2013).

89. Nyun, *supra* note 1, at 477.

90. PEDERSEN, *supra* note 6, at 234 (stating that an undeterminable number of workers had been moved to part-time status); Howlett, *supra* note 9, at 1220. Another report commissioned by the World Vision found that sixty factories had closed, costing forty to sixty thousand jobs. *Id.* The import ban was not lifted until November 16, 2012. OFFICE OF

and many women became prostitutes because there were no other jobs available.⁹¹ These actions further degraded human rights conditions.

U.S. unilateral sanctions cannot work when other countries do not also sanction Myanmar. While the U.S. sanctions close some financial markets to Myanmar, the country still has access to China and many neighboring countries.⁹² This provides some needed revenue to maintain the status quo in Myanmar. China, Singapore, and Thailand have become Myanmar's largest trading partners.⁹³ Unless the U.S. can get all countries to adopt comprehensive sanctions, U.S. sanctions will continue to be ineffective.

The hope that U.S. unilateral sanctions will work seems doubtful. Sanctions have been imposed for almost two decades, yet other countries continue to trade with Myanmar. Economic isolation has resulted in low government revenues for essential services, and the economy remains in poor condition. The agrarian population of the country likely does not have the capability to rise up against the government to create meaningful change. If Myanmar is to see meaningful change, developed countries' participation is necessary instead of hoping that Myanmar changes through coercive techniques that result in isolation.

C. Recent Changes in U.S. Sanction Policy: Constructive Engagement

As of July 2012, the U.S. has begun to ease sanctions on Myanmar.⁹⁴ This shift in U.S. foreign policy closely resembles constructive engagement, focusing on diplomatic relations and economic integration.⁹⁵ The easing of sanctions will allow new U.S. investment after fifteen years of sanctions prohibiting such investment.⁹⁶ The U.S. cited ongoing reform efforts as a justification and "believes that the participation of U.S. businesses in the Burmese economy will set a model for responsible investment and business

FOREIGN ASSET CONTROL, U.S. DEP'T OF TREASURY, GENERAL LICENSE NO. 18 (2012).

91. Howlett, *supra* note 9, at 1220.

92. Nyun, *supra* note 1, at 479 (noting that "China has become Myanmar's most important trading partner . . .").

93. *Id.* at 487. Since the imposition of the U.S. import ban, Thailand, India, and China are the primary importers of Myanmar goods. *Id.* at 488.

94. U.S. DEP'T OF STATE, *supra* note 11.

95. *See infra* Part IV.

96. U.S. DEP'T OF STATE, *supra* note 11.

operations as well as encourage further change.”⁹⁷ The easing of sanctions without complete change in the status quo in Myanmar is a huge shift in U.S. policy. While some relaxation is in exchange for Myanmar’s reforms, the U.S. is also acknowledging that, through investment, Myanmar is likely to change in accordance with U.S. goals, economic conditions in Myanmar will improve, and the Myanmar people will live better lives.

The Office of Foreign Asset Control has promulgated new licenses, which ease the previous sanctions to further the U.S. policy goals. General License Nos. 16 allows U.S. citizens to export financial services, defined as the transfer of funds, directly or indirectly from the U.S., or by a U.S. person, to Myanmar.⁹⁸ General License No. 17 allows new investment in Myanmar.⁹⁹ As mentioned above, not only had U.S. citizens been prohibited from investing, but U.S. professionals who oversaw transactions were also prohibited from giving advice regarding the transactions that U.S. citizens could not complete.¹⁰⁰ For example, a U.S. attorney could not oversee an investment into Myanmar that involved solely non-U.S. parties.¹⁰¹ Both General License No. 16 and 17 have allowed investors to start investing and taking advantage of investment opportunities. However, U.S. investors are far behind investors from other countries.¹⁰²

In November 2012, the U.S. authorized the importation of Myanmar products into the U.S.¹⁰³ In 2013, Congress decided not to renew the import ban, prompting President Obama to issue an executive order that maintains the prohibition on the importation of

97. *Id.*

98. OFFICE OF FOREIGN ASSET CONTROL, U.S. DEP’T OF TREASURY, GENERAL LICENSE NO. 16 (2012), *available at* <http://www.treasury.gov/resource-center/sanctions/Programs/Documents/burmag16.pdf>.

99. OFFICE OF FOREIGN ASSET CONTROL, U.S. DEP’T OF TREASURY, GENERAL LICENSE NO. 17 (2012), *available at* <http://www.treasury.gov/resource-center/sanctions/Programs/Documents/burmag17.pdf>.

