ECONOMIC PRESSURE: THE POLITICAL CURRENCY OF THE BURMESE JUNTA. REFORM THROUGH DISENGAGEMENT

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Introduction

Arresting the systematic and widespread human rights abuses perpetrated by the Burmese military government against the disenfranchised and impoverished Burmese population presents as one of the more difficult challenges to the international community.

This essay explores the prospect of encouraging the ruling junta to observe fundamental human rights and promote democracy in Burma, through the strategic withdrawal of trade with, and financial investment in, Burma. Economic pressures applied in a complementarity of state and private action may be more effective in enforcing human rights than the ‘constructive engagement’ approach that has been adopted by the international community. In the absence of direct intervention to restore a democratic regime, the Burmese junta is unlikely to initiate reform unless it determines that change is required for its own preservation. This essay will examine two means by which economic pressure may be applied to the junta to encourage such change.

The first ‘mode’ of influence that will be discussed is the growing body of jurisprudence in domestic law that extends liability to ‘non-state’ actors for alleged human rights violations. The essay will focus on litigation pursued by a group of Burmese citizens in the U.S. Courts against Unocal, a U.S. based company, in relation to a project it undertook in collaboration with the SPDC in Burma. This litigation has strengthened the possibility that corporations will be held legally responsible for their actions across the globe. While at the time of writing, this matter has not been finally determined by the Courts, a decision in favour of the plaintiffs in this case could potentially have far-reaching consequences for the ruling junta and trans-national corporations involved in Burma.
In brief, a decision on the merits of this case could potentially lead to large-scale divestment in Burma.

The second aspect of this essay will consider the effectiveness of targeted multi-lateral economic sanctions imposed upon Burma as another significant ‘mode’ of influence. While there are already considerable trade and assistance restrictions in place against Burma, the current arrangements are ad-hoc, rather than a complementarity of targeted and centralised measures. Despite the common criticisms of sanctions as blunt instruments with unintended and disastrous consequences for the general population, a tailored set of ‘smart sanctions’ may be an enforcement strategy that merits further consideration. In this context, a uniform set of sanctions combined with a ‘responsible engagement’ approach could provide significant pressure on the junta to embrace reform, or face the threat of returning to economic isolation.

In exploring these two distinct tools of change, my goal is to suggest that the threat of substantial barriers to global trade and investment through a combination of foreign corporate divestment and direct multi-lateral targeted sanctions may be a viable means of effecting change in Burma. The central premise to this argument is that foreign capital is inextricably linked to the survival of the junta. The SPDC is currently in a financially precarious position and is eager to expand its trade relations and economic opportunities. A concurrence of policies implemented by states and corporations alike, that jeopardise the junta’s access to revenue may force the junta to finally respond to the international community’s calls for an end to the violence.

As a human rights enforcement strategy, the confluence of corporate and state initiatives outlined above is not without its limitations. Foreign policy is multi-faceted and there are many other diplomatic and political tools available within the international community’s suite of strategies that may serve to effect change. As a number of commentators argue, state and non-government efforts including consumer boycotts, all contribute to “a multi-tiered enforcement structure” for global human rights, which combine to enhance the prospect for change. No single initiative will achieve a peaceful and genuinely democratic Burma. Most notably, this approach does not preclude the use of limited engagement to promote and elicit positive behaviour by the junta.

THE FAILINGS OF DIPLOMACY?

Since 1991 Burma has been the subject of annual resolutions by the United Nations General Assembly, condemning the junta’s human rights practices and outlining the necessary reforms to move Burma from a dictatorship to a democracy. Despite the extensive denunciations, the recalcitrant Burmese regime has been largely unresponsive to these diplomatic efforts. Burma remains one of the world’s worst violators of human rights. Little or no progress towards democ-
racy has been made. Other international bodies such as the Human Rights Commission and International Labour Organisation have also attempted to exert pressure on the junta to reform. Regional bodies have also called for change, with no apparent effect.

Over the same period, states have largely adopted a ‘constructive engagement’ approach with the SPDC. Proponents of economic engagement as a foreign policy tool cannot persuasively argue that this approach has influenced the regime to become more open or democratic. Rather, the particular litigation that is discussed below highlights the risks inherent with unregulated and unrestricted economic engagement.

PART I - LIABILITY THROUGH COMPLICITY; MULTINATIONAL CORPORATIONS OPERATING INSIDE BURMA

Due to the nature of the activities conducted by trans-national corporations alone or in conjunction with corrupt governments, these bodies have the potential to impact on human rights. Equally, it can be argued that the power these corporations wield can impact positively on the political stability and human rights situations within some countries. However, substantial foreign corporate investment in Burma over the last two decades has not achieved such positive outcomes. On the contrary, there have been instances where corporate investment has contributed to conflict and human rights abuses.

Despite the existing trade and investment barriers, foreign investment in energy and mining enterprises in Burma has become a significant source of revenue for the current regime. Such projects rarely produce tangible financial benefits to the general population and arguably further entrench the regime. In this first part of the paper, I will examine the responsibilities and risks that may be associated with trans-national corporations operating in Burma.

PURSUING CORPORATE ACCOUNTABILITY THROUGH THE COURTS

The rise of globalisation has enabled corporations to do business seamlessly across the globe, in a largely unregulated market. In their efforts to address the consequences certain corporations’ alleged complicity in human rights abuses, Non-Government Organisations (NGOs) and other bodies have successfully targeted these corporations with high profile consumer campaigns and boycotts. The breadth and intensity of scrutiny by NGOs and others is becoming a significant concern for such corporations and is impacting on multinationals’ corporate activities. As discussed below, this issue has also become a matter for the Courts.

The Unocal litigation is defining the parameters of corporate responsibility. Traditionally, states were the exclusive subjects of human rights law however
recently there has been a shift in the focus of international law on to private actors such as multinational corporations. A notable illustration of this extension is the new wave of claims initiated in domestic courts to obtain redress against multinational corporations, holding them accountable for human rights violations under norms of international law. In these cases against companies based in the United States, violations were directly committed by governments rather than the corporations however plaintiffs pursue the corporate entity on the basis that it was complicit in the violation.

This essay will focus its discussion on a matter initiated under the Alien Tort Claims Act of 1798 (ATCA), however there are other forms of litigation also being pursued with the objective of enforcing corporate compliance with human rights. Principally, the other actions target parent companies of multinationals, to encourage companies to comply with their domestic standards of care in all their operations, regardless of where their operations are conducted across the globe. There are also a number of non-litigious campaigns conducted by NGOs that form part of this approach to secure multinational accountability, with substantial success in relation to corporate conduct in Burma. These campaigns include consumer boycotts, selective purchasing laws and shareholder activism aimed at limiting economic engagement with the regime.

