

Washington International Law Journal

Volume 9 | Number 2

5-1-2000

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Recommended Citation

Anna E. Johansson, Comment, *A Silent Emergency Persists: The Limited Efficacy of U.S. Investment Sanctions on Burma*, 9 Pac. Rim L & Pol'y J. 317 (2000).

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A SILENT EMERGENCY PERSISTS: THE LIMITED EFFICACY OF U.S. INVESTMENT SANCTIONS ON BURMA

Anna E. Johansson

Abstract: For the past three decades, the repressive military junta that has ruled Burma has engaged in torture, extra-judicial killings, compulsory labor, and arbitrary arrests and detentions. Economic growth and human development in Burma have stagnated. In response to human rights abuses and uninhibited drug production and trafficking, the United States imposed investment sanctions on Burma in 1997. However, Burma's regional alliances and illicit profits from drugs have filled any vacuum left by withdrawal of U.S. investments and have neutralized the effect of the sanctions. Therefore, the United States needs to rethink its current sanctions scheme. The United States should consider a policy of constructive engagement to promote change, sustainable self-help, and growth in Burma. Further, the United States should promote international diplomatic involvement and should also support the establishment of a national human rights commission in Burma. Alternatively, if the United States believes that sanctions are the best method of promoting positive change in Burma, it should work with a multilateral organization such as the World Trade Organization or the Association of Southeast Asian Nations on a multilateral sanctions scheme.

I. INTRODUCTION

The Burmese junta's human rights abuses have earned it the distinction as one of the most repressive regimes in the world.¹ The rule of the junta, known as the State Peace and Development Council ("SPDC"),² has led to widespread poverty, human suffering, and political unrest in Burma.³ Burma's centralized and isolated economy, an oppressive bureaucracy, and the uninhibited internal flow of drug-laundered money, have subverted the lives of the Burmese people and discouraged foreign

¹ Adrian Karatnycky, *Introduction to The Most Repressive Regimes of 1998* (Apr. 1999) (A Special Report to the 55th Session of the United Nations Commission on Human Rights in Geneva, 1999) <<http://freedomhouse.org/reports/worst98/intro.html>> [hereinafter *Freedom House Introduction*].

² Formerly known as the State Law and Order Restoration Council ("SLORC"), the military regime named itself the State Peace and Development Council in 1997 in an effort to improve its international image. Bureau of Democracy, Human Rights & Labor, *Burma Country Report on Human Rights Practices for 1998*, available in U.S. Department of State Homepage (visited Feb. 26, 1999) <http://www.state.gov/www/global/human_rights/1998_hrp_report/burma.html> [hereinafter *1998 Burma Human Rights Practices*]. Fourteen older and lower-ranked generals also retired. Freedom House, *Burma, in Freedom in the World: The Annual Survey of Political Rights and Civil Liberties 1998-1999*, reprinted in *The Most Repressive Regimes of 1998*, *supra* note 1 [hereinafter *Freedom House 1998 Ratings*]. Despite this shake-up and several investigations into corrupt ministries that resulted in the removal of several ministers, the corrupt bureaucracy of the SPDC remains intact. *Id.*

³ *1998 Burma Human Rights Practices*, *supra* note 2.

investment.⁴ In 1997, in response to human rights abuses and the junta's inadequate suppression of the prospering narcotics trade, the United States imposed sanctions on Burma.⁵

Humanitarian intervention in the form of trade and economic sanctions has become a favorite foreign policy tool of U.S. lawmakers in the post Cold-war era.⁶ Seventy-five countries are now subject to some type of U.S. economic or trade sanction.⁷ The United States imposes sanctions to punish human rights violations, to discourage the proliferation of weapons of mass destruction, and to combat terrorism and drug trafficking.⁸ Sanctions can include arms embargoes, foreign aid reductions and cutoffs, export and import limitations, the revocation of most favored nation trade status, the withdrawal of diplomatic relations, and prohibitions on financing and investment.⁹ In the case of Burma, the United States imposed sanctions that prohibit U.S. persons from making new investments in Burma.¹⁰

This Comment examines the current U.S. sanctions on Burma and why these sanctions have been ineffective. Although the current sanctions scheme is morally a sound policy, both internal and external factors have reduced the efficacy of the sanctions. The prevalence of drug-laundered funds within the Burmese economy, the minimal U.S. investment in Burma before the imposition of sanctions, and the engagement policy of the member states of the Association of Southeast Asian Nations ("ASEAN") have minimized the effect of the sanctions.¹¹ Part II provides background on Burma and the problems that led to the imposition of U.S. sanctions. Part III

⁴ See *Freedom House 1998 Ratings*, *supra* note 2; James Finch, *U.S. Sanctions Against Myanmar: Are There Viable Alternatives?*, 19 E. ASIAN EXEC. REP. 9 (1997); John Paul Rollert, *A Drug Induced High: The Price of Burma's Development*, available in Burma Fund Homepage (visited Nov. 12, 1999) <<http://www.hcs.harvard.edu/~hpr/articles/cover4.html>>; Dennis Bernstein & Leslie Kean, *Singapore's Blood Money: Hanging Drug Couriers but Investing with Their Suppliers; Singapore Is the Number One Business Partner with Burma's Drug Dictatorship*, NATION, Oct. 20, 1997, at 11.

⁵ See *infra* Part III.

⁶ Panel I of Senate Task Force on Economic Sanctions Forum: *Impact and Effectiveness of Economic Sanctions: Capitol Hill Hearing with Defense Department Personnel*, 104th Cong. (1998), available in LEXIS, Legis/Hearng Database [hereinafter *Task Force on Economic Sanctions*]; see generally ECONOMIC SANCTIONS AND AMERICAN DIPLOMACY (Richard N. Haass ed., 1998).

⁷ *Task Force on Economic Sanctions*, *supra* note 6.

⁸ *Id.*

⁹ Richard N. Haass, *Introduction to ECONOMIC SANCTIONS AND AMERICAN DIPLOMACY*, *supra* note 6, at 1-2.

¹⁰ See *infra* Part III. A bloody military crackdown following massive pro-democracy demonstrations in 1988 inspired the regime to rename the country Myanmar and to change the name of the capital from Rangoon to Yangon. Li-ann Thio, *Implementing Human Rights in ASEAN Countries: 'Promises to Keep and Miles to Go Before I Sleep'*, 2 YALE HUM. RTS. & DEV. L.J. 1, 1 n.5 (1999). The country is addressed as Myanmar in the United Nations and the Association of Southeast Asian Nations. *Id.* However this Comment uses "Burma."

¹¹ See generally Finch, *supra* note 4; Rollert, *supra* note 4.

describes the scope of the U.S. sanctions. Part IV examines the factors that have limited the effect of the U.S. sanctions and allowed the junta to maintain its grip on Burma.¹² Part V argues that to ensure humanitarian progress, the United States must rethink its current sanctions strategy. First, the United States should consider a return to constructive engagement. Second, the United States should encourage international diplomatic involvement in Burma and encourage dialogue between the military junta, the leading political opposition, the National League for Democracy (“NLD”), and ethnic minority groups, whose fight for greater autonomy from the central government continues. Third, the United States should promote the establishment of a national human rights commission in Burma. Alternatively, if the United States chooses to maintain sanctions, it should promote a sanctions scheme through a multilateral organization such as the World Trade Organization (“WTO”) or ASEAN.

II. BACKGROUND

Burma has an ethnically and religiously diverse population and is endowed with abundant natural resources and ample potential for economic growth.¹³ However, the country has been under continuous authoritarian rule since 1962 and is plagued by corrupt leaders whose abuse of power has led to political repression and economic stagnation.¹⁴ Burma’s economy has performed poorly under the current regime and the junta’s human rights violations have earned it pariah status.¹⁵ Further, the junta’s reliance on the profits generated by the country’s prosperous drug trade threatens social progress and the development and sustainability of a healthy economy.¹⁶

A. Introduction to Burma

In 1962, economic uncertainties and ethnic minority insurgences led to a military coup in Burma, after which the military replaced all democratic

¹² See generally *Land of Contradictions: Myanmar's Leaders View Their Country Very Differently Than Outsiders*, ASIAN WALL ST. J. WKLY., Feb. 8, 1999, available in 1999 WL 13090101; Scott Neuman, *Burma Criticizes U.N. Report*, available in Free Burma Coalition Homepage: News (Nov. 12, 1999) <<http://www.freeburmacoalition.org/1999/juntacriticizesunreport.html>>.

¹³ Central Intelligence Agency, *The World Factbook 1999: Burma* (visited Oct. 11, 1999) <<http://www.odci.gov/cia/publicatoin/factbook/bm.html>> [hereinafter *World Factbook*].

¹⁴ *Freedom House 1998 Ratings*, *supra* note 2.

¹⁵ See Amnesty Int’l, *Amnesty International Report 1999: Myanmar* (visited Oct. 11, 1999) <<http://www.amnestyusa.org/ailib/aireport/ar99/asa16.htm>> [hereinafter *Amnesty Int’l 1999 Report*]; *Freedom House 1998 Ratings*, *supra* note 2.

¹⁶ See *infra* Part II.C.

institutions with a military government and isolated Burma from the international community.¹⁷ This self-imposed isolation and the formation of a centrally planned economy under the slogan of “the Burmese way to socialism” led to Burma’s economic decline.¹⁸ Attempts at economic reform in the seventies failed due to macroeconomic and structural factors.¹⁹ Rich in natural resources, Burma was a leading rice exporter prior to 1962, and trade accounted for nearly forty percent of its gross domestic product (“GDP”).²⁰ Between 1970 and 1977, this figure decreased to thirteen percent and the country became dependent on food aid.²¹

Burma’s economic stagnation led to massive student and clergy-led²² pro-democracy movements in the seventies and eighties.²³ In September 1988, the military responded to a massive pro-democracy uprising with fatal brutality and installed a hard-line military regime, the State Law and Order Restoration Council (“SLORC”).²⁴ About three thousand students were massacred when the military occupied Rangoon University in the crackdown.²⁵

¹⁷ Lucien J. Dhooze, *A Close Shave in Burma: Unocal Corporation and Private Enterprise Liability for International Human Rights Violations*, 24 N.C. J. INT’L L. & COM. REG. 1, 11-12 (1998).

¹⁸ World Bank, *Myanmar—Policies for Sustaining Economic Reform* (Oct. 16, 1995) <<http://www.worldbank.org/pics/eco/14062>> [hereinafter *1995 World Bank Report*]. In 1988 there were only four private firms with more than 100 employees compared to 426 state-owned enterprises of similar size. Jalal Alamgir, *Against the Current: The Survival of Authoritarianism in Burma*, 70 PAC. AFF. 333, 340-42 (1997).

¹⁹ See Alamgir, *supra* note 18, at 341.

²⁰ *Id.*

²¹ *Id.*

²² The Sangha, the Buddhist clergy, have played a central role in the pro-democracy movements. *Id.* at 343. See also U.S. Department of State, *U.S. State Department 1999 Report on Religious Freedom in Burma*, available in The Burma Fund Homepage (visited Oct. 16, 1999) <http://www.burmafund.org/Research_Library/Religious%20Freedom%20in%20Burma.htm>. Additionally, in October 1999, the U.S. State Department announced that Burma is one of seven countries (the others being China, Afghanistan, Iran, Iraq, Serbia and the Sudan) designated for possible sanctions for engaging in or tolerating “particularly severe” violations of religious freedom. *US: 7 Nations Face Sanctions for Religious Persecution*, Dow Jones Int’l News Serv., Oct. 5, 1999, available in LEXIS, Djins.

²³ See Alamgir, *supra* note 18, at 343; U.S. Department of State, *Burma—Consular Information Sheet* (visited Sept. 30, 1999) <<http://www.travel.state.gov/burma.html>> [hereinafter *Consular Information Sheet*].

²⁴ Alamgir, *supra* note 18, at 343; see also *supra* note 2 and accompanying text for an explanation of the SLORC name-change to the SPDC in 1997.