100. 31 C.F.R. § 537.205 (2013).

101. *Id.*

102. Sophie Song, *Myanmar Sees Huge Foreign Direct Investment (FDI), But American Companies Still Lag Behind*, INT’L BUS. TIMES (Sept. 20, 2013), <http://www.ibtimes.com/myanmar-sees-huge-foreign-direct-investment-fdi-american-companies-still-lag-behind-1409028> (noting that of the \$43 billion in total foreign company investment in Myanmar, U.S. companies have invested only \$243 million).

103. OFFICE OF FOREIGN ASSET CONTROL, U.S. DEP’T OF TREASURY, GENERAL LICENSE NO. 18 (2012).

jade and rubies.¹⁰⁴ This ban remains in place to reduce Myanmar's military resources.¹⁰⁵

The U.S. has also eased sanctions on Myanmar's banking sector.¹⁰⁶ However, oversight has been difficult because Myanmar only allows citizen-owned banks to operate.¹⁰⁷ To address concerns regarding specific banks, the U.S. has placed some banks on the SDN list and issued General License No. 19 to allow investors to carry out transactions with certain banks under certain conditions.¹⁰⁸ This change allows U.S. investors to import capital and more easily remit profits back to the U.S. on investments in Myanmar, which makes the country more attractive as a place to invest.¹⁰⁹

The easing of sanctions and new sanction policies are unique for the U.S. and will further U.S. objectives more efficiently. First, the sanctions are targeted.¹¹⁰ The easing of sanctions allows U.S. citizens

104. Exec. Order No. 13,651, 78 Fed. Reg. 154 (Aug. 6, 2013); Matthew Pennington, *US Extends Ban on Gems Imports from Burma*, THE IRRAWADDY (Aug. 8, 2013), <http://www.irrawaddy.org/us/us-extends-ban-on-gems-imports-from-burma.html>; see also Tom Lantos Block Burmese Jade (Junta's Anti-Democratic Efforts) Act of 2008, Pub. L. No. 110-286, 122 Stat. 2632 (2008).

105. Andrew R.C. Marshall & Min Zayar OO, *Special Report: Myanmar Old Guard Clings to \$8 billion jade empire*, REUTERS (Oct. 1, 2013), <http://www.reuters.com/article/2013/10/01/us-myanmar-jade-specialreport-idUSBRE98S00H20131001>.

106. OFFICE OF FOREIGN ASSET CONTROL, U.S. DEP'T OF TREASURY, GENERAL LICENSE NO. 19 (2013), available at <http://www.treasury.gov/resource-center/sanctions/Programs/Documents/burmagl19.pdf>.

107. *Leapfrog Spotting*, THE ECONOMIST (Sept. 28, 2013), <http://www.economist.com/news/finance-and-economics/21586841-mobile-phones-may-regenerate-countrys-withered-banking-system-leapfrog-spotting>.

108. The United States issued General License No. 19 on February 22, 2013. The license allows U.S. companies to carry out transactions with Asia Greet Development Bank, Ayeyarwady Bank, Myanma Economic Bank, and Myanma Investment and Commercial Bank. The banks may not be used to facilitate transactions directly or indirectly with the Burmese Ministry of Defense or any state or non-state armed group. The Ministry of Defense or an armed group may not own more than 50 percent of any entity that the transaction benefits either. OFFICE OF FOREIGN ASSET CONTROL, U.S. DEP'T OF TREASURY, GENERAL LICENSE NO. 19 (2013), available at <http://www.treasury.gov/resource-center/sanctions/Programs/Documents/burmagl19.pdf>. This license was necessary to override statutory requirements in the USA Patriot Act. USA Patriot Act, Pub. L. No. 107-56, § 311, 115 Stat. 272, 298 (2001).

109. The United States' Export-Import Bank also recently began offering credit for trade in Myanmar. The bank's president stated the decision sends "a strong signal that we are committed to strengthening economic ties with Burma as the nation continues its transition." *US Ex-Im Bank Opens to Myanmar*, BANGKOK POST (Feb. 7, 2014), <http://www.bangkokpost.com/breakingnews/393738/us-ex-im-bank-opens-to-myanmar>. The bank will allow United States exporters to seek credit insurance, direct loans, and loan guarantees. *Id.*

110. Exec. Order No. 13619, 77 Fed. Reg. 41,243 (2012).

to invest in the country, provide financial services, and import Myanmar products into the U.S. However, U.S. citizens may be prohibited from conducting business with certain individuals that threaten the peace, security, or stability of Myanmar.¹¹¹ This policy provides the necessary safeguards to allow foreign investment into Myanmar, while not enriching those who are responsible for the country's devastating past.