BACKGROUND TO DOE v UNOCAL

In 1996 a group of Burmese citizens made an application to the United States District Court to sue Unocal, a US-based oil multinational company, for alleged human rights violations committed by the Burmese military in Burma. The company was involved in a joint venture with the Burmese government to construct an oil pipeline called the Yadana pipeline. It was in the course of constructing the pipeline that the plaintiffs allege that the Burmese military, on behalf of the joint venture, subjected the local population to a program of violence and abuses including forced labour and forced re-location. The plaintiffs argue that Unocal conspired with the Burmese military to commit these offences. The plaintiffs further allege that Unocal was both aware of these egregious violations and benefited from the actions of the military. Although the company did not directly carry out the purported violations, by virtue of its involvement in the project and its connection with the principal perpetrator, the plaintiffs argue the company should be held liable.

The application was made under the ATCA which provides District Courts with original jurisdiction over “any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” This statute has been interpreted to permit non-citizens of the United States to file suits in federal courts against any persons captured by the court’s jurisdiction, for a violation of customary international law or a treaty to which the United States is a party. ATCA has provided a vehicle for non-US citizens to sue in US courts.
for violations of their human rights committed outside the U.S. More recently, this legislation has been used to pursue claims against multinational corporations for their complicity in the perpetration of alleged human rights abuses committed by states in offshore projects. There are a number of threshold requirements that must be established for an action to proceed against a corporation (or other non-state actor) for actions committed by a state, under ATCA. In brief, those requirements generally include the following:

- the claim is made by a non-citizen;
- the alleged tort is sufficiently serious to constitute a breach of the ‘law of nations’;
- there is a element of ‘state action’; and
- the corporation was complicit in the abuse committed by the state.

Each of these obstacles and the way the Courts have dealt with them will be discussed in turn.

**Doe v Unocal 1997** - extending jurisdiction under ATCA to corporations

In 1997, Paez J of the Central Californian District Court found that an action could lie against Unocal. In his ruling, Paez J found that the plaintiffs had established sufficient facts to sue under ATCA for a breach of the law of nations and that the requisite connection between the alleged violation, the principal perpetrator (the Burmese military) and the defendant corporation had also been sufficiently pled. This decision was a watershed and extended the types of actions that could be pursued under ATCA, to include jurisdiction over corporations as well as states and natural persons. It is worth noting that simultaneous to the federal ATCA litigation, Unocal is also being sued in a State-based action in the Superior Court of California, on the same facts.

**Doe v Unocal 2000** - a narrow standard for liability

The District Court of Central District California dismissed the case, granting Unocal’s motion for summary judgement on the basis that there was an insufficient connection between Unocal and the alleged abuses to establish liability. In considering the requirement to establish state action under ATCA, Lew J applied an extremely narrow ‘joint action’ test for determining proximate cause between the acts of the corporation and the alleged abuses committed by the military. For the purposes of claims based on murder, rape and torture the case failed because the plaintiffs did not satisfy the court that the company controlled the Burmese military’s decision to commit the acts. In terms of the claims of forced labour, the case failed because the plaintiffs could not show that Unocal “actively participated in or influenced” the military’s conduct. The Court ruled against the plaintiffs notwithstanding the finding that there was sufficient evidence to establish that Unocal knew or should have known that the abuses were
occurring and profited from the practice.32

Doe v Unocal 200233 – a broader approach to joint liability

On appeal, the U.S. Ninth Circuit Court of Appeals reversed Lew J’s decision in part and affirmed it in part. On the following threshold questions the majority found that:

- the alleged torts were a violation of the law of nations;34
- state action was not a prerequisite to establish liability under ATCA for the alleged abuses. Forced labour was held to be among the “the handful of crimes to which the law of nations attributes individual liability such that state action is not required;”35 and
- Unocal could be liable for the alleged forced labour if it could be established that the company aided and abetted the Burmese authorities as an accomplice, in perpetrating the abuses. The test derives from international criminal law and requires knowing “practical assistance or encouragement which has a substantial effect on the perpetration of the crime”.36 The majority concluded that, on the facts, this standard had been met.37 In adopting this approach, the court overruled the standard previously applied by Lew J of the District Court38 requiring ‘active participation’. Unocal also had “actual or constructive (reasonable) knowledge”39 that its conduct assisted the authorities to commit the abuses, satisfying the majority that there were genuine issues of fact that both actual and mental elements of the offence required for liability under ATCA could be met.

Reinhardt J delivered a separate judgement endorsing the conclusion of the majority, but adopting different reasoning. He determined that the majority’s consideration of whether the alleged violations constituted ‘private actor’ abuses was superfluous because it was clear that the State had acted. He rejected the majority’s application of international criminal law principles to establish that the defendant aided and abetted the Burmese authorities in the perpetration of the alleged abuses. Instead, Reinhardt J applied tort law principles40 such as agency, joint venture and reckless disregard as the appropriate source of law to determine joint liability. In brief, Reinhardt J found that the company could be held liable as a joint venturer for the violations perpetrated by its co-venturer, the Burmese military as “Unocal freely elected to participate in a profit-making venture in conjunction with an oppressive military regime – a regime that had a lengthy record of instituting forced labour, including child forced labour.”41 Furthermore, the plaintiffs had pled sufficient facts to establish the reckless disregard claim. This conclusion was based on the threshold claim that Unocal had entered into the project knowing that the Burmese military was a co-venturer. The reckless element of this conduct was based on the fact that the company “had knowledge that the military engaged in widespread human rights abuses, including forced labour.”42
The 2002 decision of the Court of Appeal is pending appeal by an en banc panel of the Ninth Circuit Court of Appeals. The full panel is scheduled to hear submissions during December 2004. Any finding of partial or complete liability will have profound implications for corporations with interests in Burma, as discussed further below. If the Court applies the 2002 tests of the majority or Reinhardt J for joint liability, the legal net for corporations will be cast significantly wider than Lew J’s scope for liability. The Appeal Court may even adopt Lew J’s approach but refine its test for state responsibility to render Unocal culpable. In the event that the Appeal Court adopts Reinhardt J’s line of reasoning, this broad construction of joint liability could lead to wholesale divestment from the country because all corporations in partnership with the brutal regime would arguably be at risk of liability for the junta’s abuses.

MEASURING COMPLICITY

As illustrated by the Unocal matter, the Courts have taken divergent views on what test should be applied in determining a level of complicity to satisfy the requirement under ATCA. The legal tests for liability under ATCA are not settled law. This area of jurisprudence is in its infancy.

