

---

## HUMAN RIGHTS AND UNINTENDED CONSEQUENCES: EMPIRICAL ANALYSIS OF INTERNATIONAL ECONOMIC SANCTIONS IN CONTEMPORARY PRACTICE

Michael P. Malloy\*

*[L]ike Rwanda, . . . [i]n the news for a day,  
and after that, the world would  
just shrug and turn away.\*\**

|      |   |     |
|------|---|-----|
| I.   | INTRODUCTION .....  | 80  |
| II.  | CONCEPTS AND THEMES: METRICS FOR EVALUATION OF<br>EFFECTIVENESS OF SANCTIONS PROGRAMS ..... | 81  |
| III. | DISCUSSION AND ANALYSIS: FOUR CASE STUDIES .....  | 89  |
|      | A. Zimbabwe/Southern Rhodesia .....   | 89  |
|      | 1. The Independence Crisis .....  | 89  |
|      | 2. Zimbabwe Crisis .....  | 97  |
|      | B. South Africa .....   | 105 |
|      | C. Myanmar.....   | 111 |
|      | D. Belarus.....   | 123 |
| IV.  | OBSERVATION AND REFLECTION .....  | 128 |

---

\* Michael P. Malloy. Distinguished Professor and Scholar. University of the Pacific, McGeorge School of Law. My work on this research is offered up as a fond memorial to the late Dennis M. O'Connell, my chief for several years and my mentor for always. For their helpful comments and friendly encouragement, I thank Diane Marie Amann, Cindy Buys, Stephanie Farrior, Erika George, Eugene Kontorovich, Linda A. Malone, Peter Margulies, Gregory S. McNeal, William B. T. Mock, Hari Michele Osofsky, Jaya E. Ramji-Nogales, Gregory C. Shaffer, Milena Sterio, and Scott Sullivan. Thanks also to David Sloss and Anupam Chander, co-chairs of the Northern California International Law Scholars, for the opportunity to present a working draft of this article to the NCILS in September 2011. My most sincere gratitude I offer to my wife Susie A. Malloy, for all her assistance and support.

\*\* Geraldine Brooks, *Slick Alliance: Shell's Nigerian Fields Produce Few Benefits For Region's Villagers*, WALL ST. J., May 6, 1994, at A1 (quoting Sister Majella McCarron, Nigeria liaison for Africa Faith and Justice Network).

## ABSTRACT

*In contemporary practice, economic sanctions, both unilateral and multilateral, have become a common feature in U.S. foreign policy. Sanctions are increasingly invoked as instrumentalities of international human rights law and policy. This article focuses on the use of sanctions in response to pervasive human rights violations such as the former Southern Rhodesian (and now in Zimbabwe itself), South Africa, Myanmar, and Belarus. Based on an empirical analysis of the instrumental effects of sanctions, it argues that the design and content of foreign policy based programs often lead to more effective results, at least in the short term, than is the case with respect to human rights based programs. Furthermore, multilateral sanctions mandated by the United Nations Security Council with respect to human rights violations do not appear to be more effective than unilateral initiatives undertaken pursuant to U.S. statutes. Indeed, economic performance of some targets of sanctions imposed in response to human rights violations appear to have significantly improved during sanctions episodes. The article concludes that a more focused and systematic understanding of economic sanctions, as an integrated body of principles and practices, would enable policymakers to invoke them in a more effective manner and to determine when crisis situations may indicate that economic sanctions are simply the wrong instrument to employ.*

## I. INTRODUCTION

On September 11, 2009, President Obama published Presidential Determination No. 2009-27,<sup>1</sup> continuing for an additional year – the thirty-second such additional year – the exercise of emergency authorities under section 5(b) of the Trading With the Enemy Act (TWEA).<sup>2</sup> The immediate effect of the Administration’s first determination,<sup>3</sup> was to continue in force the Cuban Assets Control Regulations,<sup>4</sup> which have

---

<sup>1</sup> Presidential Determination No. 2009-27, Continuation of the Exercise of Certain Authorities Under the Trading With the Enemy Act, 74 Fed. Reg. 47,431 (Sept. 11, 2009).

<sup>2</sup> 50 U.S.C. app. § 5(b) (2006).