The new rules also require U.S. businesses that invest in Myanmar to make disclosures about their investment activities.¹¹² General License No. 17 requires that a company report to the U.S. Department of State when the company invests more than \$500,000 or signs contracts with the state-owned oil and gas firm, Myanma Oil and Gas Enterprise.¹¹³ The company must provide information regarding policies and procedures for human rights, workers' rights, environmental stewardship, land acquisition, and payments that exceed \$10,000 to Myanmar government entities.¹¹⁴ U.S. investors are thus forced to provide human rights protection policies for their own businesses in Myanmar. Myanmar citizens will become familiar with international trends and demand that the government provide the same protections. In a country that has had little development in forty years, foreign businesses willing to invest could create enough pressure to encourage the government to address U.S. concerns.

Economic integration is only one aspect of a constructive engagement foreign policy strategy. The U.S. has also focused on improving diplomatic relations.¹¹⁵ The U.S. has reestablished a presence in Myanmar by appointing Derek Mitchell as U.S. Ambassador to Myanmar; he is the first U.S. ambassador since 1990.¹¹⁶ Additionally, both President Barrack Obama¹¹⁷ and then-

111. *Id.* Several individuals and entities are still on the SDN list. See *Specifically Designated Nationals and Blocked Persons List Search*, OFFICE OF FOREIGN ASSET CONTROL, U.S. DEP'T OF TREASURY, <http://sdnsearch.ofac.treas.gov/> (last visited Feb. 16, 2014) (select Burma from the Program drop down menu).

112. U.S. DEP'T OF STATE, *supra* note 11.

113. OFFICE OF FOREIGN ASSET CONTROL, U.S. DEP'T OF TREASURY, GENERAL LICENSE NO. 17 (2012), available at <http://www.treasury.gov/resource-center/sanctions/Programs/Documents/burmagl17.pdf>.

114. DEP'T OF STATE, RESPONSIBLE INVESTMENT REPORTING REQUIREMENTS (2013), available at <http://www.humanrights.gov/wp-content/uploads/2013/05/Responsible-Investment-Reporting-Requirements-Final.pdf>.

115. See *infra* Part IV for a discussion of the aspects of constructive engagement.

116. Tom McCarthy, *Barack Obama appoints Derek Mitchell as first U.S. Ambassador to Burma*, THE GUARDIAN (May 17, 2012), <http://www.theguardian.com/world/2012/may/17/>

Secretary of State Hillary Clinton have visited Myanmar in the past two years.¹¹⁸ Myanmar President Thein Sein and the leader of the National League for Democracy, Aung San Suu Kyi, have both visited Washington, D.C.¹¹⁹ These high profile visits to Washington and American leaders visits to Myanmar have provided a dialogue between Myanmar and the U.S., which has created strong partnerships to advance democratic reforms.¹²⁰ The U.S. has also restored financial aid to the country.¹²¹ These U.S. actions are key to creating strong diplomatic relations.

The warming diplomatic relations being forged in Myanmar have allowed the U.S. to use its relations to further develop partnerships that will strengthen the economic integration of the country and provide key assurances of a transparent government. Recently, the U.S. announced a new partnership with Myanmar to provide technical assistance in Myanmar's extractive industries sector.¹²² The partnership will assist Myanmar in meeting the requirements of the Extractive Industries Transparency Initiative (EITI).¹²³ Myanmar has large natural gas and oil reserves and by becoming a member of EITI, Myanmar will signal to the market that decisions in the oil and gas industry will be transparent. U.S. policymakers have long been concerned about the oil and gas

obama-administration-burma-ambassador.

117. Peter Baker, *Obama, in an emerging Myanmar, Vows Support*, N.Y. TIMES (Nov. 18, 2012), <http://www.nytimes.com/2012/11/19/world/asia/obama-heads-to-myanmar-as-it-promises-more-reforms.html?pagewanted=all>.

118. McCarthy, *supra* note 116.

119. Jay Newton, *Burma's Thein Sein Visits Washington*, TIME (May 20, 2013), <http://swampland.time.com/2013/05/20/burmas-thein-sein-visits-washington/>.