Mindful that the matter is pending an appeal, Unocal has the potential to establish a powerful precedent with respect to corporate responsibility. It is possible that the parameters for corporate accountability may be broadened to potentially include a spectrum of behaviours from direct involvement in human rights abuses to merely doing business with repressive regimes that perpetrate abuses. In considering the legal concept of ‘corporate complicity’ the Courts have drawn heavily on international and domestic criminal law principles. A helpful analysis of the approach distinguishes between three categories of complicity being direct, indirect and silent complicity.

Direct complicity involves a corporation that knowingly assists a state in violating the human rights of its citizens. Consistent with the principles of complicity in criminal law, the corporation need not be the principal perpetrator and liability is not contingent upon a finding of guilt against the principal. Transnational corporations are aware that with the influx of applications under ATCA, they can no longer be directly involved in such abuses with impunity.

Indirect or beneficial corporate complicity applies where the corporation may not be directly involved in the execution of the human rights abuses however the business benefits from these abuses. The Unocal matter has been characterised as a clear example of indirect complicity. Although Unocal did not directly commit the purported abuses, it is argued that the company is culpable because of its involvement in the project and the assistance it offered to the principal perpetrator. This form of liability raises the bar for corporations active in states with appalling human rights records. As in Burma, it is clear that transnationals that enter into partnerships with the junta can exercise little or no control of its
actions. Notwithstanding, such corporations may face the threat of legal liability for violations committed by the authorities, by virtue of their commercial relationship with the state. Corporations may be construed by the courts as “de facto state actors in breaches of international law”\(^47\) if there is sufficient connection between their assistance and the abuses committed by the state. The necessary assistance may act such as hiring the military and providing it with revenue, instructions and equipment to fulfil its tasks. So long as it can be established that the corporation was also aware that the assistance could lead to the perpetration of those abuses, a finding of liability may arise. In this context, the only course of action that a corporation could adopt to avoid liability may be to withdraw from the operation. This form of complicity is discussed in more detail below.

Silent complicity invokes the principle that transnational corporations have an obligation to speak out against abuses, and corporations should be liable for failing to exercise this responsibility. It is less likely that the Courts will find a company liable for its inaction; nevertheless the implications of ‘unethical conduct’ have become more pertinent. Companies that continue to operate in countries with repressive regimes are being targeted by consumers, shareholders and NGOs and, as suggested in Reinhardt J’s decision, some members of the judiciary.

Indirect complicity; implicating multinationals in the regime’s abuses

The second category of indirect or beneficial complicity contemplates a set of facts that are common in repressive regimes such as Burma. The courts’ development of liability in this area is at the centre of corporate concerns with respect to their operations in nations with poor human rights records. The judgements to date in the Unocal matter can provide insight into some of the practical issues companies will need to consider with respect to any potential investments in countries such as Burma.

The plaintiffs submit that Unocal’s liability derives from its relationship with its partner, the Burmese military regime for its part in the commission of egregious human rights violations in conducting its operations. This relationship has been described as a form of “militarized commerce”\(^48\) where companies operating in repressive countries rely on state military forces (or its agents) to provide security for their projects. Such interdependence with the state exposes corporations to an increasing risk of legal liability for their complicity with their partner’s human rights violations. The plaintiffs in Unocal do not claim that the company inflicted or assisted in the actual infliction of the abuses.

The corporation’s knowledge that its role may encourage the military to engage forced labour, combined with the fact that it profited from those abuses, combined to provide sufficient connection to base a cause of action.\(^49\) These legal tests fit neatly into an emerging concept of the corporate ‘sphere of influence.’\(^50\)
This notion has become the subject of commentary around the issue of corporate accountability and discusses the scope within which companies have the power (and the moral or legal obligation) to observe international norms and effect change in the offending behaviour of its operatives or partners. Unocal’s involvement in the Yadana project has been described as having a “catalytic effect” in bringing local communities into confrontation with military forces. During its construction, the military presence in the region increased from five to fourteen battalions between 1990 and 1996. Almost all the gas from the project is exported to neighbouring countries and the revenue earned does not flow beyond the regime and oil companies. Virtually no Burmese citizen will benefit from this project “instead they will suffer the consequences of a degraded environment and expanded political oppression.”

Given the emergence of this form of corporate liability, any multinational active in Burma would be prudent to assess its relationship with the authorities with a view to identifying the risk that they could be found complicit in human rights violations perpetrated by the junta. Similarly, potential investors are likely to be discouraged from entering into projects that require some form of partnership with the junta. The Unocal matter has progressed further than any other suit against a corporation under ATCA. A final decision against the company would almost certainly translate into wholesale withdrawal of foreign investment from Burma. However, this action has undoubtedly already impacted on Unocal and other similar organisations because “the bottom line for companies is that share prices respond even to the threat of liability.” Accordingly, this threat can motivate companies to change their behaviour. Ward explains that liability can be “a leveller” and, while these actions against corporations may not result in legal accountability, the evidence admitted into Court can be equally damning for the defendant’s standing. The pursuit of accountability is not solely dependant upon a finding of culpability. It follows that as a result of this action, corporations may already be revising their conduct in countries such as Burma.

There are arguments to suggest that a wholesale withdrawal of investment would have profound negative effects on the people of Burma. Conversely, it can also be argued that the corporations that improperly benefit from violations of the local population, such as through the use of forced labour, are not contributing to the prosperity and peace of the Burmese people. The presence of such organisations may perpetuate the violations of human rights conducted by the authorities. As the facts of the Yadana pipeline project have revealed, foreign investment per se does not necessarily translate into benefits for the people of Burma.

ABSOLVING THE ROLE OF STATES BY POSITING CORPORATIONS AS VEHICLES FOR CHANGE?

“... Neither the World Bank, nor the human rights Non Government Organisations could convince the military regime in Nigeria to mend its ways in
the past and cannot force change in Myanmar or Sudan today. So they saddle oil companies with the task”.

“Transnational companies have been the first to benefit from globalisation. They must take their share of responsibility for coping with its effects.”

It is important to note that the plaintiffs in this matter have not argued that the test for liability (‘practical encouragement’) should extend to apply to all corporations that do business in a repressive country. Neither the plaintiffs nor the author of this essay endorse a blanket prohibition on investment in countries with totalitarian regimes, which does not discriminate between degrees or types of complicity, as discussed above. The mere act of investment in such countries should not provide a prima facie case against corporations, for crimes committed against the citizens by a repressive regime. It is the role of governments to identify and address human rights violations perpetrated by objectionable regimes. States should not be absolved of this responsibility by corporations.

The approach adopted by the plaintiffs supports the basic principle that corporations should be held legally responsible for the consequences of their actions, including those activities that they participate in either as principal actors or accomplices. A corporation’s duty is to obey the law.