²⁵ Dhooze, *supra* note 17, at 12. Student uprisings in December 1996, and August and September of 1998 were similar to the 1988 uprising. *Id.*; see also *Consular Information Sheet, supra* note 23. The junta recently began reopening universities that had been open for only 30 months between 1988 and 1996. Mike Jendrzeczyk, *How Rangoon Could Get Burma Back into the Wide World*, INT’L HERALD TRIB., available in Burma Project Homepage (Jan. 6, 2000) <<http://www.soros.org/burma/burmanetnews/bnn010600.html>>. In October 1999, student dissidents seized diplomats and foreigners as hostages at the Burmese embassy in Thailand. The students demanded the release of all political prisoners in Burma and renewed dialogue between the military regime and the leading opposition political faction, the NLD. *WRAP: Armed Men Take over Myanmar’s Embassy in Thailand*, Dow Jones Int’l News Serv., Oct. 1, 1999, available in LEXIS, Djins.

The junta believed that economic liberalization would quiet demands for democracy and thus initiated market-oriented reform to encourage foreign investment in the early nineties.²⁶ A 1999 International Monetary Fund ("IMF") report relying on data provided by the Burmese authorities states that foreign direct investment increased from \$135.2 million in 1994/1995 to \$421.4 million in 1997/1998.²⁷ However, excessive government interference in the economy and persistent macroeconomic imbalances continue to undermine both economic liberalization and attempts to attract foreign investment.²⁸ In 1998, Burma experienced its fourth consecutive year of declining growth.²⁹ Total foreign direct investment dropped to \$278.2 million.³⁰ Additionally, in response to the 1988 crackdown, both the World Bank and the IMF stopped lending to Burma.³¹ The Asian Development Bank, which also banned financial assistance in 1988, renewed its ban in 1997.³²

In another attempt to quiet Burma's national unrest, the regime held multiparty elections in May 1990.³³ While the leading opposition party, the NLD, won an overwhelming victory with eighty percent of the vote, the regime refused to honor the results.³⁴ Furthermore, when the NLD convened a parliament in 1998 based on the 1990 election results, the regime ended its political dialogue with the NLD and detained 200 NLD members along with hundreds of other pro-democracy supporters.³⁵ Approximately 1,000 political prisoners remain incarcerated.³⁶

The junta made further attempts in the nineties to solidify and legitimize its rule. To legitimize its authoritarianism, the junta convened a

Consequently, the Thai government, which had previously been sympathetic and tolerant of exiled Burmese students, resettled the students in countries outside of Thailand such as the United States, Canada, and Australia. Anucha Charoenpo, *Academics Tell Government to Inspire Change in Burma*, BANGKOK POST, Oct. 8, 1999, at 3; Yuwadee Tunyasiri & Temsak Traisophon, *Maneelay Holding Centre: Majority Sign Up for Resettlement: of 900 Applications, 567 Ask to Go to U.S.*, BANGKOK POST (Nov. 19, 1999), available in ShweInc NEWS <<http://www.shweinc.com/news/data/9911119083807.shtml>>.

²⁶ See 137 CONG. REC. E40004-01, E4004 (1991); Int'l Monetary Fund, *Myanmar: Recent Economic Developments* (Nov. 1999) <<http://www.imf.org/external/pubs/ft/scr/1999/cr99134.pdf>> [hereinafter *1999 IMF Report*].

²⁷ *1999 IMF Report*, *supra* note 26, at 78.

²⁸ *Id.* at 8.

²⁹ *Id.*

³⁰ *Id.* at 76.

³¹ Dhooge, *supra* note 17, at 21.

³² *Id.*

³³ *1998 Burma Human Rights Practices*, *supra* note 2.

³⁴ The NLD won 392 out of the 485 parliamentary seats. *Freedom House 1998 Ratings*, *supra* note 2.

³⁵ *1998 Burma Human Rights Practices*, *supra* note 2.

³⁶ *Id.* Prison conditions are extreme and life threatening. Poor nutrition, inadequate medical care, and the use of solitary confinement are common. *Id.*

national convention to draft a new constitution in 1992 and 1993.³⁷ One of the provisions approved at the convention guaranteed the military twenty-five percent of the seats in any future parliament.³⁸ Although Aung San Suu Kyi, the NLD leader and 1991 Nobel laureate who was arrested after the 1988 uprising, was released from her six-year house arrest in 1995, the regime continues to severely limit her actions.³⁹

Today, Burma's abundant natural resources and human potential are juxtaposed against the poverty and underdevelopment that has resulted from the military junta's repressive reign.⁴⁰ While the literacy rate of eighty-three percent exceeds that of most of its neighbors, only twenty-seven percent of children complete a five-year primary school course of study in Burma, and there is less than one doctor for every twelve thousand individuals.⁴¹ In rural areas, fifty percent of the population lacks access to safe drinking water.⁴² The 1998 estimate of the GDP real growth rate is one percent.⁴³ The GDP is estimated to be \$14.2 billion, with a per capita income of about \$300.⁴⁴ Additionally, over forty percent of the annual budget goes to the military, whereas less than five percent is allocated to education.⁴⁵ The military budget has grown from \$100 million in 1988 to just under \$1 billion in 1994.⁴⁶ For 1994/1995, this placed Burma thirty-seventh in the world in defense expenditures, whereas it ranked one hundred and thirtieth in human development.⁴⁷

B. Human Rights Violations

The Burmese junta's human rights abuses have come under close scrutiny by the international community since the 1988 military crackdown.⁴⁸ For the purpose of this Comment, human rights are considered

³⁷ In 1988 the SLORC annulled the 1974 constitution and declared martial law. See, e.g., Alamgir, *supra* note 18, at 338.

³⁸ *Id.* at 346.

³⁹ MYANMAR: *Review 1998*, ASIA & PAC. REV. WORLD INFO., Nov. 1, 1998, at 2, available in 1998 WL 26760503 [hereinafter *Myanmar 1998 Review*]. On at least four occasions in 1998, the SPDC prevented Aung San Suu Kyi from leaving Rangoon. 1998 *Burma Human Rights Practices*, *supra* note 2.

⁴⁰ 1999 *IMF Report*, *supra* note 26, at 6.

⁴¹ Dhooqe, *supra* note 17, at 16-17.

⁴² *Id.*

⁴³ *Myanmar 1998 Review*, *supra* note 39.

⁴⁴ See U.S. & Foreign Commercial Serv. & U.S. Dep't of State, *Country Commercial Guide: Burma—Fiscal Year 1998* (visited Oct. 16, 1999) <<http://www.fta.doc.gov/uscs/ccg98/ccgoburm.html>> [hereinafter *Country Commercial Guide*]; 1999 *IMF Report*, *supra* note 26, at 4.

⁴⁵ Dhooqe, *supra* note 17, at 16.

⁴⁶ Alamgir, *supra* note 18, at 344.

⁴⁷ *Id.*

⁴⁸ 1999 *Amnesty Int'l Report*, *supra* note 15.

to be those basic rights enumerated in the first twenty articles of the Universal Declaration of Human Rights (“UDHR”).⁴⁹ These include the right to life, liberty, and the security of one’s person; the right to freedom from slavery or servitude; the right to freedom from torture or cruel, inhuman, or degrading treatment; the right to equality before the law; and the right to own property.⁵⁰

1. General Abuses

The past several years have seen an increase in the arbitrary beating and killing of civilians, torture, and other cruel and inhuman treatment, compulsory labor, forcible relocation, and a continued ban on freedom of expression and assembly in Burma.⁵¹ Freedom House, a human rights watchdog, rated Burma as one of the “worst violators” of basic political rights and civil liberties in their annual 1998/1999 survey.⁵² Freedom House has consistently given Burma low rankings for political rights and civil liberties since it began monitoring basic human rights in 1972.⁵³ Military personnel in Burma arbitrarily search private homes, censor mail, and monitor telephone conversations.⁵⁴ In June 1996, James Nichols, honorary consul for Norway, died in prison while serving a three-year sentence for the “unauthorized use of a fax machine.”⁵⁵ Internet access also remains highly restricted.⁵⁶

⁴⁹ The Universal Declaration of Human Rights, G.A. Res. 217A, U.N. Doc. A/810 at 71 (1948) [hereinafter UDHR]. Burma is an original signatory to the UDHR. Harvetta M. Asamoah et al., *International Legal Developments in Review: 1998 Public International Law*, 33 INT’L L. 555, 561 (1999).

⁵⁰ UDHR, *supra* note 49, arts. 3-5, 7, 17.

⁵¹ *Amnesty Int’l 1999 Report*, *supra* note 15; *Myanmar 1998 Review*, *supra* note 39; *1998 Burma Human Rights Practices*, *supra* note 2.

⁵² Burma was rated one of the most repressive regimes in the world along with Afghanistan, Cuba, Equatorial Guinea, Iraq, Libya, North Korea, Saudi Arabia, Somalia, Sudan, Syria, Turkmenistan, Vietnam, Kosovo, and Tibet. *Freedom House Introduction*, *supra* note 1. The ratings are based on information from published materials and human rights monitors, journalists, and representatives of both the private sector and trade union movement. Freedom House, *Methodology*, in *The Most Repressive Regimes of 1998*, *supra* note 1.

⁵³ Freedom House, *Country Ratings for All Years: Bolivia-Congo* (visited Feb. 17, 2000) <<http://www.freedomhouse.org/ratings/table2.html>>.

⁵⁴ *Freedom House 1998 Ratings*, *supra* note 2.

⁵⁵ Alamgir, *supra* note 18, at 345.

⁵⁶ *Consular Information Sheet*, *supra* note 23.

2. *Forced Labor*

The military regime in Burma engages in extensive use of forced labor for army operations and public works projects.⁵⁷ A U.S. Department of Labor report states, "in recent years, the SLORC has increasingly supplemented declining gross investment with uncompensated peoples 'contributions,' chiefly of forced labor, to build or maintain irrigation, transportation and tourism infrastructure projects."⁵⁸ For example, Burmese farmers from the southern Tenasserim region brought suit in *John Doe I, et al. v. Unocal Corp. et al.* against the U.S. petroleum firm Unocal, which partly financed the construction of the massive Yadana gas pipeline.⁵⁹ The suit alleged tortious conduct and violations of international human rights by the SPDC, which used forced labor, violence, and intimidation to relocate villages and steal property for the benefit of the pipeline construction. Although Unocal continues to receive harsh criticism for its implicit support of the regime's alleged human rights abuses during the pipeline construction, its operations in Burma continue.⁶⁰ In July 1998, the International Labor Organization, an organization that monitors workers' rights worldwide, found that the Burmese military junta "widely and systematically" engages in forced labor.⁶¹

3. *Environmental Abuses*

While Burma is rich in natural resources such as petroleum, timber, tin, zinc, natural gas, copper, lead, and coal, environmentalists argue that the junta's exploitation of these resources is leading to ecological devastation.⁶² In particular, the expansion of the gas industry poses a threat not only to the

⁵⁷ *Freedom House 1998 Ratings*, *supra* note 2; *1998 Burma Human Rights Practices*, *supra* note 2.

⁵⁸ Bureau of Democracy, Human Rights & Labor, *Burma Country Report on Human Rights Practices for 1997*, available in U.S. Dep't of State Homepage (Jan. 30, 1998) <http://www.state.gov/www/global/human_rights/1997_hrp_report/burma.html>.

⁵⁹ *Doe v. Unocal Corp.*, 963 F. Supp. 880, 884 (C.D. Cal. 1997) (brought under the federal Alien Tort Claims Act and holding that the Burmese plaintiffs have standing to sue Unocal for violations of human rights); *Doe I v. Unocal Corp.*, 67 F. Supp. 2d 1140 (C.D. Cal. 1999) (equitable relief that would halt Unocal's participation in the Yadana gas pipeline denied). *But see* Barry Wain, *A Pipeline Brings Prosperity to Myanmar's Poor*, *ASIAN WALL ST. J.*, Jan. 28, 2000, available in 2000 WL-WSJA 2933936.

⁶⁰ Unocal President John Imlie has said, "Unocal is motivated by 'geology and geography—not geopolitics.'" Dhooge, *supra* note 17, at 7.

⁶¹ *1998 Burma Human Rights Practices*, *supra* note 2.

