

UNILATERAL SANCTIONS: AN EFFECTIVE FOREIGN POLICY TOOL IN MYANMAR?

JOSHUA L. SAVEY*

TABLE OF CONTENTS

I. INTRODUCTION	371
II. UNITED STATES' SANCTION MECHANISMS.....	374
A. <i>Statutory Framework for Sanctions</i>	375
B. <i>Problems with Economic and Trade Sanctions</i>	378
III. MYANMAR SANCTIONS.....	380
A. <i>Events Leading to United States' Sanctions on Myanmar</i>	380
B. <i>Original Sanctions Imposed on Myanmar and Their Ineffectiveness</i>	383
C. <i>Recent Changes in U.S. Sanction Policy: Constructive Engagement</i>	385
IV. IMPROVING SANCTIONS AS AN EFFECTIVE FOREIGN POLICY TOOL	390
A. <i>Diplomatic Relations</i>	391
B. <i>Economic Integration</i>	392
C. <i>Remedies for Violations of Human Rights or Corruption by U.S. Investors</i>	395
V. CONCLUSION.....	398

I. INTRODUCTION

2014]

UNILATERAL SANCTIONS

373

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

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

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

alsolTph ctl 9.96838p

The President will also impose export sanctions in addition to trade and economic sanctions. Export sanctions generally prohibit exporting certain types of products to the target country.²⁵ Export

2014]

UNILATERAL SANCTIONS

377

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

When the President implements economic and trade sanctions, arms embargoes, and export sanctions, the U.S. has effectively cut off

B. Problems with Economic and Trade Sanctions

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

The jurisdictional reach of U.S. sanctions has become a point of contention with European countries because those countries often take a different approach.⁴⁰ The U.S. applies unilateral sanctions to U.S. persons and companies, as well as foreign subsidiaries or foreign companies doing business in or with the U.S.⁴¹

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

III. MYANMAR SANCTIONS

U.S. policy towards Myanmar was ineffective until 2012, when the U.S. acknowledged that market forces could result in quicker changes in Myanmar and began to ease sanctions under a constructive engagement approach.⁵⁵ The U.S.' and other countries'⁵⁶ primary motivations behind the use of sanctions are the military dictatorship regime and human rights violations that exist in Myanmar.⁵⁷ But, as mentioned above, the U.S. has recently begun relaxing sanctions after fifteen years of imposition.⁵⁸ U.S. government officials have cited Myanmar's ruling party's commitment to increase democracy and advance human rights as reasons for easing the sanctions.⁵⁹ However, there is little proof that sanctions actually led to the Myanmar government's sudden change.⁶⁰ If sanctions were a consideration, a collective engagement approach stithnt (adva8m(55)Tj0.0008 Tc 0.2-2.2(c Tw - 0.2-2.2ti)th)12.

2014]

UNILATERAL SANCTIONS

381

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

Myanmar was originally known as Burma during the British colonial era.⁶² The citizens were opposed to remaining a British colony and gained independence from the British on January 4, 1948.⁶³ The leader of the independence movement was General Aung San, who was the father of Aung San Suu Kyi, a human rights activist, Nobel Peace Prize laureate, parliamentarian, and Chairperson

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

2014]

UNILATERAL SANCTIONS

383

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

B. Original Sanctions Imposed on Myanmar and Their Ineffectiveness

In the 1990s, the U.S. imposed several sanctions against Myanmar that culminated in the Omnibus Consolidated Appropriations Act of 1997, which Congress enacted in 1996 to authorize the President to bar new investment in Myanmar and prohibit professionals from facilitating any transaction that a U.S.

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

The primary strain on Myanmar from sanctions is economic, which reduces the potential for Myanmar's citizens to demand a strong democracy. A strong economy results in capital to educate the population, good jobs, and could result in other governments and foreign investors demanding changes. If the Myanmar economy started to grow, the prospect of losing foreign capital could help persuade Myanmar to democratically reform and improve human rights. However, Myanmar, with the exception of some regional support, has been without significant foreign investment for two decades, which makes creating the type of strong economy require⁸⁶

2014]

UNILATERAL SANCTIONS

385

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

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

The hope that U.S. unilateral sanctions will work seems doubtful. Sanctions have been imposed for almost two decades, yet other countries continue to trade with Myanmar. Economic isolation has resulted in low government revenues for essential services, and the economy remains in poor condition. The agrarian population of

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

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

2014]

UNILATERAL SANCTIONS

387

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

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

The easing of sanctions and new sa

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

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

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

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

112. U.S. D

2014]

UNILATERAL SANCTIONS

389

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

The warming diplomatic relations being forged in Myanmar have allowed the U.S. to use its relations to further develop partnerships that will strengthen the economic integration of the country and provide key assurances of a transparent government. Recently, the U.S. announced a new partnership with Myanmar to provide technical assistance in Myanmar's extractive industries sector.¹²² The partnership will assist Myanmar in meeting the requirements of the Extractive Industrietovide

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

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

2014]

UNILATERAL SANCTIONS

391

A. Diplomatic Relations

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

B. Economic Integration

Economic integration is the primary component to a constructive

fair dispute resolution.¹⁴¹

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

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

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

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

143. MYANMAR LEGAL SERVICES LIMITED, OVERVIEW OF LEGAL AND REGULATORY REGIME, SANCTIONS, CROSS-BORDER PROJECTS AND ASEAN INTEGRATION 2015, 2-3 (2013), available at

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

Myanmar has just recently started expanding its educational opportunities. The University of Yangon was reopened for undergraduate classes during the 2013 school year after being closed since 1996.¹⁵⁰ The university had been closed, except for some post-graduate classes, because it was considered a hotbed of political activism.¹⁵¹

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

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

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

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

156. *Id.*

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

158. TRANSPARENCY INTERNATIONAL, CORRUPTIONS PERCEPTIONS INDEX 2013, at 3 (2013) (ranking M7et 3)

396

WILLAMETTE LAW REVIEW

[50:371

The ATS, passed in 1789,¹⁶¹

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

The FCPA also has the ability to discourage companies from bribing corrupt officials in dysfunctional governments, who are generally responsible for the activity that concerns the target company. The FCPA covers all U.S. companies, individuals, and foreign companies that issue U.S. securities.¹⁷⁴ The Act requires corporations to maintain books in reasonable detail and prohibits a corporation from paying a “foreign official” for receiving business, directing business, or obtaining necessary government approvals.¹⁷⁵ The term foreign official is very broad and can include most people who work for a government, in a government-sponsored project, or an international organization.¹⁷⁶ Depending on the provision violated, fines or prison time may be imposed. In 2008, Siemens AG paid a \$450 million fine for violating the FCPA when the SEC alleged that Siemens had engaged in bribes on widespread transactions.¹⁷⁷ Acts like the FCPA ensure that corporations are deterred from bribing foreign officials.458989 18.6851 263.047

2014]

UNILATERAL SANCTIONS

399

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