Criticisms against the Unocal litigation suggest that using companies indirectly as a vehicle for change in Burma may not be an appropriate strategy. It could be argued this approach places corporations in the role of political reformers. Conversely, it has been suggested that “when domestic tribunals assert jurisdiction over multinational companies, they are counter-balancing the impact of globalization with a measure of international law. Courts are asserting that multinationals should not and cannot escape the precepts of the international legal system, which benefits corporations worldwide. Globalisation is occurring within the legal system... ”. This jurisprudence can be characterised as a re-distribution of accountability to reflect the re-distribution of power from states to multinationals. Other commentators have described this process of foreign direct liability as the “flipside of foreign direct investment” or globalisation.

Litigation against private actors is just one avenue that could effect change by establishing a precedent that, at its minimum, will influence corporate behaviour in rogue nations such as Burma. A finding of liability against the corporations may result in a wholesale divestment by foreign companies in Burma. This ‘mod of influence’ may have more far-reaching effects on the Burmese junta if it is underpinned by a range of targeted multilateral sanctions against the regime. This synergy would combine state action with corporate action to exert significant pressure on the SPDC to reform.

DOE v UNOCAL - POSTSCRIPT

On 15 December 2004, the parties to both the state and federal Unocal actions announced an ‘in principle’ settlement to the litigation. Proceedings sched-
uled before the U.S. District Court of Appeals have been adjourned. The federal suit was considered to be a significant test case for actions against corporations under ATCA because, unlike most similar actions, it had overcome most of the procedural and technical hurdles to proceed to full-scale trial.60

Conjecture relating to the settlement has already commenced. It is suggested that Unocal was motivated principally by the desire to avoid a trial, where damaging evidence would be admitted into Court attracting further public scrutiny. Furthermore, the prospect of a finding against the company could result in an award of a substantial sum61 as well as further damage to its corporate image. It has also been suggested that the recent Supreme Court decision in Sosa v Alvarez Machain62, while not on point, confirmed the validity of ATCA as an avenue for victims of abuses to sue for damages. This decision may have signalled the judiciary’s acceptance of such actions.

If the action had been successful, the precedent established may have had a floodgate effect, encouraging similar communities affected by projects conducted by trans-national corporations to make applications under ATCA. It is arguable that a settlement will have similar consequences, as NGOs and public interest lawyers will be encouraged to file more claims against corporations. Accordingly, this outcome is likely to discourage foreign investment from countries with poor human rights records such as Burma. It may also exert pressure on corporations and the junta to comply with human rights norms in the future.

The settlement remains tentative and the parties are required to report to the Circuit Court if the negotiations are not finalised by 1 February 2005.

PART II - ‘SMART’ SANCTIONS; LAYING THE GROUNDWORK FOR CHANGE

“There were many moments in our struggle against apartheid when it appeared as if... injustice would have the last word. But during those hours when hope was fragile, we were strengthened by the support of our brothers and sisters around the world. Sanctions were imposed, governments and citizens worked hard against the regime, and my people are now free. Burma is the next South Africa. Its people are engaged in an epic struggle for freedom... As in South Africa, the people and legitimate leaders of Burma have called for sanctions. In South Africa when we called for international action we were often scorned, disregarded, or disappointed. To dismantle apartheid took not only commitment faith and hard work, but also intense international pressure and sanctions. In Burma, the regime has ravaged the country, and the people, to fund its illegal rule. Governments and international institutions must move past symbolic gestures and cut the lifelines to Burma’s military regime through well-implemented sanctions...”63

In this second part of the paper, I will examine the use of centralised and tailored economic sanctions as an important tool available to the international
community to promote respect for and enforce compliance with human rights in Burma.64 Restrictions on economic assistance and trade can be used for a broad range of purposes beyond the narrow punitive objective traditionally associated with sanctions. Rather than simply punishing rogue states for their conduct, sanctions also contribute to the international community’s understanding of universal human rights and the rules that apply to breaches of those rights.65 Furthermore, sanctions should not be assessed with an expectation that they achieve immediate or expeditious results. These measures may not instantly effect a regime change however they may achieve less tangible results such as an incremental undermining of the target state. They may also serve to encourage the pro-democracy movement within Burma and lead to partial liberalisation efforts by the junta.66 In this context, the sanctions imposed upon Burma have raised the international community’s awareness of the junta’s repressive regime and strengthened global resolve to promote improved human rights conditions and an open democracy in Burma. However, on balance, while the existing sanctions may have raised international attention and pressure on the regime, they have failed substantively to enforce international human rights norms.67

BACKGROUND: A SNAPSHOT OF EXISTING SANCTIONS

There are a myriad of aid and trade restrictions currently in place against Burma, imposed by individual states, regional associations, U.N. bodies, private corporations and others. The United States has been a key proponent in imposing unilateral economic sanctions against Burma and encouraging other States to oppose the ruling regime.68 Since 1988 it has suspended various aid programs, withdrawn Burma’s preferred trading status, reduced diplomatic contacts, imposed embargos on arms sales and lobbied other states to refrain from selling weapons to the junta. Domestic legislation has also formed part of the package of measures employed by the United States. In 1990 federal legislation was enacted to empower the President to impose any economic sanctions upon Burma deemed appropriate in the absence of any progress towards a democracy. The same Statute requires the President to develop a multilateral response to improve the human rights situation in Burma. Under this legislation a number of mandatory sanctions have been imposed, including a general prohibition on foreign aid69 and a ban on any new investment in Burma by U.S. citizens post-1997.70 It has been estimated that the ban on investment alone has had a significant impact on the Burmese junta’s financial resources, resulting in a reduction in foreign investment from $US 2.8 billion in 1996 to $US 19.1 million in 2001/2002.71

Other States and regional associations have adopted similar yet less stringent measures to the United States. The European Union (EU) has suspended military cooperation, imposed bans on prescribed exports, maintained an arms embargo and limited its assistance to humanitarian aid. Recently the EU banned all European companies from investing in Burmese firms controlled or associ-
ated with the junta. Consideration is also being given to suspending further loans to the junta from the World Bank and IMF. Similarly, a ban on entry visas for senior members of the junta has been introduced, as has a freeze on assets in Europe held by members of the junta. Burma’s trade status has also been diminished by the European Commission. The EU also supported the United States’ opposition to Burma’s membership in ASEAN in 1996. Since then, the EU has excluded or attempted to exclude Burma from the annual meetings between ASEAN and EU states (ASEM).

These measures have been disjointed and a number of states that have imposed such restrictions also pursue engagement and some trade with the junta. Another ‘stumbling block’ in efforts to negatively impact the junta is the willingness of ASEAN nations to trade with and support the regime. Arguably the most important trade and investment partner the Burmese regime has is China. China aggressively pursues the Burmese market and has been identified as the “single most significant impediment to the success of the transnational sanctions efforts” because of its interests in Burma. It is likely that this partnership may undermine the individual efforts of some of the largest trading nations across the globe.