120. Press Release, USAID, President Obama announces US-Burma Partnership for Democracy, Peace & Prosperity (Nov. 19, 2012), *available at* <http://www.usaid.gov/news-information/press-releases/president-obama-announces-us-burma-partnership-democracy-peace> (announcing that the United States will provide \$170 million over the next two years to support democratic reform in Myanmar.)

121. *Id.*

122. Press Release, U.S. Dep't of State, Extractives Industries Transparency Partnership Between the United States and Myanmar (June 14, 2013), *available at* <http://www.state.gov/r/pa/prs/ps/2013/06/210679.htm>.

123. *Id.* EITI is a "global coalition of governments, companies and civil society working together to improve openness and accountable management of revenues from natural resources." EITI was announced by Tony Blair, former Prime Minister of the United Kingdom, in 2002. Since then twenty-three countries have become compliant, sixteen countries are candidates for EITI, and thirty-five countries have produced EITI reports. EXTRACTIVE INDUS. TRANSPARENCY INITIATIVE, <http://www.eiti.org/eiti>; <http://www.eiti.org/eiti/history> (last visited Feb. 16, 2014).

industry, thus resulting in the current disclosure requirements.¹²⁴ This is only one example of what is possible by forging diplomatic relations.¹²⁵

The U.S.' new sanction policies are also more effective in alleviating the previous practices of Myanmar. Myanmar has released additional political prisoners and has plans for elections in 2015, where the National League for Democracy is likely to win a majority of seats in parliament.¹²⁶ Foreign investors continue to visit the country to find opportunities for investment since the relaxation, resulting in the promulgation of a new Myanmar foreign investment law that provides incentives for foreign investment.¹²⁷ The U.S. should play an active role as Myanmar continues to develop.¹²⁸ The country is highly undeveloped and could benefit from the assistance that more developed countries can provide.

IV. IMPROVING SANCTIONS AS AN EFFECTIVE FOREIGN POLICY TOOL

The changes in foreign policy towards Myanmar signal an overall shift in U.S. foreign policy towards a constructive engagement model. Constructive engagement has two focuses: "diplomatic relations involving dialogue rather than isolation," and economic integration.¹²⁹ This part discusses both diplomatic relations and economic integration. Further, this part discusses certain unilateral sanctions that fit with a constructive engagement policy.

124. DEP'T OF STATE, RESPONSIBLE INVESTMENT REPORTING REQUIREMENTS (2013), available at <http://www.humanrights.gov/wp-content/uploads/2013/05/Responsible-Investment-Reporting-Requirements-Final.pdf> (explaining the notification requirements for a U.S. country that signs an agreement with Myanmar Oil and Gas Enterprise).

125. The U.S. foreign aid department, USAID, has created several partnerships with the Myanmar government, local companies, and U.S. companies to improve the economic vitality of the country. See generally *Burma*, USAID, <http://www.usaid.gov/burma> (last visited Feb. 16, 2014).

126. Thomas Fuller, *As Myanmar Changes, So Does Its Leader*, N.Y. TIMES, Apr. 4, 2012, at A4.

127. Myanmar Foreign Investment Law of 2012, Pyidaungsu Hluttaw No. 21/2012 (2012), available at <http://www.moj.go.jp/content/000112674.pdf>.

128. While the U.S. has changed many of its policies, in the recent U.S. spending bill, Congress required Myanmar to enact constitutional reforms in consultation with political opposition and ethnic groups before aid is made available to the central government. The law also prohibits funds from being made available to any individual or organization that has committed "gross violations of human rights." Consolidated Appropriations Act 2014, Pub. L. No. 113-76, § 7043(b), 128 Stat. 5, 533-34 (2014).

129. Craig Forcese, *Globalizing Decency: Responsible Engagement in an Era of Economic Integration*, 5 YALE HUM. RTS. & DEV. L.J. 1, 5 (2002).

A. Diplomatic Relations

A country that uses unilateral sanctions isolates the target country diplomatically. Constructive engagement focuses on a strong diplomatic relationship with a country to persuade change.¹³⁰ Diplomatic relations will often be unsuccessful with tyrannical governments because the leaders have little interest in changing. However, diplomacy still has advantages and can encourage a country's citizens to invest in the target country, thus furthering economic integration.

Diplomatic relations allows a country to provide technical expertise and work towards persuading a target country to change. Many countries that have been sanctioned often blame a sanctioning country, such as the U.S., for their economic situation.¹³¹ However, by using diplomatic relations and economic integration to work with a target country, the U.S. has a presence, and blame can be shifted from the passive country imposing sanctions to the target country's government officials.