<sup>3</sup> See Presidential Determination No. 2010-13, Continuation of the Exercise of Certain Authorities Under the Trading With the Enemy Act, 75 Fed. Reg. 54,459 (Sept. 2, 2010) (continuing until September 14, 2011, “the exercise of [certain] authorities [under the Trading With the Enemy Act] with respect to Cuba, as implemented by the Cuban Assets Control Regulations, 31 C.F.R. Part 515”); Presidential Determination No. 2011-15, Continuation of the Exercise of Certain Authorities Under the Trading With the Enemy Act, 76 Fed. Reg. 57,623 (Sept. 13, 2011) (continuing until September 14, 2012, Trading With the Enemy Act authorities with respect to Cuba).

<sup>4</sup> 31 C.F.R. pt. 515 (1975).

been in effect since 1963. The broader historical effect of the determination, however, was to place the Administration in a continuous line of foreign and national security policy that has persisted in one form or another since the years immediately prior to the entry of the United States into World War II. This article explores one contemporary development in U.S. economic sanctions law and policy: the application of sanctions in response to human rights violations or the threat of such violations.

In contemporary practice, the use of economic sanctions – unilateral,<sup>5</sup> as well as multilateral<sup>6</sup> – no longer represents a series of isolated “emergency” incidents in foreign affairs. Economic sanctions have become a common feature in foreign and national security policy. In recent years, economic sanctions have been increasingly invoked as instrumentalities of international human rights law and policy, under generally applicable rubrics of public international law and foreign affairs law.

This article examines situations in which, in varying combinations, economic sanctions have been invoked in the service of human rights law and policy. It first identifies some shared concepts and themes, particularly the question of the effectiveness of sanctions as an instrument of policy.<sup>7</sup> It then examines four case studies involving the use of sanctions in response to pervasive human rights violations: Zimbabwe/Southern Rhodesia, South Africa, Myanmar, and Belarus.<sup>8</sup> The article concludes with a reflection on the contemporary use of economic sanctions,<sup>9</sup> with the hope that policymakers gain a more focused understanding of economic sanctions as an integrated body of principles and practices. With such an understanding, policymakers would be in a position to invoke economic sanctions in a more effective manner, as well as to determine when crisis situations in human rights policy occur and are likely to be served by the application of sanctions.

## II. CONCEPTS AND THEMES: METRICS FOR EVALUATION OF EFFECTIVENESS OF SANCTIONS PROGRAMS

Sanctions themselves are instruments that may be used in a variety of contexts, and will have whatever instrumental effect the circumstances of their use might allow. Ultimately, however, it is overarching

---

<sup>5</sup> See 50 U.S.C. §§ 1701-07 (2006) (establishing the authority of the TWEA and its successor the International Emergency Economic Powers Act (IEEPA)).

<sup>6</sup> 22 U.S.C. § 287(c) (2006) (implementing the United Nations Participation Act of 1945 (UNPA) in U.S. practice under section 5).

<sup>7</sup> See *infra* Part II.

<sup>8</sup> See *infra* Part III.

<sup>9</sup> See *infra* Part IV.

domestic or foreign policy behind the sanctions that must be judged in terms of effectiveness, not just the sanctions. Thus, to declare that in principle economic sanctions are “ineffective” and should not be imposed is to confuse the assessment of the effectiveness of policy with the assessment of the instrumental effectiveness of sanctions.

Whatever policy one adopts with respect to a particular state or a specific international crisis, economic sanctions remain but one available instrument to further policy. The metrics remain elusive, but empirical analysis of the immediate and discrete instrumental effects of sanctions suggests that the design and content of foreign policy-based and national security-based programs often lead to more significant effects on a target group or state, at least in the short run, than has been true with human rights-based programs.<sup>10</sup> Sanctions may be a relatively more or less appropriate instrument depending upon practical circumstances, and depending upon the relative importance, as a matter of policy, the realization of a particular policy goal may be (compared with the cost of attainment).

The search for appropriate criteria to assess the effectiveness of sanctions in the instrumental sense is a critical and longstanding concern.<sup>11</sup> “Effectiveness” of a sanctions program depends upon the type of policy objective the sanction is instrumentally intended to serve, whether the policy intends to influence the behavior of a target state or group, to defend or protect some important domestic interest, to communicate or otherwise express the sanctioning state’s displeasure with the actions or threatened actions of the target, or, as has usually been the case, some combination of these objectives. The effectiveness of a particular sanctions program should be measured against the conformity of the outcome of the program with the underlying policy objective<sup>12</sup> and the cost

---

<sup>10</sup> Contrast, for example, the stunning effectiveness of the tightly constructed *unilateral* sanctions employed as part of the response to the Iran hostage crisis of 1979-1981, Michael P. Malloy, *The Iran Crisis: Law Under Pressure*, 1984 WISC. INT’L L.J. 15 (1984), with the frustrated and protracted experience with *multilateral* sanctions employed as part of the response to the continuing crisis with respect to Zimbabwe/Southern Rhodesia, detailed in Part III.A, *infra*.