A CALIBRATED MULTI-LATERAL APPROACH?

It follows that one of the weaknesses of the current unilateral regime of sanctions imposed upon Burma is its fragmentation. These isolated efforts have provided scope for the Burmese regime to find alternative markets or suppliers for the sanctioned goods which has undermined the impact on the junta. Notwithstanding the potential for countries such as China to compromise a concerted global effort, a coordinated scheme of uniform and tailored restrictions may be more effective than the current approach.

The U.N. Charter expressly provides for multi-lateral economic sanctions for the purposes of preserving the peace and stability of the international system. A centralised approach to promote human rights goals is therefore consistent with the objectives and obligations imposed on states under the Charter. The Security Council also has broad powers to impose legally binding sanctions. A set of tailored measures would preferably be coordinated through the U.N. Security Council, given its status as an international body and its power to enforce such sanctions. However, the prospect of achieving Security Council endorsement for this approach is remote. In this context, a loose form of multi-lateral strategies, or an alternative international grouping of states may provide the means of achieving a broad-based and consistent approach. In considering alternatives to the current Security Council as the source for the approach, Forcese suggests that an alternative body, being the Group of Eight (G8), could emerge as “an institution whose sanctioning role will become more important.” Under their collective, the economies of the G8 wield significant power over global markets and could have a significant impact on the Burmese junta.
standing its potential to coordinate such sanctions, such groups are restricted
from imposing sanctions on non-members, which hampers their effectiveness.
This is particularly the case with measures such as arms embargos, because the
junta is known to obtain significant military hardware from neighbouring states
such as China. Therefore, it is clear that the U.N.’s membership and status as the
principal international organisation would be the most effective location for
such measures.

The concept of ‘smart sanctions’ arose from concerns regarding the sanctions
imposed on Iraq throughout the 1990s. The principles underpinning this con-
cept are that sanctions should target the decision-makers responsible for the
violations while guarding against further hardships for the local population.
Where possible, sanctions should also serve to empower opposition groups. These
principles should be adopted in any targeted, concerted effort. The restrictions
currently imposed by the United States are largely consistent with these prin-
ciples and, save for some revisions, could serve as a template to develop a uni-
versal set of sanctions.

The proposed approach should focus on placing coercive pressure on the junta
by obstructing access to their offshore assets and foreign markets to sell their
resources. Given the recalcitrant nature of the regime, the measures should not
be moderate as the junta has proven largely unresponsive to the foreign policies
applied by the international community to date. Accordingly, the sanctions must
be proportionate to the egregious violations perpetrated by the state. The
approach could include a complete arms embargo, and selective trade bans on
imports of goods and services from SPDC-owned enterprises. This may include
sanctions on strategically important markets under state control such as natural
resources, including timber and gems, a source of significant revenue for the
junta. The package of sanctions would also include a ban on international trans-
fers and transactions with the junta. A freeze on the assets owned by the junta
should also be included. To ensure consistency with the principles of ‘smart
sanctions’ the current blanket U.S. ban on foreign investment (post 1997) should
be revised to prohibit any investment that either reinforces the regime finan-
cially or lends it political legitimacy. These measures would reduce capital flow
to the repressive regime and have little or no impact on the Burmese popula-
tions. However, it is critical that strategically important states that trade with the
junta are incorporated into the multi-lateral effort to ensure the maximum im-
pact of the restrictions. This decisive element of the approach is discussed fur-
ther below.

Responsible engagement

The imposition of a coordinated set of restrictions on trade with Burma is un-
derpinned and informed by a ‘responsible engagement’ approach. This approach
involves limited trade and diplomatic relations that cannot translate into practi-
cal support for the repressive regime or the perpetration of human rights abuses.
In assessing whether a particular form of investment or trade agreement could be so characterised, the test is whether the net impact of that arrangement is positive for human rights or whether it exacerbates human suffering.

Accordingly, economic participation in Burma may be characterised as ‘responsible engagement’ if it does not “augment the staying power” of the Burmese regime. However, a foreign investment project that required the foreign corporation to enter into a joint-venture with the Burmese authorities, involving the engagement of the Burmese military to provide security for the project, could be characterised as investment that directly bolsters the financial and political security of the junta. This form of investment may fail the test in which case, economic disengagement would be considered the appropriate course of action. Unocal’s investment and subsequent role in the Yadana pipeline project clearly falls within the realm of such irresponsible engagement. The corporation’s involvement caused further human rights violations and strengthened the repressive junta’s capacity (by providing a major source of revenue and creating infrastructure that is used by the military government against the local people).

Notwithstanding the option individual plaintiffs may have of pursuing liability through the courts, a state-based approach prohibiting such forms of investment would complement such litigation and send a clear signal to corporations that such conduct will not be tolerated by the international community or domestic courts.

The prospects of effecting change

There are two threshold issues in terms of gauging the success of a suite of ‘smart sanctions’ imposed upon Burma. The first is the challenge of securing multilateral support for the approach outlined, and the second is then obtaining the desired result from the measures. Both will be dealt with in turn.

As discussed above, there may be some impediments to obtaining a Security Council resolution imposing any economic sanctions against Burma. However, the prospect of obtaining broad based support for multilateral sanctions remains positive. The degree of international public support for government actions against Burma is strong and, as evidenced in the U.S, domestic regulation of corporations has been largely complied with. In the absence of U.N. support, a loose network of nation states could adopt consistent domestic legislation, to achieve the same effect as such a resolution. Alternatively, further consideration could also be given to existing regional and international groupings of nation states, as possible models for the multi-lateral approach outlined.

The challenge of generating sufficient influence over the revenue stream available to the junta turns on the level of support for the approach by individual states. Despite China’s burgeoning interest in Burma, the junta’s revenue stream has been substantially dependant on foreign investment from Western corporations and trade with Western nations. Accordingly, even in the absence of a
Security Council resolution, a broad coalition of predominantly Western nations may prove to be very effective. Approved foreign direct investment to Burma since 1989 was worth US$ 6.6 billion. This form of investment is concentrated in the areas of natural resource extraction projects and tourist infrastructure and this revenue stream for the junta has resulted in an expansion of the military from 180,000 personnel to 450,000, while the country’s health, education and public services are on the brink of collapse.87

An additional issue raised by such a multilateral approach is the tension between trade-restraining measures and international trade law, most notably the General Agreement on Tariffs and Trade (GATT).88 This area of law remains largely untested however, there appears to be a strong prima facie case that certain human rights trade sanctions contravene the GATT. The international trade regulatory regime generally obliges market access and trade. Certain measures currently employed against Burma, such as the various selective purchasing laws,89 raises trade law issues. In fact, the WTO dispute mechanism has previously been invoked under the Government Procurement Agreement by the EU and Japan in relation to a U.S selecting purchasing statute. The matter was undecided90 and therefore the legality of such laws remains unclear. While some states have creatively avoided liability under the GATT and continued to link trade with human rights conditions,91 it is clear that in the absence of Security Council resolutions, legal uncertainty remains with respect to a number of important ‘smart’ sanctions.92 Resolving some of these tensions will be another challenge for any multi-lateral approach.