A country without diplomatic relations is often isolated, which causes closed minds and no improvement for social developments.¹³² The lack of diplomacy can often result in governmental defensive measures.¹³³ Governments must participate in a constructive conversation with a sanctioned country to avoid isolation and make improvements to social development. This promotes human rights and encourages economic integration.¹³⁴

130. *Id.*

131. Thomas Erdbrink, *Iran's President Ties Recent Drop in Currency to U.S.-Led Sanctions*, N.Y. TIMES, Oct. 3, 2012, at A8.

132. PEDERSEN, *supra* note 6, at 267.

133. *Id.*

134. In promoting human rights, the U.S. should encourage Myanmar to create independent mechanisms for promoting and protecting human rights. The Myanmar President set up the Human Rights Commission, consisting of retired government officials, in 2011. Wendy Zeldin, *Burma: New Human Rights Commission*, LIBRARY OF CONG. (Sept. 9, 2011), http://www.loc.gov/lawweb/servlet/lloc_news?disp3_l205402800_text. The Commission's purpose is to investigate complaints of human rights violations. However, because of its lack of independence, little has been accomplished. The commission should be responsible for advising the government on proper human rights policy and make recommendations to adopt international human rights treaties, including the Rome Statute, which provides the International Criminal Court with jurisdiction of certain crimes that infringe on an individual's human rights. Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90.

B. Economic Integration

Economic integration is the primary component to a constructive engagement policy.¹³⁵ Instead of isolating an entire country, a country encourages investment to improve conditions in a target country. Integration is able to produce the needed change because change is not dependent on the target country's government. Economic integration is able to: (1) improve a country's infrastructure, (2) improve human rights, (3) create a more stable middle class, and (4) protect the environment.¹³⁶ All of these are broad goals of U.S. sanctions, but with constructive engagement, the process may start earlier than when waiting for a country to change on its own.

U.S. companies will have certain expectations of a foreign government, thus creating pressure for the target country to implement policy changes or risk losing foreign investment. The companies will expect the same or similar protections as provided in the U.S., primarily the rule of law.¹³⁷ Companies will expect the government and locals to honor contracts, protect intellectual property, and offer fair arbitration, preferably with international rules.¹³⁸ These protections provide certainty for a foreign corporation that is often expected to bring a certain amount of capital into the country. Myanmar's previous foreign investment law required a foreign company to contribute \$300,000 to \$500,000 in capital depending on the business; the new law allows the Myanmar Investment Commission to set the capital requirement based on the activity.¹³⁹ While a foreign investor can minimize his or her risk by contributing less capital under the new law, investing in Myanmar can still result in a high risk from an archaic legal system that cannot develop fast enough to meet the country's current needs. Additionally, in Myanmar, many foreign company investments must have a local Myanmar partner.¹⁴⁰ Companies will want proper assurances that its investments will be safe via honored contracts and

135. Forcese, *supra* note 129, at 6.

136. *Id.*

137. *Id.* at 7.

138. *Id.*

139. Myanmar Foreign Investment Law of 2012, Pyidaungsu Hluttaw No. 21/2012 (2012); Myanmar Foreign Investment Law of 1988, Pyidaungsu Hluttaw No. 10/88 (1988).

140. MYANMAR INV. COMM'N, STIPULATION OF TYPES OF ECONOMIC ACTIVITIES, NOTIFICATION NO. 1/2013 (2013), available at http://www.dica.gov.mm/includes/FIL-notification%20_English_%20A4.pdf.

fair dispute resolution.¹⁴¹

The Myanmar government has tried to provide assurances to foreign corporations and ensure the rule of law since sanctions were relaxed. Over forty laws have been enacted since the fall of 2011.¹⁴² These laws include: a new foreign investment law, new labor laws, a new central bank law, and a new foreign exchange law.¹⁴³ Additionally, the government has started working on a new banking law, new intellectual property laws, a new electricity law, a new anti-bribery law, and a new arbitration law that will make Myanmar's accession to the New York Convention on the Recognition and Enforcement of Foreign Arbitration Awards effective.¹⁴⁴ The Myanmar government has begun issuing rules and notifications on many of its internal practices, providing investors with more certainty.¹⁴⁵ Myanmar businesses have also become accustomed to agreeing to either foreign law or international arbitration rules to settle disputes.¹⁴⁶ This is a huge development in the rule of law by a country that had been run arbitrarily. During this time period, investment continues to increase, and many of these laws were developed to accommodate foreign investors.¹⁴⁷