<sup>11</sup> See, e.g., BARRY E. CARTER, *INTERNATIONAL ECONOMIC SANCTIONS* (1988) (providing seminal legal and policy analysis of economic sanctions); MARGARET P. DOXEY, *INTERNATIONAL SANCTIONS IN CONTEMPORARY PERSPECTIVE* (1987) (providing insightful context for analysis of economic sanctions); GARY C. HUFBAUER ET AL., *ECONOMIC SANCTIONS RECONSIDERED: HISTORY AND CURRENT POLICY* (2d ed. 1990) (providing innovative economic and policy analysis of economic sanctions).

<sup>12</sup> See Thomas O. Bayard et al., *Stakes and Risks in Economic Sanctions*, 6 THE WORLD ECON. 73, 74-75 (1983) (discussing outcome conformity).

of achieving that outcome.<sup>13</sup>

Of these metrics, outcome conformity “is undoubtedly the most important, but it is also the most difficult to assess.”<sup>14</sup> The difficulties of this assessment also affect the more straightforward task of evaluating the costs of the sanctions. Without a clear understanding of the policy objective of a particular sanctions program, and agreement on what “outcome conformity” – a successful conclusion to the sanctions episode – would look like, determining whether the costs of that particular program are justified is difficult.

To say that a particular sanctions program is not “effective” can be a politically charged statement. What this assessment may reflect is fundamental opposition to the overarching foreign policy with respect to the target, more than any specific objection to sanctions.<sup>15</sup> In addition, argument about the “effectiveness” of a particular sanctions program may simply reflect an underlying assumption that sanctions – any sanctions – are never, or almost never, effective.<sup>16</sup> Yet sanctions occur in concrete circumstances, and their immediate objectives often shift in emphasis over time.

The Iran hostage crisis offers a case in point.<sup>17</sup> The unilateral actions undertaken by the President did not, in themselves, resolve the crisis between the United States and Iran. Indeed, with the religious and revolutionary fervor prevalent in Iran, it is unlikely that any unilateral action, however harsh, could have forced a resolution of the crisis. A more serious issue is whether these actions, though not sufficient in themselves, were at least necessary for such a resolution. U.S. courts traditionally viewed the trade embargo and financial restrictions employed in that situation as instrumental in the resolution of international crises.<sup>18</sup>

---

<sup>13</sup> See THOMAS O. BAYARD ET AL., *AN ECONOMIC MODEL OF UNITED STATES AND WESTERN CONTROLS ON EXPORTS TO THE SOVIET UNION AND EASTERN EUROPE*, reprinted in STAFF OF J. ECON. COMM. 97TH CONG., *THE SOVIET ECONOMY IN THE 1980'S: PROBLEMS AND PROSPECTS PART 2* (Comm. Print 1983) (providing quantitative model for evaluating costs associated with sanctions).

<sup>14</sup> Bayard et al., *supra* note 12, at 75.

<sup>15</sup> See, e.g., Bruce Bartlett, *Sanctions Almost Never Work*, WALL ST. J., Aug. 19, 1985, at 14 (asking “If [House members who objected to Nicaraguan sanctions] are right in the case of Nicaragua -- as they surely are – what makes South Africa so different?”); cf. Susan F. Rasky, *Tough Sanctions Against Pretoria Are Sought by House Democrats*, N.Y. TIMES, June 6, 1988, at A8 (noting House leader’s plan to pass expanded sanctions bill just before Democratic national convention).

<sup>16</sup> See Bartlett, *supra* note 15.

<sup>17</sup> See generally Malloy, *supra* note 10 (discussing sanctions imposed on Iran in response to hostage crisis).