The success of the measures will be assessed by the capacity to coerce the junta to cooperate with the international community and comply with international human rights laws. This approach is designed to encourage the regime to calculate that the benefits of compliance outweigh the costs of their defiance of U.N. resolutions and other multilateral calls for change. The effect of the measures should therefore compromise the ability of the junta to continue its programs which, in turn, will undermine the economy.

Unlike other case studies such as South Africa, it is not foreseeable that local businesses will rise in power as a result of these measures, largely because the Burmese economy is not sufficiently developed. However, it is anticipated that the sanctions approach will be strengthened by the existence of a strong and coordinated opposition movement within Burma. The National League of Democracy (NLD) was elected to government in a landslide victory in the 1990 democratic elections. The junta has disregarded those results and detained key figures and activists involved in the NLD, the most prominent being the leader Aung San Suu Kyi who has been under house arrest for most of the past nine years. Despite the junta’s attempts at repression, the NLD is a remarkably effective and strong opposition force.
PROMOTING CHANGE OR DEEPING THE DIVIDE? COUNTERING CRITICISMS AGAINST SANCTIONS.

Economic sanctions have been condemned as ineffective measures that rarely accomplish changes to the target’s policies, and have been described as “unjustifiably blunt, indiscriminate and brutal in that they harm innocent citizens rather than the perpetrators” and counter-productive because they may entrench the perpetrators. However there is a significant body of work that supports multilateral sanctions as an effective foreign policy tool to demonstrate resolve and send clear messages of condemnation. In the context of foreign investment in Burma, it can also be argued that projects such as oil and gas exploration and development deliver little benefit to the local populace, while providing critical foreign currency to the repressive government. Such investment does not translate into infrastructure or sustainable employment for the Burmese people. Accordingly, a program of withdrawing and banning such investment would generally not negatively effect the innocent population.

Restrictions on economic engagement are also criticised on the basis that they impede economic development which necessarily leads to democratic government. Total economic isolation would arguably increase the plight of the oppressed population. However, there is no causal link between democracy, respect for human rights and economic development. Free trade advocates and others also argue that such restrictions breach the international trade regulatory regime, as discussed above. This area of law has largely been untested. However, the legalities of imposing sanctions will clearly be a challenge for states and the international community in the coming years.

CONCLUSION

It is important to note that neither creative litigation nor responsible engagement and sanctions are the sole mechanisms that will bring about reforms in Burma. In fact, in isolation, these measures are unlikely to have a sufficiently significant impact on the ruling junta to bring about respect for human rights and the restoration of democracy. However, these strategies may combine to have significant implications for the junta’s revenue stream, which in turn may provide the international community with the requisite leverage to insist on compliance with human rights norms.

In order to maintain its repressive rule and continue its program of militarisation, the junta relies heavily on a steady stream of capital. Accordingly, foreign capital through trade and investment is the most powerful political currency for the junta. An approach that recognises this strategic vulnerability may go some way towards restoring human rights and democracy in Burma.
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Endnotes

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1. The Burmese military dictatorship is called the State Peace and Development Council (SPDC). The junta was formerly known as the State Law and Order Council (SLORC) until 1997.

2. ‘Constructive engagement’ is a policy that justifies economic and diplomatic relations with repressive states such as Burma on the basis that trade with and investment in such countries will promote political reform and strengthen compliance with human rights norms. This approach does not preclude the use of other foreign policy tools such as economic sanctions. Over the past twenty years, states have adopted this ‘mixed’ approach in their relations with the SPDC. However the imposition of sanctions has principally been applied by the West. C Forcione ‘Globalizing Decency: Responsible Engagement in an Era of Economic Integration’ (2002) 5 Yale Human Rights and Development Law Journal 57.

3. On 15 December it was announced that the parties to the Unocal litigation have arrived at an ‘in principle’ settlement. Please refer to postscript at the conclusion of Part I of this essay for a brief overview of this recent development.

4. The concept of responsible engagement is discussed in Part II of this essay.

5. Burma was identified by the World Bank in 1945 as one of the economies most likely to grow in the region, largely due to its wealth in natural resources. From the 1960s to the late 1980s, the junta destroyed the local economy by practising economic isolation from the international community. By the 1970s the ‘closed state-run economy’ was run down and economic growth was halted. Department of Foreign Affairs 2003, Globalisation Keeping the Gains, Commonwealth of Australia, p87. In 1987, the United Nations designated Burma as a ‘Least Developed Country’ this status was arguably earned due to the economic policies instituted by the junta.

6. There are a number of large projects involving foreign investment currently in train. For example, the proposed Shwe Natural Gas Pipeline project is currently being planned by a consortium of South Korean and Indian corporations to build a large-scale gas field on the Western coast of Burma.

8. In its 2000 report on the situation of human rights in Burma, the General Assembly deplored "the continuing violations of human rights in Burma, including extrajudicial, summary or arbitrary executions, enforced disappearances, rape, torture, inhuman treatment, mass arrests, forced labour, including the use of children, forced relocation and denial of freedom of assembly, association, expression and movement" UN GA Res 54/186. The U.N. has given the junta until 2006 to begin substantive dialogue with the National League of Democracy (NLD) and the release of its leader, Aung San Suu Kyi. The NLD is the main Opposition Party to the SPDC and won a landslide victory in the 1990 democratically held elections. Its leader has been detained by the junta under house arrest sporadically since 1990.

9. In 2002, the SPDC responded to the U.N. criticisms by introducing a National Constitutional Convention, titled the 'road map to democracy.' The junta has consistently argued in the international arena that the 'roadmap' illustrates the junta's commitment to restore democracy within Burma. However, this forum has been overwhelmingly denigrated by human rights activists, members of the NLD and the United States as a sham. The Convention has not allowed NLD participants and, in November 2004, the architect of the 'road map' the Prime Minister General Khin Nyunt was deposed by the junta and is currently detained under house arrest. This recent development signals even less hope for the prospect of reform.