⁶² Stephanie Tai, *Foreign Publication & Book Review*, 11 *GEO INT'L. ENVTL. L. REV.* 497 (1999) (reviewing *ARTICLE 19: INTERNATIONAL CENTRE AGAINST CENSORSHIP, PARADISE LOST? THE SUPPRESSION OF ENVIRONMENTAL RIGHTS AND FREEDOM OF EXPRESSION IN BURMA* (1994)); *World Factbook*, *supra* note 13.

environment but also to human development in Burma.⁶³ For example, observers allege that Burma's rain forest and endangered species were harmed during construction of the Yadana gas pipeline⁶⁴ in the southern Tenasserim region of Burma.⁶⁵

C. *Drug Trafficking and the Oppression of Ethnic Minorities*

Burma is the world's leading heroin producer.⁶⁶ The junta contributes to Burma's prospering narcotics trade.⁶⁷ In recent years, the regime has negotiated numerous cease-fire agreements with warlords in the ethnic minority areas who continue to fight for greater autonomy from the central government and have increasingly turned to the profitable drug trade.⁶⁸ In exchange for their allegiance to the regime, the junta tolerates the warlords'

⁶³ The Worldwide Fund for Nature considers Tenasserim one of 200 globally significant ecosystems with one of the largest and most diverse mammal populations in Asia. Ellen Alcorn, *The Unlikely Activist*, CONDE NAST TRAVELER, Nov. 1999, at 56, 60.

⁶⁴ Dhooge, *supra* note 17, at 3. When completed, the 416-mile pipeline will be the country's largest source of revenue and foreign currency. The pipeline will earn between \$200 and \$500 billion annually and provide 525 million cubic feet of natural gas. *Id.* at 2.

⁶⁵ Alcorn, *supra* note 63, at 59-60. The Burmese government and a multinational consortium of energy companies, which include Unocal (American), TOTAL (French), Petroleum Authority of Thailand, and Myanmar Oil and Gas Enterprise ("MOGE"), which is Burma's state-owned oil and gas-company, financed the multi-billion dollar Yadana pipeline project. Thailand's Deputy Minister of Foreign Affairs, Sukhumbhand Paribatra, has remarked:

I regret very strongly that a company, the Petroleum Authority of Thailand, which is owned by the government, was party of a deal which bought gas from Burma, and hence opened up the conditions for the suppression of the Karens in the area where the gas pipelines have to pass. So I think that, for better or worse, we have blood on our hands.

Id. at 64.

⁶⁶ *World Factbook*, *supra* note 13. Burma produces approximately 24,000 metric tons of heroin per year, which is far above the U.S. consumption of about 10 metric tons per year. *Laying Blame*, S. CHINA MORNING POST, Feb. 24, 1999, at 14 [hereinafter *Laying Blame*]. The United States argues that Burma's counter-narcotics efforts are insufficient. President's Letter to Congressional Leaders on Burma, 34 WKLY. COMP. PRESIDENT DOCUMENT 967 (May 26, 1998) [hereinafter 1998 President's Letter]. See generally Bureau of Int'l Narcotics & Law Enforcement Affairs, *INL Country Programs Asia/Africa/Middle East* (visited Oct. 11, 1999) <http://www.state.gov/www/global/narcotics_law/fs_asafme.html>.

⁶⁷ See generally PBS Frontline, *Interview with Barry R. McCaffrey* (visited Feb. 17, 2000) <<http://www.pbs.org/wgbh/pages/frontline/shows/heroin/crackdown/mccaffrey/html>> [hereinafter *McCaffrey Interview*]; 1998 *Burma Human Rights Practices*, *supra* note 2; *Freedom House 1998 Ratings*, *supra* note 2; Albright: *Myanmar Human Rights Abuses Threaten Asia Security*, Dow Jones Int'l News Serv., July 25, 1999, available in LEXIS, Djins.

⁶⁸ *Freedom House 1998 Ratings*, *supra* note 2. Burma's ethnic minorities have been struggling for greater autonomy from the central government since the late 1940s. *Id.* The Burmese are the nation's dominant ethnic group and constitute about 68% of the population. David Schmahmann & James Finch, *The Unconstitutionality of State and Local Enactments in the United States Restricting Business Ties with Burma (Myanmar)*, 30 VAND. J. TRANSNAT'L L. 175, 177 (1997). Other ethnic groups in Burma include the Shan (9%), the Karen (7%), the Rakhine (4%), the Chinese (3%), the Mon (2%), and the Indian (2%). *World Factbook*, *supra* note 13.

drug activities.⁶⁹ Illicit drug exports have more than doubled since the SLORC seized power in 1988.⁷⁰ In fact, because the warlords reinvest a significant portion of their drug profits in Burmese infrastructure, drug trafficking has become the backbone of the Burmese economy.⁷¹

The military's human rights abuses are especially widespread in areas populated by ethnic minorities.⁷² Undercover agents report that numerous villages in the northern Arakan Yoma mountain range have been expelled from their land so that the land can be used for opium cultivation by the drug lords.⁷³ In the Shan state, where much of the poppy cultivation originates, the military has played a role in the relocation of more than 1,400 villages and the uprooting of 300,000 people since 1996.⁷⁴ One human rights organization, the Burma Fund, estimates that about 150,000 refugees remain exiled from the country, and that an additional 350,000 refugees remain within Burma.⁷⁵

D. *Consequences of the Junta's Oppressive Rule*

The Burmese junta's human rights violations and repressive political agenda have turned the resource-rich Southeast Asian nation into a deteriorating zone of poverty, malnutrition, and warfare.⁷⁶ With the junta's backing, Burma has become the world's leading heroin exporter,⁷⁷ and the junta gladly accepts the reinvestment of these drug profits into the Burmese infrastructure. Nevertheless, the Burmese economy continues to stagnate, and attempts to liberalize the economy and promote foreign investment have failed.⁷⁸ Consequently, the junta resorts to both forced labor and forcible relocation to support internal development projects.⁷⁹

Further, because of the accessibility and quasi-legitimacy of heroin,⁸⁰ the HIV-infection rate in Burma is growing. Human rights investigator

⁶⁹ *Freedom House 1998 Ratings*, *supra* note 2.

⁷⁰ Bernstein & Kean, *supra* note 4.

⁷¹ Rollert, *supra* note 4.

⁷² *Amnesty Int'l 1999 Report*, *supra* note, 15.

⁷³ *Laying Blame*, *supra* note 66, at 14.

⁷⁴ Amnesty Int'l, *Myanmar: Atrocities in the Shan State* (visited Oct. 11, 1999) <<http://www.amnesty.org/ailib/aipub/1998/ASA/31600598.htm>>, offers an in-depth review of the political and economical turmoil and human rights abuses in the central Shan State.

⁷⁵ Burma Fund, *Burma Fund's Burma in Summary* (visited Oct. 16, 1999) <http://www.burmafund.org/Research_Library/burma_in_summary.htm>.

⁷⁶ *See 1999 IMF Report*, *supra* note 26.

⁷⁷ *World Factbook*, *supra* note 13.

⁷⁸ *See 1999 IMF Report*, *supra* note 26; Finch, *supra* note 4, at 14.

⁷⁹ *See supra* Part II.B.2.

⁸⁰ Rollert, *supra* note 4.

Benjamin Min, who was formerly with the SPDC Ministry of Mines, reported that two-thirds of the 100,000 workers at the government-owned Hpakant Jade Mine chose to receive their wages in the form of heroin.⁸¹ Hundreds of miners shoot up in on-site galleries with a single needle.⁸² While the World Health Organization estimates approximately 500,000 of Burma's forty-seven million people are HIV positive,⁸³ the regime acknowledges only 21,503 confirmed HIV cases and 2,854 AIDS cases.⁸⁴ In April 1999, Dr. Peter Piot, executive director of the United Nations AIDS program UNAIDS said, "Burma has the second worst AIDS epidemic in Asia. . . . But the big problem is the recognition of the problem by the government."⁸⁵

In response to the well-scrutinized human rights abuses and the junta's insufficient anti-narcotics actions, Western countries have taken retaliatory trade actions.⁸⁶ In October 1999, the European Union foreign ministers extended European sanctions on Burma.⁸⁷ European Union sanctions include a visa ban on military officials, a withdrawal of preferential tariff treatment for Burma,⁸⁸ and an arms embargo, all of which were extended in 1999.⁸⁹ Canadian sanctions imposed since 1997 limit exports to Burma and have removed Burma's eligibility under Canada's General Preferential Tariff.⁹⁰ As the only political, military, and economic superpower, the United States has also taken an active approach to human

⁸¹ *Id.*

⁸² *Id.*

⁸³ Burma Fund, *Remarks of Eric Schwartz at the Workshop on Humanitarian Aid to Burma* (visited Nov. 12, 1999) <http://www.burmafund.org/Research_Library/Remarks%20of%20Eric%20Schwartz.htm>; see also Burma Fund, *The Humanitarian Crisis, Aid and Governance in Burma: A Working Paper for the Workshop on Humanitarian Aid to Burma* (May 24, 1999) <http://www.burmafund.org/Research_Library/Humanitarian%20Crisis%20Aid%20and%20Governance.htm> [hereinafter *Humanitarian Aid Working Paper*].

⁸⁴ 1999 IMF Report, *supra* note 26, at 5.

⁸⁵ See *Humanitarian Aid Working Paper*, *supra* note 83.

⁸⁶ In its 1990 human rights report on Burma, the U.S. State Department concluded that "torture, beatings, and mistreatment of political detainees were commonplace." 137 CONG. REC. S3106-02 (1991).

⁸⁷ *EU Renews Myanmar Sanctions*, Dow Jones Int'l News Serv., Oct. 11, 1999, available in LEXIS, Djins [hereinafter *EU Renews Myanmar Sanctions*]; 1998 *Burma Human Rights Practices*, *supra* note 2.

⁸⁸ The Generalized System of Preferences, which was revoked for Burma, is a system under which preferential tariff treatment is granted on a non-reciprocal and non-discriminatory basis by most developed countries to exports from developing countries. United Nations Conference on Trade & Development, *The Generalized System of Preferences and Other Trade Laws* (visited Mar. 21, 2000) <<http://www.unctad.org/en/techcop/trad0103.htm>>.

⁸⁹ *EU Renews Myanmar Sanctions*, *supra* note 87.

⁹⁰ Thio, *supra* note 10, at 44-45; see also *supra* note 88 and accompanying text.

rights compliance in Burma by imposing sanctions.⁹¹ In 1997, the United States prohibited future investment in Burma by U.S. persons.⁹²

III. THE LEGAL FRAMEWORK FOR U.S. SANCTIONS ON BURMA

The United States first took action in response to the repressive SPDC regime in the late eighties, but waited another decade to impose additional sanctions. To punish Burma for its human rights violations and insufficient anti-narcotics actions, the United States imposed sanctions on Burma under the Burma policy provision of the Omnibus Consolidated Appropriations Act of 1997 ("the Act").⁹³ Along with imposing a visa ban and a prohibition on all non-humanitarian aid, the Act authorized the President to prohibit all new investment in Burma if the situation there did not improve.⁹⁴ On May 20, 1997, the President issued Executive Order 13,047, which prohibits all new investment in Burma by U.S. persons.⁹⁵

A. *Chronology of Events Related to U.S. Sanctions on Burma*

1. *Initial Action*

The United States took several actions to punish Burma prior to imposing sanctions in 1997. In 1989, after the bloody suppression of pro-democracy demonstrators and the subsequent house arrest of the NLD leader Aung San Suu Kyi, the United States proclaimed that Burma's eligibility under the U.S. Generalized Systems of Preferences would be suspended until the Burmese junta afforded its labor force internationally recognized labor rights.⁹⁶ In an effort to target the Burmese garment industry, President Bush, under the authority of the Customs and Trade Act of 1990, did not renew the Bilateral Textile Agreement with Burma, which lapsed on December 31, 1990.⁹⁷ In 1990 textile imports accounted for \$9.2 million of the total \$22 million in trade between the United States and Burma.⁹⁸ The United States did not impose further sanctions until 1997.

⁹¹ *Task Force on Economic Sanctions*, *supra* note 6.

⁹² *See infra* Part III for a description of current U.S. sanctions against Burma.

⁹³ Omnibus Consolidated Appropriations Act of 1997 ("Omnibus Consolidated Appropriations Act") § 570, Pub. L. No. 104-208, 110 Stat. 3009-165 (1999).

⁹⁴ *Id.* § 570(b).

⁹⁵ Exec. Order No. 13,047, 62 Fed. Reg. 28, 301 (May 20, 1997) [hereinafter Exec. Order No. 13,047].

⁹⁶ *1998 Burma Human Rights Practices*, *supra* note 2; *see supra* note 88 and accompanying text.