<sup>18</sup> See, e.g., *Richardson v. Simon*, 560 F.2d 500, 505 (2d Cir. 1977); *Real v.*

Another aspect of the President's unilateral actions in that crisis – the graduated intensification of sanctions – has become a common feature in many current sanctions programs.<sup>19</sup> This technique exhibits a more consciously selective approach, apparently attempting to respond to the specific conditions of the moment. The selectivity of the restrictions, is most pronounced in the early stages of the crisis,<sup>20</sup> insofar as the 1979 restrictions were intended to affect directly only the Government of Iran and its owned and controlled entities, and not Iranian nationals or wholly private transactions.<sup>21</sup>

The Iran hostage sanctions were gradually intensified over a very short time span, with the upward spiral of the restrictions exhibiting a relatively deliberate process. In any event, direct ad hoc negotiations on Iran's terms were necessary before the crisis precipitated by the taking of the hostages could be resolved. The President's unilateral responses to the Iran crisis were no more sufficient for a resolution of that crisis than was the United States's use of dispute resolution mechanisms afforded by the U.N. Security Council and the International Court of Justice.<sup>22</sup>

The basic regulatory technique, however, was quite clear: to impose a

---

Simon, 510 F.2d 557, 563 (5th Cir. 1975); *Sardino v. Fed. Reserve Bank of N.Y.*, 361 F.2d 106, 112-13 (2d Cir. 1966) (so stating); see also Michael P. Malloy, *The Impact of U.S. Control of Foreign Assets on Refugees and Expatriates*, 3 MICH. Y.B. INT'L LEGAL STUD. 399, 413-14 (1982); Stanley L. Sommerfield, *Treasury Regulations Affecting Trade With the Sino-Soviet Bloc and Cuba*, 19 BUS. LAW. 861, 862 (1964). To the extent that they were viewed as necessary predicates, the unilateral acts of the President in the Iran hostage crisis do partake of a certain continuity with unilateral presidential actions undertaken in previous emergencies. See, e.g., *Dames & Moore v. Regan*, 453 U.S. 654 (1981); *Chas. T. Main Int'l, Inc. v. Khuzestan Water & Power Auth.*, 651 F.2d 800, 807 (1st Cir. 1981); *Am. Int'l Group v. Islamic Republic of Iran*, 657 F.2d 430, 440 (D.C. Cir. 1981); *Behring Int'l, Inc. v. Miller*, 504 F. Supp. 552, 557 n. 8 (D.N.J. 1980). But see *Elec. Data Sys. Corp. Iran v. Soc. Sec. Org. of Gov't of Iran*, 508 F. Supp. 1350, 1361 (N.D. Tex.), *vacated in part & aff'd in part*, 651 F.2d 1007 (5th Cir. 1981).

<sup>19</sup> This is not intended to suggest that graduated or selective application was unique to the Iran hostage crisis. The technique as applied in the Iran episode is in fact reminiscent of the sanctions imposed by the United States during the Suez Canal crisis in 1956. See *Egyptian Assets Control Regulations*, 21 Fed. Reg. 5777 (July 17, 1956).

<sup>20</sup> See Malloy, *supra* note 10 at 28-30, 34-35 (discussing graduated intensification of sanctions).

<sup>21</sup> But see Michael P. Malloy, *Embargo Programs of the United States Treasury Department*, 20 COLUM. J. TRANSNAT'L L. 485, 512-513 (1981) (suggesting that Iran sanctions were not so narrow in practical effect).

<sup>22</sup> See Malloy, *supra* note 10 at 59-68, 96-97 (discussing resort to U.N.).

prohibition on any transaction involving any property in which the Government of Iran, its agencies, instrumentalities, or controlled entities might have any conceivable interest of any nature whatsoever. Arguably, the broad and sweeping nature of this prohibition, essentially a “blocking” of assets, is central to an effective use of blocking as a weapon of economic warfare. In its initial stages, when the blocking most disrupts the normal expectations of international commercial and financial transactions, it is at its most patently effective. In some significant sense, the Iranian sanctions played a role in effectuating the resolution of the hostage crisis.<sup>23</sup>

This long view of the application of sanctions would suggest that one should be cautious in making quick assessments of sanctions programs, yet instant analysis continues to be the norm. Thus, in less than four months from their imposition in the spring of 1985, the Nicaraguan sanctions were declared to be “a flop.”<sup>24</sup> By mid-1987, the long-term effect of the sanctions was said to be a gain in trade for Japan, to the detriment of the United States.<sup>25</sup> Yet by the end of 1988, information from Nicaragua appeared to indicate that the country was in a state of economic decay,<sup>26</sup> to some extent and perhaps irrevocably so,<sup>27</sup> and this situation apparently persisted until the sanctions were lifted in 1990.<sup>28</sup>

Where a political consensus, for or against, develops with respect to a particular target, public perceptions of the effectiveness of sanctions may coalesce. Otherwise, views may be so disparate that it may seem

---

<sup>23</sup> See ANDREAS F. LOWENFELD, *TRADE CONTROL FOR POLITICAL ENDS* 591 (2d ed. 1983) (suggesting that Iranian sanctions “may have played a part” in resolving hostage crisis).