Foreign companies investing in a developing country also need a skilled labor force.¹⁴⁸ If the labor force is not skilled, companies will expect the government to improve education or allow foreigners to do most jobs. However, many countries require the hiring of locals or restrict the type of jobs that a foreigner can do. For example, Myanmar's new foreign investment law requires a foreign company who seeks investment incentives to hire twenty-five percent locals in

141. Assurances are particularly important in Myanmar's case because the military regime expropriated an estimated 15,000 businesses in the 1960s. STEINBERG, *supra* note 88, at 135.

142. MYANMAR LEGAL SERVICES LIMITED, DOING BUSINESS IN MYANMAR 1 (2013), *available at* http://www.myanmarlegalservices.com/wp-content/uploads/2013/08/Doing-Business-in-Myanmar-ATC_Josh-20-Aug-2013_693980_17.pdf.

143. MYANMAR LEGAL SERVICES LIMITED, OVERVIEW OF LEGAL AND REGULATORY REGIME, SANCTIONS, CROSS-BORDER PROJECTS AND ASEAN INTEGRATION 2015, 2–3 (2013), *available at* http://www.myanmarlegalservices.com/wp-content/uploads/2013/08/MLS-L-Overview-of-Legal-Regulatory-Regime-140813_695081_16.pdf.

144. *Id.* at 4.

145. *Id.* at 2–3.

146. MYANMAR LEGAL SERVICES LIMITED, *supra* note 142, at 13.

147. *See Song, supra* note 102 (noting that as of August 1, 2013, Myanmar has approved \$1.8 billion in foreign direct investment this fiscal year compared to \$1.4 billion for the previous fiscal year).

148. Forcese, *supra* note 129, at 7.

the first two years, with up to seventy-five percent by year six of operation in the country.¹⁴⁹ For a company to meet these objectives, the country must provide an educated workforce that can complete the necessary work.

Myanmar has just recently started expanding its educational opportunities. The University of Yangon was reopened for undergraduate classes during the 2013 school year after being closed since 1996.¹⁵⁰ The university had been closed, except for some post-graduate classes, because it was considered a hotbed of political activism.¹⁵¹ In addition, graduate programs are expanding at the university with the help of universities from the west.¹⁵² While Myanmar's education system is still developing, investment continues to increase and companies will need and expect an educated workforce.

When a U.S. company chooses to invest in a particular country with which the U.S. government has concerns, the U.S. can impose certain conditions on the company's investment to avoid negative effects. For example, current U.S. sanctions against Myanmar require certain disclosures of company expenditures when money is given to the government or certain companies.¹⁵³ Further, corporations have publicity incentives to avoid poor human rights conditions when investing in a foreign project. Recently, in Bangladesh, major brands, including Nike, Puma, and Adidas, have been accused of paying factory workers less than minimum wage, while allowing workplace abuse and sexual harassment.¹⁵⁴ Accusations of poor working environments have put pressure on large multi-national corporations, such as Apple, to improve conditions.¹⁵⁵ Apple has recently joined the Fair Labor Association and began publishing reports on human

149. Myanmar Foreign Investment Law of 2012 § 24, Pyidaungsu Hluttaw No. 21/2012 (2012).

150. *Yangon Hotbed of Protest Reopens to Undergraduates*, THE NATION (July 10, 2013), <http://www.nationmultimedia.com/aec/Yangon-hotbed-of-protest-reopens-to-undergraduates-30210050.html>.

151. *Id.*

152. Naomi Gingold, *Graduate Program Breathes New Life Into Rangoon University*, THE IRRAWADDY (Sept. 23, 2013), http://www.irrawaddy.org/z_education/graduate-program-breathes-new-life-rangoon-university.html.

153. OFFICE OF FOREIGN ASSET CONTROL, U.S. DEP'T OF TREASURY, GENERAL LICENSE NO. 17 (2012).

154. Jim Yardley, *Made in Bangladesh: Export Powerhouse Feels Pangs of Labor Strife*, N.Y. TIMES, Aug. 24, 2012, at A1.

155. Nick Wingfield, *Fixing Apple's Supply Line*, N.Y. TIMES, Apr. 2, 2012, at B1.

rights conditions.¹⁵⁶ Disclosure and public perception about companies who exploit foreign workers can thus contribute to improving work conditions.