⁹⁷ 137 CONG. REC. S10487 (1991).

⁹⁸ *Id.* at S10488.

2. *Section 570 of the Omnibus Consolidated Appropriations Act of 1997*

The Omnibus Consolidated Appropriations Act of 1997 prohibits all aid to Burma except humanitarian assistance,⁹⁹ counter-narcotics assistance,¹⁰⁰ and assistance to advance democracy and human rights.¹⁰¹ It requires the United States to oppose multilateral loans, including World Bank and IMF loans,¹⁰² and prohibits the issuance of American visas to Burmese officials.¹⁰³ The Act also encourages the President to develop a multilateral strategy to foster democracy and humanitarian progress in Burma.¹⁰⁴ Finally, Section 570(b) of the Act authorizes the President to prohibit new investment “if the Government of Burma has physically harmed, rearrested for political acts, or exiled Aung Sun Suu Kyi, or has committed large-scale repression of or violence against the democratic opposition.”¹⁰⁵

U.S. investment sanctions were imposed to limit the Burmese junta’s ability to build military muscle with profit generated from U.S. investors. The junta’s extensive controls over Burma’s economy allow it to pocket such profit and disperse it to the military.¹⁰⁶ Some senators, such as Kentucky Republican Mitch McConnell and New York Democrat Daniel Patrick Moynihan, favored complete divestiture from Burma.¹⁰⁷ However, Congress did not want to harm existing U.S. business interests or eliminate the entire U.S. presence in Burma due to concerns regarding future

⁹⁹ Omnibus Consolidated Appropriations Act § 570(a)(1)(A).

¹⁰⁰ *Id.* § 570(a)(1)(B).

¹⁰¹ *Id.* § 570(a)(1)(C).

¹⁰² *Id.* § 570(a)(2).

¹⁰³ *Id.* § 570(a)(3).

¹⁰⁴ *Id.* § 570(c).

¹⁰⁵ See Exec. Order No. 13,407, *supra* note 95.

¹⁰⁶ As Burton Levin, former U.S. Ambassador to Burma said, “whatever money SLORC obtains from foreign investors it pours directly into the army, while the rest of the country is collapsing.” Burma.net, *Burma’s Purchasing Laws: Frequently Asked Questions* (visited Dec. 9, 1999) <http://www.burma.net/selective-purchasing/bsp_faq.html#sanctions>.

¹⁰⁷ See *id.* at 331 (citing congressional debate from 142 CONG. REC. S8749 (daily ed. of July 25, 1996), which contains a statement by Senator Johnson, who opposed a total ban on economic activity:

No one defends the SLORC, the group that is running Myanmar, or Burma . . . The question is: would it be effective to do what Senator McConnell has proposed? . . . [W]ould it help achieve the end? Mr. President, I think it would do precisely the opposite. Mr. President, to cut off American participation in Burma—not foreign participation but American participation—would be exactly the wrong thing. First of all, it is no sanction because Americans are less than ten percent of foreign investment in Burma today . . . and the question is: Is it good to have an American company, or would it be better to have Total, the French company, have the contract? Really that is the question proposed by the McConnell approach. I submit that it is better to have an American company there.)

economic ties with Burma.¹⁰⁸ In the end, the Senate compromised with Section 570(b), which was known as the so-called Cohen-Feinstein Amendment. As such, sanctions cover only future investments and do not mandate a complete withdrawal of all U.S. interests in Burma.¹⁰⁹

3. *Executive Order No. 13,047*

On May 20 1997, President Clinton issued Executive Order No. 13,047 (the "Order"), which prohibits new investment or the facilitation of new investment in Burma by U.S. persons.¹¹⁰ The Order was issued under the authority of Section 570(b) of the Omnibus Consolidated Appropriations Act of 1997,¹¹¹ and Section 204(c) of the International Emergency Economic Powers Act ("IEEPA").¹¹² President Clinton declared a national emergency under the IEEPA so that criminal sanctions could be invoked if the Order were violated.¹¹³ Violations of the Order may prompt criminal penalties of up to ten years in jail, \$500,000 in corporate and \$250,000 in individual fines, along with a civil penalty of \$11,000.¹¹⁴ Under the IEEPA the President must also report to Congress every six months on the status of the situation in Burma.¹¹⁵

The Order prohibits new investment and the facilitation of such investment by a U.S. person in Burma after May 21, 1997.¹¹⁶ The entry into, performance, or financing of a contract to sell or purchase goods, services, or technology, non-equity investments, and non-profit activities and programs are exempt from the prohibition.¹¹⁷ Additionally, current U.S.

¹⁰⁸ See James Finch et al., *With a Broad Brush: The Federal Regulation of Sanctions Against Burma (Myanmar)*, 22 HASTINGS INT'L & COMP. L. REV. 323, 324, 337 (1999).

¹⁰⁹ Omnibus Consolidated Appropriations Act § 570(b).

¹¹⁰ Exec. Order No. 13,407, *supra* note 95.

¹¹¹ See *supra* Part III.A.2.

¹¹² Exec. Order No. 13,047, *supra* note 95.

¹¹³ Although the President did not explain how the situation in Burma poses "an extraordinary and unusual threat to the national security and foreign policy of the United States," he stated in his letter to Congress that "[i]t is in the national security and foreign policy interests of the U.S. to seek an end to abuses of human rights in Burma, to support efforts to achieve democratic reform that would promote regional peace and stability, and to urge effective counter-narcotics policies." Exec. Order No. 13,047, *supra* note 95. Yet it is difficult to argue that Burma is a threat to the security and stability of the region. Burma has existed in virtual isolation from the international community since the early sixties and has maintained good relations with neighboring countries. Finch et al., *supra* note 108, at 326.

¹¹⁴ Exec. Order No. 13,047, *supra* note 95; 50 U.S.C. § 1705 (1999). Office of Foreign Assets Control, U.S. Dep't of the Treasury, *An Overview of the Burmese Sanctions Regulations* (visited Nov. 9, 1999) <<http://www.treas.gov/ofac>> [hereinafter *BSR*]. Executive Order 13,047 is still in force. Continuation of Emergency with Respect to Burma, 3 C.F.R. Note of 5/18/99.

¹¹⁵ 50 U.S.C. § 1703(c) (1999).

¹¹⁶ Exec. Order No. 13,047, *supra* note 95.

¹¹⁷ See *infra* Part III.B.4.

investors may, under license approved by the Office of Foreign Assets Control ("OFAC") of the U.S. Department of Treasury, make subsequent related investments to projects initiated before May 21, 1997.¹¹⁸ On May 21 1998, OFAC issued Burmese Sanctions Regulations to implement the prohibitions of the Order.¹¹⁹

B. Description of Sanctions

1. Prohibition on New Investment

Under the sanctions scheme, future investment in the economic development of resources in Burma by U.S. persons on or after May 21, 1997 is prohibited.¹²⁰ U.S. persons are defined as "U.S. citizens and permanent resident aliens wherever they are located, entities organized under U.S. law (including their foreign branches), and entities and individuals actually located in the U.S."¹²¹ New investment is defined as (1) a contract with the "Government of Burma"¹²² or a "nongovernmental entity"¹²³ in Burma for the economic development of resources located in Burma; (2) the entry into a contract providing for the general supervision and guarantee of another person's performance of a contract that includes the economic development of resources located in Burma; and (3) the purchase of a share of ownership in the economic development of resources in Burma.¹²⁴ Investments not prohibited include not-for-profit, educational, health, or other humanitarian investments or activities.¹²⁵

¹¹⁸ See *infra* Part III.B.2; Burmese Sanctions Regulations, 31 C.F.R. § 537.407 (1999).

¹¹⁹ BSR, *supra* note 114.

¹²⁰ Exec. Order No. 13,047, *supra* note 95; 31 C.F.R. § 537.201.

¹²¹ BSR, *supra* note 114; 1998 President's Letter, *supra* note 66.

¹²² The "Government of Burma" includes "any political subdivision, agency or instrumentality thereof." 31 C.F.R. § 537.306.

¹²³ "Non-governmental entity" includes "partnership, association, trust, joint venture, corporation, or other organization . . . that is located in Burma or exists for the exclusive or predominant purpose of engaging in the economic development of resources in Burma or derives its income predominantly from such economic development." *Id.* § 537.309.

¹²⁴ BSR, *supra* note 114. The regulations contain a definition of "new investment":

The term new investment means any of the following activities, if such an activity is undertaken pursuant to an agreement, or pursuant to the exercise of rights under such an agreement, that is entered into with the Government of Burma or a nongovernmental entity in Burma on or after the effective date: (a) [t]he entry into a contract that includes the economic development of resources located in Burma; (b) [t]he entry into a contract providing for the general supervision and guarantee of another person's performance of a contract that includes the economic development of resources located in Burma; (c) [t]he purchase of a share of ownership, including an equity interest, in the economic development of resources located in Burma; or (d) [t]he entry into a contract providing for the participation in royalties, earnings, or profits in the

One focus of the sanctions is investment in the development of "resources" in Burma. The term "resources" means natural, agricultural, commercial, financial, industrial, and human resources.¹²⁶ Burma is blessed with an abundance of natural resources, and the sanctions target the economic development of these natural resources.¹²⁷ Contracts related to the economic development of these resources include "contracts conferring rights to explore, develop, extract, or refine petroleum, natural gas, or minerals . . . to take over a mining operation [or] . . . to acquire land and run a hotel or factory . . . to acquire a forest or agricultural area and exploit the timber or other crops,"¹²⁸ as well as the acquisition of land on which a factory or hotel could be built.¹²⁹ For example, a U.S. company is prohibited from building factories in Burma that make use of industrial, commercial, and human resources located in Burma.¹³⁰

Sanctions also prohibit the supervision or guarantee of a third party's performance of a contract that includes the economic development of resources in Burma.¹³¹ For example, sanctions would prohibit a U.S. company from acting as a general contractor for a foreign oil company for a

economic development of resources located in Burma, without regard to the form of the participation.

31 C.F.R. § 537.308.

Finch et al. suggest that U.S. persons could contract with individuals in Burma to develop resources since the sanctions technically only cover contracts with the government of Burma and non-governmental entities. Finch et al., *supra* note 108, at 332.

¹²⁵ 31 C.F.R. § 537.301.

¹²⁶ *Id.* § 537.403.

¹²⁷ See Finch et al., *supra* note 108, at 328.

¹²⁸ 31 C.F.R. § 537.403.

¹²⁹ *Id.*

¹³⁰ See BSR, *supra* note 114.

¹³¹ The text of 31 C.F.R. § 537.406 reads as follows:

Section 537.201 prohibits the entry by a U.S. person into a contract providing for the general supervision and guarantee of another person's performance of a contract that includes the economic development of resources located in Burma, if the U.S. person's contract is entered into on or after the effective date, unless undertaken pursuant to, or in the exercise of rights under, a pre-effective date agreement. For the purposes of § 537.201, only the entry into contracts for supervision and guarantee at the top level of project management, such as entry into a contract with a development project's sponsor or owner to become a prime contractor or general manager for a development project, will be considered new investment in Burma. By contrast, subcontracts to provide goods, services, or technology to a prime contractor or general manager of a development project are exempt from the prohibitions of this part pursuant to § 537.204 unless: (a) the functional scope of the subcontractor's obligations is substantially similar to that of a prime contractor's or general manager's obligations; or (b) the consideration for such subcontracts includes a share of ownership in, or participation in the royalties, earnings or profits of, the economic development of resources located in Burma.

31 C.F.R. § 537.406.

project to develop resources in Burma.¹³² Furthermore, a U.S. company may not provide ongoing technical support to a foreign-owned factory in Burma where the U.S. company is paid a percentage of generated profits.¹³³ However, for purposes of the regulations, only entering into contracts at the top level of management for a development project is considered new investment in Burma.¹³⁴ Subcontracts to provide goods, services, or technology are exempt under the regulations unless the subcontractor functions as a general manager or the project involves participation in the earnings or profits from the development of economic resources in Burma.¹³⁵

In addition, a U.S. person may not make investments in foreign companies involved in economic development projects in Burma.¹³⁶ Although a U.S. person who has already invested in a presently prohibited activity is not required to relinquish its shares,¹³⁷ new shares may not be acquired.¹³⁸ Divestment of such shares, such as contracting to sell a U.S. person's equity or income interest in a development project in Burma to a foreign company, is authorized under Section 537.504 of the regulations and does not constitute a prohibited facilitation of a third-party's investment in Burma.¹³⁹

2. *Agreements Entered into Prior to May 21, 1997*

The Order exempts investment agreements made prior to May 21, 1997 if the agreements meet certain conditions.¹⁴⁰ OFAC must approve all U.S. investments in Burma that fall within the authority of the sanctions.¹⁴¹ OFAC evaluates the clarity of the agreement, the scope and the specificity of the activity or investment, and the legal enforceability of the terms of the agreement to determine whether an activity may be allowed.¹⁴² Moreover, a

¹³² *BSR, supra* note 114.