10. For example, the Human Rights Commission appointed a special rapporteur to Burma in 1992 and this office's mandate continues to the present day. Furthermore, the International Labour Organisation (ILO) after repeated expressions of concern and resolutions of condemnation, took the unprecedented step of invoking measures against Burma under Article 33 of its Constitution for breaching its international labour obligations. The practical effect of these measures has been expulsion as a member of the ILO: ILO Resolution on the Widespread Use of Forced Labour in Myanmar, 97th Session, November 2000. The World Bank has also previously suspended international assistance to Burma.

11. More recently, pressure has been exerted on the junta by regional bodies such as the European Union (the EU). Through its negotiations with ASEAN, the EU has attempted to influence the foreign policies of ASEAN members in relation to their engagement with Burma. A gain, this has yet to result in any change and ASEAN members generally remain firm in their refusal to comment on the internal politics of Burma. Despite the EU's efforts, Burma will assume the role of Chair of ASEAN in 2006.

12. While the US imposed broad sweeping sanctions against Burma which came into force in the 1990s, these were not adopted by other nations including the European Union. The imposition of sanctions by the West is discussed in further detail below.


15. An overview of existing sanctions imposed upon Burma is provided in Part II of this paper.

16. C Forcese (2001) 'ATCA's Achilles Heel: Corporate Complicity, International Law and the Alien Tort Claims Act' Yale Journal of International Law 26 p 4. It has been estimated that Yadana will provide the SPDC with in excess of $US 400 million per year. This is the single largest source of liquid funds for the junta. The SPDC has also imposed a number of substantial fees on other oil companies who have sought to conduct explorations.

17. The currency from the Yadana pipeline project that is the subject of the U.S. legal litigation has been a significant source of finance for the junta's program of militarization. The junta spends an estimated 40% of its national budget on the military. In the year the Yadana contract between the joint venturers was entered into, an unprecedented $390 million was spent on its military. The currency from the Yadana pipeline project has been a significant source of finance for the junta's program of militarization. As Burma is not under threat from any of its bordering neighbours, the military hardware is used for the sole purpose of repressing Burmese citizens: 'Total Denial: A Report on the Yadana Pipeline Project in Burma' 1996, Earthrights International and Southeast Asian Information Network.
20. J Paul ‘Holding Multinational Corporations Responsible Under International Law’ Hastings International and Comparative Law Review 24 p 290. In his article, the author suggests that corporations have “displaced the state’s exclusivity” in the sphere of international law and regulation. Paul describes the number of actions taken by private individuals against multinationals under international law in domestic courts as “private citizens becoming the agents for internalizing international law on private actors, including multinational corporations” ibid p 289. He characterises this development as individuals taking the law into their own hands because of the failure of states to respond. Paul goes on to argue that when domestic courts “assert jurisdiction over multinational companies, they are counter-balancing the impact of globalisation with a measure of international law.” ibid. p 290.
23. For example, international advocacy networks were instrumental in the withdrawal of oil companies such as BP, Chevron and Texaco from Burma. Similarly, non-oil companies like Best Western, Levi Strauss, Federated Department Stores, European brewers Carlsberg and Heineken, and PepsiCo also pulled out of their operations in Burma after sustained campaigns. However, it should be noted that all these companies’ operations in Burma represented a relatively small proportion of their overall operations and therefore the extent of these withdrawals should not be overestimated. The UK firm Premier Oil chose to remain in Burma even after the UK Government requested they withdraw in 2000. For a detailed discussion of investment and divestment in Burma, refer to S Pegg ‘An Emerging Market for the New Millennium’ in J Frynas and S Pegg (2003) ‘Transnational Corporations and Human Rights’ Palgrave Macmillan, New York, p 23.
24. The joint-venture was directly with the state-controlled oil company, the Myanmar Oil and Gas Enterprise (Myanmar Oil) to construct the gas pipeline. Myanmar Oil had been hired to provide security and labour for the onshore construction and operation of an oil pipeline. The plaintiffs’ original action was also against Total (a French energy company that had jointly invested with Unocal in the project). The Court however decided on jurisdictional grounds that the claim could not succeed against Total in Doe v Unocal 1998 27 F Supp 2d 1174 (CD Cal 1998).
25. The plaintiff’s case also included claims that the Burmese authorities also subjected the local villagers to murder, rape and torture.
26. This requirement is discussed below, at note 33.
27. The requirement for state action applies in matters against private actors under ATCA. Generally, private actors can only be liable under ATCA where they acted in concert with state officials. However, there are a number of exceptions to the rule that a breach of the law of nations requires an element of state action. The type of human rights violations that do not require any conduct by a state are defined as ‘private actor’ violations. In those instances, corporations may be liable for violations of international law absent any state action.
29. This matter also alleges liability for a number of torts including wrongful death, battery and false imprisonment. It is beyond the scope of this essay to examine the developments in this suit.
32. Doe v Unocal 2000 1310. This included evidence of memorandums to the company concluding the “egregious human rights violations have occurred and are occurring now...[including] forced relocation... along the pipeline route, forced labour to work on infrastructure projects supporting the pipeline... and imprisonment and or execution by the army of those opposing such actions. Unocal, by seeming to have accepted SLORC’s version of events, appears at best naive and worst a willing partner in the situation.”
34. The court held that the torts set out in the claim constituted violations of the law of nations, the necessary jurisdictional hurdle to satisfy the requirements of ATCA. The Court recognised that forced labour, torture, murder and slavery are “jus cogens” violations meaning norms of international law that are binding on nations even if they do not agree with them, thereby they are also violations of the law of nations: Doe v Unocal 2002 14208.
35. Doe v Unocal 2002 14210, 14212. Similarly, the allegations of murder and rape also came under this category because they were committed in furtherance of the forced labour program. Doe v Unocal 2002 14223, 14224.
37. On the facts, Unocal encouraged and assisted the military to subject the plaintiffs to forced labour by hiring, paying and instructing the military to provide security and build infrastructure. Unocal provided further practical assistance by providing the Burmese authorities with the necessary instructions, technology and resources for them to carry out their tasks. This assistance was provided despite the corporation’s knowledge that forced labour was being used in connection with the project. The majority concluded that such assistance was held to have had a ‘substantial effect’ on the perpetration of forced labour, Doe v Unocal 2002 1421, 1422.
38. Doe v Unocal 2002 14213 n22. Notwithstanding the finding that the District Court applied an erroneous standard of ‘active participation’, the majority noted that there was sufficient evidence to meet this standard. The majority relied on evidence of Unocal’s directives to the Burmese military to infer there was at least constructive knowledge of the brutal methods employed by their partners, the Burmese military.
40. Reinhardt J stated it is clear that international law applies under ATCA to determine whether a violation has occurred. However, federal common law should be applied to resolve the ancillary issues that may arise under such applications such as whether a third party may be held liable in tort for a government’s violations of the law of nations: Doe v Unocal 2002 14248. In obiter, the majority noted that Unocal may be liable under tort law principles such as joint venture, negligence and recklessness. However it determined that it did not need to address these theories because it considered that the company could be held liable for aiding and abetting in violation of international law: Doe v Unocal 2002 14212 n 20.
41. Doe v Unocal 2002 14259.
42. Doe v Unocal 2002 14266.
44. For example, a corporation that promotes the forced relocation of people could constitute direct complicity in the violation.