While constructive engagement with a focus on economic integration is more efficient than unilateral sanctions, some sanctions are effective in reaching foreign policy goals. Sanctions should be tailored to focus on certain individuals rather than the entire country. Sanctions that target particular leaders, such as government leaders and military personnel, can be effective.¹⁵⁷ These sanctions create difficulties for officials making investments without a political check and for the military purchasing weapons that can be used to silence the majority. Narrowly-tailored sanctions also provide bargaining power for a country engaged in diplomatic negotiations with a target country.

C. Remedies for Violations of Human Rights or Corruption by U.S. Investors

One concern with and counterargument to constructive engagement is that by allowing economic integration, foreign companies are able to profit from taking advantage of dysfunctional governments. There have been concerns about both work conditions and corruption in Myanmar.¹⁵⁸ However, governments such as the U.S. are able to provide adequate protections to minimize the risk of foreign companies exploiting the local workforce and resources. Strong disclosure requirements can ensure that companies are discouraged from operating with poor working conditions. Access to U.S. courts can also provide a deterrent from engaging in unlawful conduct. The U.S. has also long been concerned about corruption in foreign countries, which can be averted through legislation. The United States has passed the Alien Tort Statute (ATS)¹⁵⁹ and Foreign Corrupt Practices Act (FCPA),¹⁶⁰ which could provide effective remedies.

156. *Id.*

157. Howlett, *supra* note 9, at 1233.

158. TRANSPARENCY INTERNATIONAL, CORRUPTIONS PERCEPTIONS INDEX 2013, at 3 (2013) (ranking Myanmar as one of the most corrupt countries in the world); Nyun, *supra* note 1, at 477.

159. 28 U.S.C. § 1350 (2012).

160. Foreign Corrupt Practice Act of 1977, Pub. L. No. 95-213, 91 Stat. 1495 (1977) (codified as amended at 15 U.S.C. §§ 78dd-1 to 3, 78ff, 78(m) (2012)).

The ATS, passed in 1789,¹⁶¹ provides that “[the] district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”¹⁶² While the legislative intent behind the ATS is not entirely clear,¹⁶³ the statute has provided aliens with access to United States courts for violations of the law of nations committed outside the U.S.¹⁶⁴ However, issues of when the ATS may be used extraterritorially and what torts apply still remain.

The U.S. Supreme Court recently delivered a blow to using the ATS to enforce human rights. In *Kiobel v. Royal Dutch Petroleum*, the Court held that Royal Dutch Petroleum could not be sued in U.S. courts for human rights violations in Nigeria under the ATS.¹⁶⁵ The plaintiffs alleged that the Nigerian subsidiary of Royal Dutch Petroleum supplied Nigerian forces with food, transportation, and compensation.¹⁶⁶ The Nigerian forces had committed atrocities against those who protested Royal Dutch Petroleum’s environmental practice.¹⁶⁷ The majority concluded that the presumption against extraterritorial application applied to claims under the ATS, and therefore the petitioners were barred from bringing a claim for human rights violations occurring outside of the U.S.¹⁶⁸ However, the Court stated that other claims might succeed that “touch and concern the territory of the United States,” provided that they did so “with sufficient force to displace the presumption against extraterritorial application,”¹⁶⁹ The majority did not provide any guidance on what may touch and concern the U.S.

In concurrence, Justice Kennedy left open the possibility that the Court may allow an ATS action to proceed when conduct occurs abroad.¹⁷⁰ However, Justice Alito would require a violation of

161. Judiciary Act of 1789, 1 Stat. 73 (1789).

162. 28 U.S.C. § 1350 (2013).

163. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 712–28 (2004), for a discussion of the ATS’s legislative history.

164. See, e.g., *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995); *Filartiga v. Pena-Irala*, 630 F.3d 876 (2d Cir. 1980).

165. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013).

166. *Id.* at 1662.

167. *Id.* at 1662–63.

168. *Id.* at 1669. The issue in *Kiobel* was originally whether the law of nations recognizes corporate liability. After hearing arguments on this issue, the Court ordered rearguments on the extraterritoriality of the ATS. *Id.* at 1663.