¹³³ *Id.*

¹³⁴ *Id.*; 31 C.F.R. § 537.406.

¹³⁵ 31 C.F.R. §§ 537.204, 537.406.

¹³⁶ *Id.* § 537.409.

¹³⁷ *Id.* § 537.405.

¹³⁸ *Id.*

¹³⁹ *Id.* § 537.504. The following is an example of a permitted divestment in a development project in Burma. "A U.S. oil company holds a pre-effective date contract to develop a Burmese oil field. It wishes to sell its rights under the contract to a foreign company. It is authorized to sell an interest without prior authorization from OFAC, but if the agreement is valued at more than \$10,000, the seller must file a report with OFAC within 10 days of the signing of the agreement." *BSR, supra* note 114.

¹⁴⁰ 31 C.F.R. § 537.407(a).

¹⁴¹ *BSR, supra* note 114; *see also* 31 C.F.R. § 537.407.

¹⁴² 31 C.F.R. § 537.407.

U.S. person who is party to an agreement or investment made prior to May 21, 1997 may enter into subsequent agreements related to investments pursuant to the pre-effective date, if such agreements were specifically contemplated at the time the original contract was made and after the original exempt activity has been approved by OFAC.¹⁴³ OFAC has issued several licenses with respect to transactions in Burma since the imposition of investment sanctions in 1997.¹⁴⁴

3. *Prohibition on Facilitating New Investment*

Foreign affiliates and subsidiaries of U.S. companies are not explicitly prohibited from investing in Burma. However, the sanctions prohibit a U.S. person from facilitating or approving a third party's new investment in Burma.¹⁴⁵ Section 537.409 of the regulations describes several prohibited activities, including "brokering, financing, guaranteeing, or approving the entry by any foreign person, including a foreign affiliate, into a contract for the development of, e.g., a natural gas field, a tourist hotel complex, or a rubber plantation in Burma."¹⁴⁶

4. *Commercial Exemptions*

The regulations specifically state that not-for-profit and educational investments in Burma are still permitted.¹⁴⁷ Moreover, a U.S. citizen or corporation may engage in "the entry into, performance of, or financing of a contract to sell or purchase goods, services, or technology" provided it is not for the general supervision and guarantee of a third party's performance in an economic development project in Burma, that payment is not in the form of shares of ownership in such a project, or that the U.S. person or entity does not participate in the earnings or profits of the development of resources.¹⁴⁸ Non-equity investments are also exempt.¹⁴⁹ Thus, U.S. persons may purchase debt instruments from the Burmese government or companies in Burma as long as the instruments are not convertible into equity and the U.S. person does not participate in royalties, earnings, or

¹⁴³ *Id.* §§ 537.407(b)-(c).

¹⁴⁴ 1998 President's Letter, *supra* note 66.

¹⁴⁵ 31 C.F.R. § 537.202.

¹⁴⁶ *Id.* § 537.409(b).

¹⁴⁷ *Id.* § 537.301.

¹⁴⁸ *See id.* § 537.408.

¹⁴⁹ *See id.* §§ 537.204, 537.404, 537.405, 537.408.

profits.¹⁵⁰ To clarify further, the following activities are permitted: (1) the marketing of goods or services through a sales representative or sales agent, through a U.S. person or corporate subsidiary established and operating in Burma before May 21, 1997, or through any established foreign (including Burmese) distributorship;¹⁵¹ (2) the rental, lease, or purchase of space in connection with the continued operation of a business in operation prior to the effective date;¹⁵² (3) the hiring and training of Burmese employees to carry out exempted activities;¹⁵³ (4) entering into contracts for registration or renewal of patents, trademarks, and copyrights;¹⁵⁴ and (5) financing by U.S. banks, as long as financing instruments cannot be converted into equity and the bank does not receive any profits from the development of the project in Burma.¹⁵⁵

C. *Selective Purchasing Laws*

Dissatisfied with federal sanctions, a number of U.S. municipalities and states have enacted measures modeled after South African anti-apartheid statutes that restrict trade and commerce with Burma.¹⁵⁶ For example,

¹⁵⁰ See *id.* § 537.404:

The purchase of shares, including an equity interest, in the economic development of resources located in Burma, is prohibited when those shares are purchased after the effective date directly or indirectly from the Government of Burma or a nongovernmental entity in Burma, unless purchased pursuant to an agreement entered into prior to May 21, 1997. U.S. persons may purchase debt instruments issued by the Government of Burma or a nongovernmental entity in Burma, directly or indirectly, provided that such instruments are not convertible into equity, and do not provide for participation, including as collateral or security, in royalties, earnings, or profits in the economic development of resources located in Burma.

See also *id.* § 537.405.

¹⁵¹ *Id.* § 537.408(b)(1).

¹⁵² *Id.* § 537.408(b)(2).

¹⁵³ *Id.* § 537.408(b)(3). The employment of personnel in Burma under these circumstances is considered the purchase of employment services, which is exempt from prohibition under Section 537.204. *Id.* § 537.204.

¹⁵⁴ *Id.* § 537.408(b)(4).

¹⁵⁵ *Id.* § 537.408(b)(5).

¹⁵⁶ See Shawna Fullerton, *State Foreign Policy: The Legitimacy of the Massachusetts Burma Law*, 8 MINN. J. GLOBAL TRADE 249 (1999). However, in June 1999, the First Circuit Court of Appeals ruled that federal law preempts the Massachusetts law. The U.S. Supreme Court granted certiorari and will hear oral arguments in the spring of 2000. Linda Greenhouse, *Justices to Decide Foreign Policy Question in Massachusetts Boycott of Burma*, N.Y. TIMES, Nov. 30, 1999, at A19. See also *State Attorney General Seeks Review of Burma Trade Ruling*, BOSTON GLOBE, July 13, 1999, at B5. In addition, the WTO, the European Union, the National Foreign Trade Council, and the U.S. Chamber of Commerce have challenged the legality of the Massachusetts law. See Steve Charnovitz, *Symposium, The Universal Declaration of Human Rights at 50 and the Challenge of Global Markets: The Globalization of Economic Human Rights*, 25 BROOK. J. INT'L L. 113, 123 (1999); National Foreign Trade Council v. Baker, 26 F. Supp. 2d 287, 289 (D. Mass. 1998). The European Union and Japan assert that the Massachusetts law violates U.S.

Massachusetts prohibits the state from doing business with companies that trade with Burma.¹⁵⁷ Although selective purchasing laws place potential contractors at a competitive disadvantage, these purchasing policies apply to both U.S. and foreign companies, which creates a level playing field for all investors. In contrast, federal investment sanctions affect only U.S. persons.¹⁵⁸

IV. LIMITATIONS ON THE EFFICACY OF THE U.S. SANCTIONS

The impact of the current sanctions scheme has been diminished because U.S. companies are authorized to continue existing operations and remain free to trade with Burma.¹⁵⁹ Moreover, the current sanctions actually remove the President's flexibility to respond to changes in Burma because it is Congress that must lift sanctions,¹⁶⁰ and nowhere is it explained how sanctions will lead to improvements in human rights.¹⁶¹ In fact, sanctions have not inspired positive reform or development in Burma. The efficacy of sanctions is also limited by a combination of both internal and external factors. Burma's drug-saturated economy and ASEAN's engagement policy have neutralized the impact of the sanctions on Burma's economy.¹⁶² Burma has compensated for the small amount of lost U.S. investment by focusing on its thriving drug trade and by doing business with other countries in the region.

A. *Drug-laundered Funds Sustain the Burmese Economy*

Burma's prosperous drug trade sustains the Burmese economy and explains in part why the withdrawal of U.S. investments in the late nineties

obligations under the WTO Agreement on Government Procurement with respect to non-discrimination for qualified suppliers. Asamoah et al., *supra* note 49, at 562. See also Robert Reno, *Bay State's Tilt at 'Burma' Shows Us Why Trade Is Hot*, NEWSDAY, Dec. 2, 1999, available in 1999 WL 8201410. "What we feel very uncomfortable with is that we get conflicting signals about who determines U.S. foreign policy and what the content of U.S. foreign policy is," says Bernd Langeheine, trade counselor in the European Commission's Washington office. Robert S. Greenberger, *U.S. States and Cities Increase Use of Trade Sanctions*, ASIAN WALL ST. J., Apr. 2, 1998, at 12.

¹⁵⁷ Reno, *supra* note 156.

¹⁵⁸ See *supra* Part III.B.I.

¹⁵⁹ See Exec. Order No. 13,047, *supra* note 95.

¹⁶⁰ Finch et al., *supra* note 108, at 338.

¹⁶¹ *Id.* at 325.

¹⁶² 1998 President's Letter, *supra* note 66.

has had only a minor impact.¹⁶³ The saturation of drug-laundered funds in Burma threatens legitimate business investments and contributes to an infrastructure already lacking the institutional mechanisms for economic growth.¹⁶⁴ As U.S. Assistant Secretary of State for Narcotics and Law Enforcement Affairs Robert Gelbard concludes, "The Burmese junta has brazenly exploited drug trafficking . . . [D]rug traffickers and their families are among the leading backers of high-profile infrastructure projects in Burma. They launder their money with impunity in banks controlled by the military."¹⁶⁵

Burma's leaders maintain cooperative relationships with the country's drug traffickers. In October 1999, Khin Nyunt, a top general, visited the notorious drug lord Wei Hsueh-kang at Wei's headquarters near the Thai border.¹⁶⁶ Wei Hsueh-kang is the leader of the rebel United Wa State Army and has been given land, political amnesty, and support by the junta to stop his movement against the central government.¹⁶⁷ In return, many of his drug profits have been reinvested in Burmese infrastructure.¹⁶⁸ Moreover, the junta has rejected repeated U.S. requests for action against the notorious opium warlord Khun Sa, who surrendered to the Burmese government in 1996 but who continues to live under military protection in Rangoon.¹⁶⁹

The shortsightedness of the military junta ruling Burma presents a threat to Burma's sustainable growth and development. The junta presently has a steady inflow of illicit drug profits to fill any vacuum left by the withdrawal of U.S. investments. However, the prevalence of drug profits threatens economic development and sustainable growth because the drug business discourages legitimate investment in Burma.

¹⁶³ See Marisa Chimprabha & Yindee Lertcharoenchok, *U.S. Blasts Burma for Allowing Drug Barons to Live with Impunity in Rangoon*, NATION (Bangkok), Mar. 5, 1999, available in LEXIS, 1999 FT Asia Intelligence Wire.

¹⁶⁴ See Rollert, *supra* note 4; *Drug Lord Spreads Trade 'With Help of Generals'*, S. CHINA MORNING POST (Nov. 17, 1999), available in Shweinc Team Homepage <<http://www.shweinc.com/news/data/991117130933.shtml>>.

¹⁶⁵ Rollert, *supra* note 4.

¹⁶⁶ *Bangkok Post Editorial: Burma's Dangerous Message on Drugs*, BANGKOK POST (Nov. 7, 1999), available in Free Burma Coalition Website: News <<http://www.freeburmacoalition.org/1999/11/07/drugsinburmaeditorial.html>> [hereinafter *Burma's Dangerous Message on Drugs*].

¹⁶⁷ *Id.*

¹⁶⁸ See Rollert, *supra* note 4; *Freedom House 1998 Ratings*, *supra* note 2.

¹⁶⁹ Chimprabha & Lertcharoenchok, *supra* note 163.