55. Conversely, some commentators suggest that Burma may be one of a small number of pariah states that are exempt from this approach. For instance, in his analysis this issue S Pegg suggests that “with the exception of a few cases (perhaps including Angola, Burma and Sudan today, Nigeria under its most recent military dictatorships and apartheid under South Africa), the argument that any investment in a particular country is necessarily bad is unlikely to convince most corporate executives, government policy-makers or consumers at large.” An Emerging Market for the New Millennium in J. Frynas and S. Pegg (2003) ‘Transnational Corporations and Human Rights’ Palgrave Macmillan, New York.


59. Media release “Settlement in Principle reached in Unocal Case” www.earthrights.org; At present no substantive actions against corporations under ATCA have been decided on their merits.

60. Unocal’s legal costs were reportedly estimated to be $US 25 million to date, Guardian Unlimited, 15 December 2004. Campbell D ‘Energy giant agrees settlement with Burmese villagers.’


63. There are a number of notable examples where sanctions have contributed to significant reform such as the dismantling of the apartheid regime in South Africa. For a detailed discussion on the merits of sanctions, please refer to S. Cleveland, 2001 ‘Norm Internalization and U.S Economic Sanctions’ Yale Journal of International Law Winter 26 p 3. In relation to Burma, it has been suggested that the U.S Congress’ consideration of sanctions in 1995 partially prompted the government’s release of Aung San Suu Kyi from house arrest. It is also suggested the regimes’ ratification of a number of Conventions, such as the Convention on the Rights of the Child in 1997 and its efforts to become more open to NGOs such as allowing the Red Cross access to prisons in 1999 have also been in response to the threat of more sanctions.


66. Despite all the measures imposed by predominantly Western nations, the U.S State Department’s annual report to Congress states that the SPDC “has made no progress in moving towards greater democratization, nor has it made any progress toward fundamental improvement in the quality of life of the people of Burma”: U.S State Department Country reports on Human Rights Prac-
For a comprehensive discussion of the United States’ and other individual state’s unilateral measures against Burma, refer to S Cleveland, 2001 ‘Norm Internalization and U.S. Economic Sanctions’ Yale Journal of International Law Winter. Further U.S. restrictions include a ban on U.S. entry visas to Burmese officials and concerted opposition to financial assistance programs sponsored by the World Bank. Over the same period, the various administrations have elected not to renew lapsed trade agreements and have insisted its contribution to various U.N. projects are not expended on the Burmese military. Domestic procurement legislation, known as ‘selective purchasing laws’ have also prohibited authorities from doing business with Burma. Other common law countries such as Canada, Australia and the United Kingdom have all imposed various diplomatic, assistance and trade restrictions against Burma.

The prohibition does not include humanitarian and anti-drug trafficking assistance.

Until November 2004, the United States was the only country that prohibited new investment in Burma. The EU has recently announced its decision to impose a similar ban.


The EU has also withdrawn preferential trading terms that Burma enjoyed as a developing country under the General System of Preferences and has publicly stated that tourism to Burma is inappropriate.

The EU has excluded Burma from participating in a range of ASEM meetings and negotiations since 1997.

Imports from Burma to the U.K alone have reportedly trebled since 1997 and were estimated to be £62.2 million in 2003: D Gow, 2004 ‘Burmese ban for European firms’ The Guardian.

However, the imposition of sanctions does not preclude a strategy of constructive engagement. As discussed below, I do not argue in this essay for a complete ban on engagement and trade with the Burmese regime. While there is merit in the argument that any engagement can potentially fuel further abuses, an approach of ‘responsible engagement’ and the imposition of ‘smart sanctions’ can be utilised to influence the targeted regime while not contributing to the repressive program imposed upon Burma’s citizens.

86. S. Pegg 2001 ‘An emerging market for the new millennium’ in Transnational Corporations and Human Rights 1st Ed, Palgrave Macmillan, New York p 19. There is support for the argument that ‘home country’ regulation of multinational companies can be effective. Compliance with extra-territorial sanctions in the US is generally high. Importantly, some research suggests that multinationals prioritise their relationship with the US authorities over lost opportunities for investment overseas and therefore they comply strongly with sanctions in order to avoid threatening their relationship with the government.

87. Burma Sanctions Coalition website: wwwfreeburma.org.au

88. C. Forcense 2002 ‘Globalising Decency: Responsible Engagement in an Era of Economic Integration’ 5 Yale Human Rights and Development Law Journal 1 p 20. Trade constraints against Burma (a WTO member) may breach Article XI of the GATT. However Articles XX and XXI of the GATT provide exemptions to the general principle that trade should not be fettered by prohibitions or restrictions. Those exemptions are limited and apply where: a) a state is taking action in pursuance of its obligations under the U.N Charter, to maintain peace and security; or b) a state is acting to protect its security interests. In the absence of Security Council resolutions, any restrictions on trade with Burma could breach the GATT.

89. As discussed above, these laws prohibit government procurement from companies operating in Burma. Such laws operate as economic sanctions.

90. The complaint related to a Massachusetts statute that was recently held to be unconstitutional in a decision of the Supreme Court in Crosby v National Foreign Trade Council 530 U.S (2000). Given this ruling, the WTO dispute was discontinued.

91. The U.S and EU have utilised their respective General System of Preferences programs to tie human rights compliance with trade. Both systems allow incentive trade benefits to countries wishing to trade with their markets and the withdrawal of those benefits, contingent upon prescribed conditions such as compliance with labour standards. Given the non-binding nature, this approach is unlikely to contravene the GATT.

92. While some ‘smart sanctions’ such as investment bans may not be at risk of breaching the GATT, procurement regimes and the promotion of voluntary codes of conduct are vulnerable. For a more detailed discussion of these issues, please refer to C. Forcense 2002 ‘Globalising Decency: Responsible Engagement in an Era of Economic Integration’ 5 Yale Human Rights and Development Law Journal 1.


95. Please refer to S. Cleveland, 2001 ‘Norm Internalization and U.S Economic Sanctions’ Yale Journal of International Law Winter 26 for illustrations of successful policies that imposed sanctions. Instances sanctions have proven to be effective in achieving their objectives.