169. *Id.*

170. *Id.* at 1669 (Kennedy, J., concurring).

international law norms to occur inside the U.S. before an action could proceed.¹⁷¹ Justice Breyer, along with Justices Ginsburg, Sotomayor, and Kagan, concurred in the judgment. They would allow cases where: (1) the conduct occurs in the U.S., (2) the defendant is a U.S. national, or (3) the conduct “substantially and adversely affects an important American national interest[.]”¹⁷² Justice Breyer disagreed with the Court’s use of the presumption against extraterritoriality but, under the facts in *Kiobel*, would hold that the plaintiffs’ could not bring an ATS action.¹⁷³ This leaves open the possibility that U.S. corporations could be held liable for violations of human rights that occurred abroad, such as in Myanmar, under either Justice Breyer’s analysis or the majority’s “touch and concern” analysis.

The FCPA also has the ability to discourage companies from bribing corrupt officials in dysfunctional governments, who are generally responsible for the activity that concerns the target company. The FCPA covers all U.S. companies, individuals, and foreign companies that issue U.S. securities.¹⁷⁴ The Act requires corporations to maintain books in reasonable detail and prohibits a corporation from paying a “foreign official” for receiving business, directing business, or obtaining necessary government approvals.¹⁷⁵ The term foreign official is very broad and can include most people who work for a government, in a government-sponsored project, or an international organization.¹⁷⁶ Depending on the provision violated, fines or prison time may be imposed. In 2008, Siemens AG paid a \$450 million fine for violating the FCPA when the SEC alleged that Siemens had engaged in bribes on widespread transactions.¹⁷⁷ Acts like the FCPA ensure that corporations are deterred from bribing foreign officials.¹⁷⁸

Acts such as the FCPA are becoming prevalent around the

171. *Id.* at 1670 (Alito, J., concurring).

172. *Id.* at 1671 (Breyer, S., concurring in the judgment).

173. *Id.*

174. 15 U.S.C. §§ 78dd-1 to 78dd-3 (2013).

175. *Id.*

176. 15 U.S.C. § 78dd-1(f)(1)(A) (2013).

177. Press Release, Sec. Exch. Comm’n, SEC Charges Siemens AG for Engaging in Worldwide Bribery (Dec. 15, 2008), *available at* <http://www.sec.gov/news/press/2008/2008-294.htm>.

178. The author has previously worked at a law firm in Myanmar. In the author’s experience, clients are very concerned about FCPA violations when investing in foreign countries. Most clients ask for a copy of the firm’s FCPA compliance policy.

world. In 2010, the United Kingdom passed the Bribery Act 2010, which provides safeguards similar to the FCPA.¹⁷⁹ International conventions also exist to prevent against corruption. The Organisation for Economic Co-operation and Development (OECD) created the Convention on Combating Bribery of Foreign Public Officials in International Business, which requires countries to implement legislation that prohibits foreign corruption.¹⁸⁰ The U.S. is a party along with forty other countries.¹⁸¹ Additionally, an investor must consider local laws that compliment U.S., U.K., and international law. For example, Myanmar has laws that penalize a company or individual who induce public officials through improper means.¹⁸² Myanmar also has laws that penalize the public official.¹⁸³ The strong discouragement and widespread legislation against corrupt practices will lead to difficulties for corporations who choose to engage in such practices.

Policymakers could provide additional remedies for violations of human rights that occur in Myanmar or other developing countries. The U.S. Supreme Court has left open the question of whether U.S. companies could be sued for violations of human rights. Anti-corruption legislation encourages companies to work with foreign governments in a fair manner. Disclosure requirements provide information to the public and a concerned government about key areas of a company's overseas business and can allow governments to make corrective action when necessary.

V. CONCLUSION

The U.S. uses three types of unilateral sanctions as foreign policy tools: trade and economic sanctions, export sanctions, and arms embargos. Economic and export sanctions that result in harsh living conditions for the locals have proven ineffective in promptly creating change in Myanmar. Recently, the U.S. has shifted course to impose a constructive engagement model of foreign policy in Myanmar, focusing on building diplomatic relations and economic

179. Bribery Act 2010, 2010, c. 23 (U.K.).

180. Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Nov. 21, 1997, S. Treaty Doc. No. 105-43, 37 I.L.M. 1.

181. OECD, RATIFICATION STATUS AS OF 20 NOV. 2012 (2012), *available at* <http://www.oecd.org/daf/anti-bribery/antibriberyconventionratification.pdf>.

182. CODE PENAL art. 162 (Myanmar).

183. Suppression of Corruption Act (Act No. LXVII of 1948) (Myanmar).

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integration through the relaxation of economic and export sanctions. This policy will assist in building a middle class in the country that is capable of demanding democratic change and improving human rights conditions for the citizens of Myanmar.