B. *Minimal U.S. Investment*

The impact of U.S. sanctions in Burma has also been limited because there was never much U.S. investment in Burma to begin with. In 1997, U.S. investment represented less than ten percent of foreign investment in Burma.¹⁷⁰ OFAC only had to notify fifty firms with operations in or ties to Burma of the implications and prohibition of new investment under Executive Order 13,047.¹⁷¹ U.S. investments in Burma totaled only \$30.2 million in 1995/1996.¹⁷² In contrast, in 1998/1999 the United Kingdom and Singapore invested \$96.4 million and \$87.9 million, respectively, in Burma.¹⁷³ In 1997/1998, Singapore's foreign direct investment in Burma totaled \$307.5 million.¹⁷⁴

Although the U.S. sanctions do not specifically target trade between Burma and the United States (as opposed to investment in Burma), trade between the two countries is relatively small. In November 1999, year-to-date trade between the United States and Burma amounted to \$7.61 million in exports (mainly machinery and transport equipment) and \$158.43 million in imports (mainly manufactured articles).¹⁷⁵ During this same period, the total trade volumes between the United States and its major trading partners were as follows: Canada, \$298.42 billion; Japan, \$154.89 billion; China, \$78.57 billion; and Taiwan, \$44.33 billion.¹⁷⁶

While the decrease of foreign direct investment in Burma may indicate that U.S. sanctions are negatively affecting the Burmese economy, economic mismanagement and the Asian financial crisis are more likely the reasons for the downturn.¹⁷⁷ In fact, even before the imposition of investment sanctions in 1997, U.S. investment in Burma was decreasing.¹⁷⁸ A number of U.S. companies, including Pepsi Co., Levi Strauss, Motorola, Hewlett Packard,¹⁷⁹ Amoco, Liz Claiborne, Macy's, Eddie Bauer, Columbia

¹⁷⁰ Schmahmann & Finch, *supra* note 68, at 187.

¹⁷¹ 1998 President's Letter, *supra* note 66.

¹⁷² 1999 IMF Report, *supra* note 26, at 78.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ U.S. Census Bureau, *U.S. Trade with Burma (Myanmar) in 1999* (visited Nov. 19, 1999) <<http://www.census.gov/foreign-trade/sfctr/1999/c5460.html>>.

¹⁷⁶ U.S. Census Bureau, *Top Ten Countries with Which the U.S. Trades* (visited Jan. 14, 2000) <<http://www.census.gov/foreign-trade/top/dst/1999/10/balance.html>>.

¹⁷⁷ See *U.S. Sanctions Hurt Myanmar*, OIL DAILY, Aug. 9, 1999, available in 1999 WL 10013668; see also 1998 President's Letter, *supra* note 66.

¹⁷⁸ See 1999 IMF Report, *supra* note 26, at 78.

¹⁷⁹ *Myanmar 1998 Review*, *supra* note 39.

Sportswear, Oshkosh B'Gosh, and Apple Computer, withdrew from Burma even before sanctions were imposed.¹⁸⁰

C. *The Substitution Effect*

The engagement policy of member states of the Association of Southeast Asian Nations effectively counteracts the policy of isolating Burma that the United States promotes with its current sanctions scheme.¹⁸¹ The ASEAN member states that continue to invest in Burma fill any void left by the withdrawal of U.S. investment.¹⁸² When Texaco sold its 42.9% stake in the Burmese Yetagun oil and gas field in late 1997, Petronas of Malaysia purchased 36.4%.¹⁸³ When Dutch beer brewer Heineken pulled out of Burma, Fraser and Neave of Singapore bought its stake in the half-completed brewery there.¹⁸⁴ Moreover, in November 1998, the Canadian company Indochina Goldfields announced the opening of a \$300 million copper mine in Burma.¹⁸⁵ Another Canadian company, Mindoro Resources, has partnered with the Burmese junta in a gold exploration project.¹⁸⁶

Furthermore, the withdrawal of most U.S. interests in Burma strengthened the historically close relations between China and Burma.¹⁸⁷ One week after the U.S. announced its sanctions in 1997, the Chinese signed

¹⁸⁰ 143 CONG. REC. S3464 (1997).

¹⁸¹ Formed in 1967 to foster regional trade, growth, peace, and prosperity, ASEAN counts as member states all of the countries of Southeast Asia (Brunei, Burma, Indonesia, Laos, Malaysia, Philippines, Singapore, Thailand, Vietnam) except Cambodia, which was denied entry in 1997 due to political instability and human rights concerns. (This is ironic since ASEAN has not yet showed concern over the Burmese junta's human rights record and turned a blind eye to the Indonesian invasion of East Timor in 1975). Thio, *supra* note 10, at 13. Despite fervent lobbying by both the United States and the European Union, Burma became a member of ASEAN in 1997. The United States and the European Union argued that ASEAN membership would impose legitimacy on an illegitimate, repressive regime. *Id.* at 48. Although Thailand and the Philippines suggested that Burma should democratize before entry into ASEAN in 1997, the prevailing view was that the Burmese junta would improve its human rights record after entry. No demands were made on the military dictatorship to liberalize or improve its human rights record prior to entry into ASEAN. *Id.* at 40. In contrast, European Union membership is contingent on observance of treaty-based human rights norms. Frank J. Garcia, *Symposium, The Global Market and Human Rights: Trading away the Human Rights Principle*, 25 BROOK J. INT'L L. 51, 61 (1999). Moreover, ASEAN member states maintain that the economic, social, and cultural realities of each country are unique and that the human rights situations of a country should be evaluated with these realities in mind. Thio, *supra* note 10, at 1-2.

¹⁸² See Siazon *Criticizes U.S. Policy on Burma: Economic Sanctions Won't Work*, *Philippine Foreign Minister Says*, ASIAN WALL ST. J., July 30, 1997, available in 1997 WL-WSJA 11012874.

¹⁸³ *Myanmar 1998 Review*, *supra* note 39.

¹⁸⁴ Schmahmann & Finch, *supra* note 68, at 204.

¹⁸⁵ Craig Forcece, *The Great Trade-off*, THIS MAG., Feb. 1999, at 24-25.

¹⁸⁶ *Id.*

¹⁸⁷ *Myanmar 1998 Review*, *supra* note 39.

a new economic and trade agreement with Burma.¹⁸⁸ Between 1992 and 1994, the two countries signed a \$1.2 billion arms deal, and China supplied arms worth \$300 million out of the total \$370 million that Burma spent on arms imports.¹⁸⁹ China has also supplied Burma with technical staff and communications equipment to monitor naval developments in the Indian Ocean,¹⁹⁰ and Burmese military officers are regularly trained in Yunnan Province in southwest China.¹⁹¹

The engagement policy of Burma's neighbors and the facility with which the junta has substituted any lost U.S. investment with drug-laundered profits have neutralized the impact of U.S. investment sanctions. The United States did fulfill its moral obligation as the *de facto* world policeman when it imposed sanctions on Burma. Lawmakers, human rights activists, corporate lobbyists, and consumers would probably all agree that the human rights abuses by the Burmese junta justify some form of punitive action. However, both internal and external factors limit the efficacy of the current sanctions.

V. RECOMMENDATIONS

Although the reprehensible conduct of the Burmese military junta justifies sanctions on moral grounds, the U.S. sanctions have not had their intended result.¹⁹² The suffering of the Burmese people continues. Therefore, the United States should consider revoking investment sanctions and returning to a policy of constructive engagement.¹⁹³ Additionally, the United States should employ a multifaceted approach by advocating and assisting with international mediation between Burma's military junta, the NLD and ethnic minorities, and facilitating the establishment of a national human rights commission in Burma to train and educate military personnel and corporate employees. Alternatively, if the United States decides that sanctions are the best method for encouraging positive change, it should promote the role of multilateral organizations such as the WTO or ASEAN in the enforcement of human rights in Burma. The WTO could enforce multilateral sanctions against countries with especially egregious human rights records. In addition, the United States should promote the ASEAN

¹⁸⁸ *Id.*

¹⁸⁹ Alamgir, *supra* note 18, at 346.

¹⁹⁰ *Myanmar 1998 Review*, *supra* note 39.

¹⁹¹ *Id.*

¹⁹² *See supra* Parts II, IV.

¹⁹³ Richard N. Haass, *Conclusion to ECONOMIC SANCTIONS AND AMERICAN DIPLOMACY*, *supra* note 6, at 198.

initiative for establishment of a human rights body in Southeast Asia to monitor regional human rights violations. ASEAN needs to assume a position of leadership to ensure realization of its mission to advance the prosperity, health, and safety of the region's citizens.

A. *Return to Engagement*

Although the severity of human rights violations engaged in by the Burmese junta and the insufficiency of counter-narcotics actions in Burma may morally justify the imposition of sanctions, the United States should consider revoking its investment prohibition due to its limited practical effect.¹⁹⁴ It is easy for the United States to assume the role of the world's policeman and continue sanctions as a symbol of its official displeasure with the Burmese junta's rule. However, the continued suffering of the Burmese people at the hands of the military junta does not support the policy of isolation the United States currently endorses. The problems outlined above, which reduce the efficacy of investment sanctions, suggest that constructive engagement may present a better option for lasting reform and sustainable self-help and growth in Burma.

Economic engagement and growth expands the middle-class, increases contact with the outside world, and loosens the government's grip on power,¹⁹⁵ thus creating pressure to reform.¹⁹⁶ Democratization is very difficult to manipulate from the outside,¹⁹⁷ and the success of sanctions such

¹⁹⁴ See generally Finch, *supra* note 4; Finch et al., *supra* note 108. U.S. Secretary of State Madeline Albright answered a question on whether it was hypocritical to impose tougher sanctions on Burma than on China by saying "[w]e have to have a flexible approach to how we deal with it, depending upon what our national interests are, and we have to understand where we have strategic relationships that require us to take a different approach." Secretary of State Madeleine K. Albright, *Statement on U.S. Sanctions Against Burma*, available in U.S. Dep't of State Homepage (Apr. 22, 1997) <<http://secretary.state.gov/www/statements/970422.html>>. The reasons for inflicting a punitive sanction scheme on Burma and not China probably include the fact that Burma is of little geopolitical or economic importance versus the economic and military muscle China asserts. Robin Broad & John Cavanagh, *The Corporate Accountability Movement: Lessons & Opportunities*, 23 FLETCHER F. WORLD AFF. 151, 164 (1999).

¹⁹⁵ Mark A. Warner, *Globalization and Human Rights: An Economic Model*, 25 BROOK. J. INT'L L. 99, 108, 110 (1999).

¹⁹⁶ See *id.*; see also Clinton Defends 'Constructive Engagement' of China, available in CNN.com Homepage (Oct. 24, 1997) <<http://europe.cnn.com/ALLPOLITICS/1997/10/24/clinton.china/>>; Catharin Dalpino, *China Eases Gingerly into an Era of Cautious Openness: Human Rights Improving Slowly*, available in CNN.com Homepage (Oct. 23, 1999) <<http://cnn.com/SPECIALS/1999/china.50/red.giant/human.rights.dalpino/>> (discussing the economic reforms and environment of "soft authoritarianism" that has resulted in noticeable improvement of human rights in China).

¹⁹⁷ Rose Gideon, *Haiti*, in ECONOMIC SANCTIONS AND AMERICAN DIPLOMACY, *supra* note 6, at 57, 72.

as the ban on new investment in Burma is questionable.¹⁹⁸ Richard Haass, Director of Foreign Policy Studies at the Brookings Institution, states, “depending on how they are used, they [sanctions] can cause great damage to innocent men, women and children.”¹⁹⁹ Indeed, sanctions “reduc[e] the scope for independent action” and “can work against forces promoting political pluralism” by creating scarcity and enabling the autocratic government to better control distribution of goods.²⁰⁰ Contributing to the very isolation Burma voluntarily engaged in for so long simply perpetuates its poverty and underdevelopment. In isolation, the repressive military generals in Burma have nobody to answer to but themselves.

B. *International Diplomacy*

The United States should encourage the regime to enter a “meaningful dialogue” with the democratic opposition, the NLD, and ethnic minority groups with the assistance of an international mediator. All parties in Burma could benefit from the neutrality of international involvement as each has accused the other of intransigence in negotiations.²⁰¹ A promising development in relations between Burma and the United States was the one-day February 2000 visit to Burma by Ralph Boyce, Deputy Assistant Secretary of State for East Asian and Pacific Affairs.²⁰² This was the highest-level visit by a U.S. government representative in five years, and Boyce met with the NLD leader Aung San Suu Kyi, the SPDC’s deputy foreign minister Khin Maung Win, and foreign aid workers.²⁰³

The United States should also encourage its allies to enter into dialogue with Burma. The European Union sent a diplomatic mission to Burma in July 1999.²⁰⁴ In addition, Japan’s Prime Minister Keizo Obuchi met with Burmese General Than Shwe in November 1999, ending a fifteen-year period in which there was no high-level political contact between the two countries.²⁰⁵ Japan had historically been Burma’s largest bilateral aid donor, but aid was suspended in 1988 after the bloody military crackdown

¹⁹⁸ Barry E. Carter, *International Economic Sanctions: Improving the Haphazard U.S. Legal Regime*, 75 CALIF. L. REV. 1159, 1174 (1987).

¹⁹⁹ Haass, *supra* note 6, at 206.

²⁰⁰ *Id.* at 203.

²⁰¹ See Finch, *supra* note 4, at 14.

²⁰² U.S. Official Visits Myanmar, AP ONLINE, Feb. 18, 2000, available in 2000 WL 1432170.

²⁰³ *Id.*

²⁰⁴ EU Suggests Fact-Finding Mission to Myanmar, Reuters, available in University of Adelaide Student Webpage (June 30, 1999) <<http://www.physics.adelaide.edu.au/~uneoo/a120/99.htm>>.

²⁰⁵ Jendrzeczyk, *supra* note 25.

on pro-democracy supporters.²⁰⁶ Japanese leaders have indicated that aid could resume if Burma demonstrates “visible” signs of political and economic reform.²⁰⁷

There are signs that Burma’s leaders are opening up to international demands for liberalization and reform. While in 1998 the junta rejected a billion-dollar offer of aid from the World Bank and the United Nations that was conditioned on political reform,²⁰⁸ after the World Bank published a scathing report condemning the regime and calling for political and economic reform in the fall of 1999, the junta reopened dialogue with the World Bank.²⁰⁹ Moreover, after the junta concluded its talks with Japan, it began to reopen the universities that had been open for only thirty months between 1988 and 1996.²¹⁰ This is a step in the right direction. Lifting restrictions on freedom of expression and assembly, releasing all political prisoners, and taking effective action to end the use of forced labor should be next on the junta’s agenda.²¹¹

C. *Establishment of a National Human Rights Commission in Burma*

The United States should support the establishment of a national human rights commission (“HRC”) in Burma. The junta and the NLD should negotiate the principles and framework for the national HRC.²¹² Both the Philippines and Indonesia have set up national HRCs in the last decade. The 1997 Thai Constitution requires the establishment of an HRC in Thailand, and Malaysia is currently considering the establishment of a similar body.²¹³ In addition, ASEAN established a working group for an

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ Thomas Crampton, *Policy Shift in Rangoon After WB Warning*, DAWN, available in Shweinc NEWS (Nov. 17, 1999) <[wysiwyg://49/http://www.shweinc.com/news/data/991117130823.shtml](http://www.shweinc.com/news/data/991117130823.shtml)>.

²⁰⁹ *Myanmar Invites World Bank for Talk*, Assoc. Press News Wire, available in Shweinc NEWS (Nov. 15, 1999) <[wysiwyg://52/http://www.shweinc.com/news/data/991115120411.shtml](http://www.shweinc.com/news/data/991115120411.shtml)> [hereinafter *Myanmar Invites World Bank for Talks*]; *Burma’s Dangerous Message on Drugs*, *supra* note 166. The World Bank has no plans to resume a lending relationship with Burma at this time. *World Bank to Continue Talks with Myanmar, but Rules out Loans*, AGENCE FRANCE-PRESSE, Feb. 15, 2000, available in 2000 WL 2733527.

²¹⁰ Foreign Affairs Comm., All Burma Fed’n of Student Unions, *Statement Upon the Long-term Closure of Universities and Colleges in Burma*, available in Free Burma Coalition Homepage (Nov. 25, 1999) <<http://www.freeburmacoalition.org/1999/11/21/universityclosures.html>>.

²¹¹ See Jendrzejczyk, *supra* note 25.

²¹² See, e.g., Finch, *supra* note 4, at 14.

²¹³ Thio, *supra* note 10, at 2; Malaysianlaw.com, *Human Rights Commission to Be Established* (visited Apr. 7, 2000) <<http://www.geocities.com/~malaysianlaw/news061299.html>>.

ASEAN Human Rights Mechanism in 1996, and member states are taking an internal, proactive approach to improving the welfare of its citizens.²¹⁴

1. Main Functions and Necessary Conditions

A national HRC can have a positive effect even in a country such as Burma, which is ruled by an authoritarian regime. David Steinberg, Director of Asian Studies at Georgetown University, noted that under President Suharto in Indonesia, the Indonesian Human Rights Commission played a positive role even under an authoritarian administration.²¹⁵ In post-Suharto Indonesia, the Indonesian Human Rights Commission continues to uncover a large number of human rights violations that took place during Suharto's thirty-two year rule.²¹⁶

A Burmese HRC would work to distribute information to the general public about human rights norms, provide training and curricula for both military personnel and corporate employees on standards of conduct that would promote human rights, hear grievances, and monitor compliance with human rights norms by the military, corporations, and nongovernmental organizations ("NGOs").²¹⁷ The four main functions of the Indonesian Human Rights Commission offer a framework for an HRC in Burma. These four functions are (1) to inform national communities about the national and international norms of human rights; (2) to monitor international human rights treaties and make ratification recommendations; (3) to make suggestions to government agencies on human rights protection mechanisms; and (4) to cooperate with regional and international agencies.²¹⁸

According to Li-ann Thio, law professor at the National University of Singapore, several elements are required for an HRC to function effectively: (1) legal, operational, and financial autonomy; and (2) independent procedures governing the composition, appointment, and dismissal of members.²¹⁹ Because Burma lacks a system of checks and balances between society and the militarist state,²²⁰ international mediators should initially

²¹⁴ Thio, *supra* note 10, at 5; *see infra* Part V.D.2.

²¹⁵ David I. Steinberg, *Cautious Diplomacy May Help Burma*, *ASIAN WALL ST. J.*, Aug. 10, 1999, available in 1999 WL-WSJA 20529242.

²¹⁶ Thio, *supra* note 10, at 66.

²¹⁷ *See generally* Thio, *supra* note 10; Steinberg, *supra* note 215.

²¹⁸ Thio, *supra* note 10, at 64.

²¹⁹ *Id.* at 62.

²²⁰ *See generally id.*

monitor the set-up and operation of the HRC. Cooperation and consultation between the various national HRCs should also be encouraged.²²¹

2. *Corporate Involvement*

While numerous firms have left Burma due to consumer and government pressure, firms such as Best Western Hotels, Unocal, InterDigital, Total, Sony, Fujitsu, Mitsubishi, Premier Oil, and LaSalle Bank continue to operate in Burma.²²² The HRC could train and monitor corporate employees and managers in a corporate code and thereby enlist the help of businesses in improving human rights in Burma.²²³

The HRC could establish a code of corporate conduct for foreign companies operating in Burma along the lines of the Sullivan Principles employed in South Africa when that country was under apartheid rule.²²⁴ Buttressing the Sullivan Principles is the idea that economic growth should be used to positively improve a country's human rights record. The Sullivan Principles were a voluntary code of conduct for foreign companies in South Africa developed as an alternative to complete divestiture.²²⁵ These general principles were directed at "breaking down the barriers of apartheid and [e]ngaging all sides to the conflict," while also embracing the notion that a constructive American presence imparts American values.²²⁶

Rangoon-based attorney James Finch has proposed a number of components for a corporate code of conduct in Burma. These include (1) a prohibition against forced labor and child labor; (2) a prohibition on dealing with partners or contractors suspected of operating with laundered drug funds; (3) a commitment to affirmative action policies; (4) a commitment to

²²¹ *Id.* at 78.

²²² See *Burma and the Investors in Terror*, available in Burma.net (visited Dec. 9, 1999) <<http://www.geocities.com/Capitol Hill/3108/>>; Free Burma Coalition, *Best Western: Clean Rooms, Dirty Conscience* (visited Nov. 30, 1999) <<http://www.freeburmacoalition.org/campaigns/bestwestern/bestwestern.html>>.

²²³ See generally Finch, *supra* note 4; Morton Winston, *Human Rights: Corporate Morals in the Globallocal Theater (Enlisting Corporate Assistance in the Fight for International Human Rights)*, *WHOLE EARTH*, June 22, 1999, available in 1999 WL 16634513.

²²⁴ See Finch, *supra* note 4, at 14.

²²⁵ Created by Leon Sullivan, an African-American minister in Philadelphia who was on the board of General Motors, the Sullivan Principles were negotiated between companies and the nonprofit organizations that were pressuring them to pull out of South Africa. *Id.* at 14, 15 n.8.

²²⁶ See *id.* at 14. Similarly, the MacBride principles mandate non-discrimination against Catholics and were developed for U.S. corporations operating in Northern Ireland. The principles were introduced by Sean MacBride, former U.N. Commissioner to Namibia, Nobel Peace Prize winner, and co-founder of Amnesty International. Craig Forcese, *Municipal Buying Power and Human Rights in Burma: The Case for Canadian Municipal 'Selective Purchasing' Policies*, 56 U. TORONTO FAC. L. REV. 251, 256 n.21 (1998).

engage in environmentally responsible conduct; (5) a requirement that representatives of companies meet with representatives of both the SPDC and the NLD to discuss progress and compliance; and (6) a requirement that a percentage of profits generated by the corporation go to support local NGOs such as the Burma Red Cross and AIDS prevention programs.²²⁷

3. *Current Efforts to Establish an HRC in Burma*

The junta has discussed the possibility of establishing an HRC in Burma. In August 1999, Australian Human Rights Commissioner Chris Sidoti spent three days in Rangoon discussing the establishment of an HRC in Burma similar to those that exist in Indonesia and the Philippines.²²⁸ The proposed HRC discussed would work in cooperation with the Asia-Pacific Forum of National Human Rights Institutes, an organization established by delegates from HRCs in India, Indonesia, New Zealand, and other countries.²²⁹ NLD leaders opposed the talks, warning that such discussions could be viewed by the Burmese government as a "tacit approval of what they are doing to the democratic forces of Burma."²³⁰ In response Sidoti said, "I know that Daw Aung Sun Suu Kyi and the NLD and others who support the development of democracy in Burma might not like this, but the NLD is not in power in Burma. It is not in a position to do anything to improve the human rights of the people of Burma."²³¹ Thus, based on the model proposed and the experience of other East Asian countries, the United States should support efforts to establish an HRC in Burma.

D. *The Contribution of Multilateral Organizations to the Enforcement of Human Rights*

The growing importance of multilateral organizations such as the WTO and ASEAN makes these organizations potentially key players in the promotion of human rights in Burma and other countries.²³² If the United States decides against a policy of constructive engagement and in favor of

²²⁷ Finch, *supra* note 4, at 14.

²²⁸ Steinberg, *supra* note 215; Bob Burton, *Australia-Burma: After Timor, Time to 'Talk Tough' on Rangoon*, Inter Press Service, Sept. 29, 1999.

²²⁹ Thio, *supra* note 10, at 60.

²³⁰ Burton, *supra* note 228.

²³¹ *Id.* One wonders whether Sidoti's words are somewhat overstated. Yet, the importance of an HRC in Burma as a first step towards monitoring human rights compliance and improving the daily suffering endured by the Burmese should not be underestimated.

²³² See Patricia Stirling, *The Use of Trade Sanctions As an Enforcement Mechanism for Basic Human Rights: A Proposal for Addition to the World Trade Organization*, 11 AM. U. J. INT'L L. & POL'Y 1 (1996).

maintaining sanctions on Burma, it should encourage human rights monitoring and enforcement by these multilateral organizations.²³³ Burma is a member of both the WTO and ASEAN and is therefore subject to the jurisdiction of both organizations.²³⁴ Whereas the unilateral sanctions scheme imposed by the United States has been ineffective, a multilateral sanctions scheme could prove successful because it would eliminate the problem of the substitution effect.²³⁵

1. WTO

A multinational trade organization such as the WTO could play a constructive role in the multilateral enforcement of human rights in Burma.²³⁶ The WTO was formed on January 1, 1995, as the “legal and institutional foundation of the multilateral trading system” and is intended to provide a framework for international trade agreements and a platform for collective debate and negotiations on trade relations.²³⁷

The WTO should establish a human rights monitoring body with investigative, judicial, and decision-making powers.²³⁸ A standardized system of trade sanctions for the enforcement of human rights is compatible with the WTO regime. Article XX(e) allows a member of the WTO to prohibit the import of another member’s goods if the other member uses prison labor to produce those goods.²³⁹ The WTO thus presently permits one member to use trade sanctions to protect the basic human rights of citizens of other member states.²⁴⁰

Pressure is growing within the WTO for the establishment of mechanisms designed to maintain and promote basic human rights

²³³ *Id.*

²³⁴ *Members of the World Trade Organization* (visited Apr. 12, 2000) <<http://www.fwkc.com/encyclopedia/low/articles/w/w028001118f.html>>; Thio, *supra* note 10, at 13 and accompanying text.

²³⁵ *Id.* at 32. Stirling states, “Burma is also an example of the less than successful attempts of the United States to act independently as the world’s arbiter of human rights.” *Id.* at 31.

²³⁶ *Id.*; see Garcia, *supra* note 181, at 87; see generally Steve Charnovitz, *The Moral Exception in Trade Policy*, 38 VA. J. INT’L L. 689 (1998) (further discussing the linkages between morality and international trade policy).

²³⁷ Elisabeth Cappuyns, *Linking Labor Standards and Trade Sanctions: An Analysis of Their Current Relationship*, 36 COLUM. J. TRANSNAT’L L. 659, 673 (1998).

²³⁸ Stirling, *supra* note 232, at 40-42. See World Trade Org., *WTO Dispute Settlement* (visited Mar. 21, 2000) <<http://www.wto.org/wto/dispute/dispute.htm>> for an in-depth description of WTO dispute settlement rules and procedures.

²³⁹ Stirling, *supra* note 232, at 38. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. No. 1700, 55 U.N.T.S. 194; Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, LEGAL INSTRUMENTS RESULTS OF THE URUGUAY ROUND vol. 1, 33 I.L.M. 1125 (1994).

²⁴⁰ Stirling, *supra* note 232, at 38.

standards. While developing countries such as Burma argue that the WTO should not deviate from its primary function of eliminating trade barriers, the argument that the WTO should address human rights, labor, and environmental issues in the context of its efforts to promote trade is gaining worldwide support.²⁴¹ At the Quadrilateral Meeting between the United States, Europe, Canada, and Japan following the completion of the 1994 Uruguay Round of negotiations, representatives of the four nations discussed the subject of a "social clause" in future rounds.²⁴² Further, at the December 1999 WTO Ministerial meeting in Seattle, President Clinton suggested that his administration is open to the possibility of using the WTO to advance international human rights when he said, "ultimately I would favor a system in which sanctions would come for violating any provision of a trade agreement."²⁴³ Assuming that Clinton means that every trade agreement under the WTO should include provisions protecting the human rights of workers and citizens of the member countries, he is supporting the role of multilateral sanctions in the international enforcement of human rights.²⁴⁴

2. ASEAN

The United States should support an ASEAN initiative to establish a regional enforcement mechanism for human rights that could address human rights violations in Burma. Though infamous for its noninterventionist policy and antipathy towards the human rights records of its member states, ASEAN has been inspired by the development of HRCs in Indonesia and the Philippines and, since the early nineties, has renewed efforts to establish a regional enforcement mechanism for human rights.²⁴⁵ Thus, the establishment of a regional protective mechanism for human rights within ASEAN may be just around the corner.²⁴⁶

²⁴¹ See generally *id.*

²⁴² *Id.* at 36.

²⁴³ Guy De Jonquieres, *Clinton Demands Threaten Turmoil at WTO Summit: President Outlines Long-Term Goal of Link Between Trade and Labour Standards*, FIN. TIMES (London), Dec. 2, 1999.

²⁴⁴ Stirling, *supra* note 232, at 3. Stirling argues that trade sanctions are the most effective mechanism for the international enforcement of human rights. *Id.*

²⁴⁵ Thio, *supra* note 10, at 7; see also *ASEAN Chairman Sees Positive Human Rights Trend in Region*, Dow Jones Int'l News Serv., July 28, 1999, available in LEXIS, Djins. Further, all ASEAN countries are parties to the Convention on the Rights of the Child, and all member states, except Brunei, are parties to the Convention on the Elimination of All Forms of Discrimination Against Women. Dr. Viti Muntarbhorn, Working Group for an ASEAN Human Rights Mechanism, *Towards an ASEAN Human Rights Mechanism* (visited Feb. 25, 2000) <<http://www.rwgmechanism.com/humanrights/html>> [hereinafter *ASEAN Human Rights Concept Paper*].

²⁴⁶ See generally Thio, *supra* note 10. Other human rights activities in 1998 and 1999 within ASEAN included the workshop on the Advocacy of Human Rights to Establish Democracy as Part of the

Because ASEAN serves as a forum of intra-regional cooperation, a human rights mechanism is entirely within its scope.²⁴⁷ Although originally established to promote economic development, peace, and prosperity in Southeast Asia, ASEAN has extended its cooperative activities to include human development.²⁴⁸ In fact, Principle III of the Declaration of ASEAN Concord from 1976 states that a primary concern of ASEAN is “the elimination of poverty, hunger, disease and illiteracy . . . [with] particular emphasis on the promotion of social justice and on the improvement of the living standards of their peoples.”²⁴⁹ The 1992 Singapore Declaration issued at the Fourth ASEAN Summit highlights cooperative activities in the realms of environmental protection, sustainable development, control of HIV, and measures against drug trafficking.²⁵⁰ Furthermore, the ASEAN Vision 2020, adopted by ASEAN heads of government in 1997, states that ASEAN envisions a region free from hunger, poverty, malnutrition, and illicit drug production, trafficking, and use, and where “social justice and the rule of law reign.”²⁵¹

The initiative for a regional human rights mechanism in ASEAN dates back to the early nineties.²⁵² In 1993, ASEAN foreign ministers reaffirmed their commitment to the Universal Declaration of Human Rights, adopted the 1993 Vienna Declaration and Programme of Action of the World Conference of Human Rights, and agreed that ASEAN should consider the

Reformation Agenda in Indonesia; national and state level seminars on the role of NGOs and human rights in Malaysia; the Philippine Declaration of Human Rights and a Philippine national campaign for an ASEAN human rights mechanism; workshops and research on HRCs; and a national conference and workshop on human rights education in Thailand. Working Group for an ASEAN Human Rights Mechanism, *National Activities for 1998-1999* (visited Feb. 25, 2000) <<http://www.rwgmechanism.com/national.html>>. Regional activities in 1998 and 1999 included the workshop on national human rights institutions in Asia and a regional conference on complying with the standards of the Convention on the Rights of the Child. Working Group for an ASEAN Human Rights Mechanism, *Chronology of Activities* (visited Feb. 25, 2000) <<http://www.rwgmechanism.com/chronology.html>> [hereinafter *Chronology of Working Group Activities*]. Note that Europe, Africa, and the Americas already have regional protective mechanisms for human rights. These institutions range from commissions that can receive complaints from states and individuals to regional courts, such as the European Court of Human Rights. *ASEAN Human Rights Concept Paper*, *supra* note 245.

²⁴⁷ See Thio, *supra* note 10, at 78.

²⁴⁸ Working Group for ASEAN Human Rights Mechanism, *ASEAN Vision 2020* (visited Feb. 25, 2000) <<http://www.rwgmechanism.com/vision.html>> [hereinafter *ASEAN Vision 2020*].

²⁴⁹ Association of Southeast Asian Nations, *Declaration of ASEAN Concord* (Feb. 24, 1976) <<http://www.aseansec.org/summit/concord/htm>>.

²⁵⁰ Thio, *supra* note 10, at 11.

²⁵¹ Working Group for an ASEAN Human Rights Mechanism, *ASEAN Vision 2020: A Community of Caring Societies* (visited Feb. 25, 2000) <<http://www.rwgmechanism.com/community.html>>.

²⁵² See Working Group for an ASEAN Human Rights Mechanism, *Synopsis of a Policy Initiative for the Establishment of an ASEAN Human Rights Mechanism* (Apr. 17, 1998) <<http://www.rwgmechanism.com/synopsis.html>> [hereinafter *Human Rights Mechanism Synopsis*].

establishment of a regional human rights mechanism.²⁵³ Stressing the point that a regional human rights mechanism would permit human rights compliance and monitoring from the standpoint of ASEAN, a working group composed of both governmental and non-governmental members was established after a series of workshops and meetings.²⁵⁴ In addition to advocating the establishment of a regional mechanism, the working group also promotes the establishment of a national HRC in every country of ASEAN.²⁵⁵

While the specifics of the future regional human rights mechanism in Southeast Asia have yet to be devised, all member states and non-state actors, such as international NGOs, should participate. Rights protected by the human rights body should include those core human rights articulated in the UDHR, such as the right to life, liberty and the security of one's person; the right to freedom from slavery or servitude; the right to freedom from torture or cruel, inhuman, or degrading treatment; and the right to equality before the law.²⁵⁶ While the establishment of a supra-national court system that hears human rights complaints seems unlikely considering the loose organizational structure of ASEAN, a commission that hears grievances from both state and non-state actors and has the power to issue non-binding recommendations is surely possible.

VI. CONCLUSION

An autocratic military junta noted for its systematic abuses of human rights, thriving drug trade, and violent suppression of the democratically elected opposition rules Burma with an iron fist.²⁵⁷ The Burmese economy is a casualty of the military rule, and sustained human and economic development in Burma will be an elusive aspiration unless significant political and economic liberalization occurs. Naturally, the anguish and suffering endured by the Burmese people, who live in a world of "silent emergency," demanded action. As the *de facto* world policeman, the United

²⁵³ Specifically, the Bangkok Declaration from the Asia Intergovernmental Meeting, March 29-April 2, 1993, emphasized the region's "need to explore the possibilities of establishing regional arrangements for the promotion and protection of human rights in Asia." Working Group for an ASEAN Human Rights Mechanism, *Asia Intergov'tal Meeting—Bangkok Declaration* (visited Feb. 25, 2000) <<http://www.rwgmechanism.com/asia.html>> [hereinafter *Asia Intergov'tal Meeting*]; see also *Human Rights Mechanism Synopsis*, *supra* note 252.

²⁵⁴ *Chronology of Working Group Activities*, *supra* note 246; *Human Rights Mechanism Synopsis*, *supra* note 252.

²⁵⁵ *Asia Intergov'tal Meeting*, *supra* note 253; see also *supra* Part V.C.

²⁵⁶ Garcia, *supra* note 182, at 51-52.

²⁵⁷ See *1998 Burma Human Rights Practices*, *supra* note 2; Rollert, *supra* note 4.

States responded by imposing investment sanctions on Burma in 1997. The purposes of the sanctions were to coerce change and end the Burmese military junta's brutal reign.

Yet critics on both sides have labeled the current Burmese sanctions scheme counterproductive and inefficient.²⁵⁸ Factors such as the quasi-legitimacy of drug-laundered funds, the paucity of U.S. investment in Burma, and the substitution effect of substituting lost investment and trade limit the efficacy of the current sanctions. As a result, the U.S. sanctions have had little impact on the military junta ruling Burma, a force that shows no sign of loosening its iron grip on the country.

The current sanctions scheme is not working. As such, the United States should change its focus in dealing with Burma. First, the United States should consider a return to engagement. Second, the United States should promote dialogue between the NLD, ethnic minorities in Burma, and the military junta with the assistance of an international mediator. Third, the U.S. should promote the establishment of a national HRC in Burma that monitors national compliance with international human rights norms and trains corporate employees and relief workers to espouse human rights norms. Alternately, the United States should work through the WTO to promote a multilateral sanctions scheme. The WTO is in a good position to assume leadership of the multilateral enforcement of human rights with a sanctions regime for especially egregious human rights violators. Finally, the United States should encourage ASEAN to assume responsibility for human rights compliance and enforcement in Southeast Asia. It is the member states of the regional organization ASEAN that are in the best economic and geopolitical position to alter Burma's increasing backwards slide into devastating poverty and end the human suffering the Burmese people live through daily.

²⁵⁸ Dhooge, *supra* note 17, at 25; see generally Finch et al., *supra* note 108.