<sup>24</sup> See Charles Wheeler, *U.S. Trade Embargo Against Nicaragua a Flop, Experts Say*, WASH. TIMES, Aug. 23, 1985, at 4D.

<sup>25</sup> See Clifford Krauss, *Japan Gains From American Embargo Against Nicaragua*, WALL ST. J., June 12, 1987, at 10.

<sup>26</sup> See, e.g., Mark A. Uhlig, *Nicaragua Currency Tumbles and American Dollar Is King*, N.Y. TIMES, Feb. 5, 1989, § 1, at 1; Mark A. Uhlig, *Is Nicaraguan Piggy Bank an Endangered Species?* N.Y. TIMES, June 24, 1989, at 2; Mark A. Uhlig, *Nicaragua Study Depicts Economy In Drastic Decline*, N.Y. TIMES, June 26, 1989, at A1.

<sup>27</sup> See Stephen Kinzer, *In Managua, 2 Economists Debate Crisis*, N.Y. TIMES, Dec. 25, 1988, § 1, at 8.

<sup>28</sup> See Exec. Order No. 12,707, 3 C.F.R. 276 (1991) (terminating declared national emergency with respect to Nicaragua and finding that “the February 25, 1990, democratic election in Nicaragua has ended the unusual and extraordinary threat to the national security and foreign policy of the United States previously posed by the policies and actions of the Sandinista government in that country, and the need to continue the national emergency declared in Executive Order No. 12513 of May 1, 1985, to deal with that threat.”).

as though opposing critics are speaking about different programs altogether. The case in point here is the South Africa sanctions program, where the most balanced early view of the presidentially-imposed 1985 sanctions appeared to be that the sanctions were having “mixed effects.”<sup>29</sup> The atmosphere of increased pressure on South Africa had the palpable effect of hastening divestment by U.S. firms of direct South African investments.<sup>30</sup> Still, the Government of South Africa remained at least publicly confident, despite fears expressed by South African business representatives.<sup>31</sup>

Within a year of these pronouncements, however (and after passage of statutory sanctions over the president’s veto), some commentators claimed that the expanded sanctions were having a positive effect.<sup>32</sup> Six months later, it was becoming clearer that, while sanctions were not a “quick fix,” they had a long-term role to play in resolving the situation in South Africa.<sup>33</sup> Yet, enlightened elements within South Africa still argued that the admitted economic effects of the sanctions would not end apartheid, but would ultimately be counterproductive.<sup>34</sup> Sanctions continued, and by early 1988 there were clear indications that sanctions were having a palpable economic effect.<sup>35</sup> Nevertheless, as these sanctions completed their fourth year, there was a report that South African firms continued to act in international commerce through cloaks or fronts, or third-country subsidiaries of South African firms.<sup>36</sup>

Criticism of the effectiveness of the South African sanctions suggests two potential problems in assessing a sanctions program. First, identify-

---

<sup>29</sup> See Peter T. Kilborn, *Psychological Effects Seen for Curbs*, N.Y. TIMES, Sept. 10, 1985, at A13.

<sup>30</sup> See Ellen Hume, *Continuing Anti-Apartheid Protests Hasten Pace Of Exits by U.S. Companies From South Africa*, WALL ST. J., Feb. 27, 1986, at 54.

<sup>31</sup> See Steve Mufson, *South Africa Regime Is Confident Sanctions Could Be Circumvented*, WALL ST. J., June 20, 1986, at 23.

<sup>32</sup> See Anthony Lewis, *Sanctions At Work*, N.Y. TIMES, Mar. 13, 1987, at A35 (so reporting).

<sup>33</sup> Robert S. Greenberger, *U.S. Trade Sanctions on South Africa Starting to Pay Long-Term Dividends*, WALL ST. J., Sept. 21, 1987, at 24 (quoting Rep. Howard Wolpe, chair of House Foreign Affairs Subcommittee on Africa).

<sup>34</sup> See Helen Suzman, Editorial, *Sanctions Won't End Apartheid*, N.Y. TIMES, Oct. 4, 1987, at E23 (so stating).

<sup>35</sup> See, e.g., *South African Trade*, GLOBE & MAIL (Toronto), Dec. 24, 1988, at B4. *But cf.* Robert S. Greenberger, *Congress Moves Toward New Sanctions on South Africa Despite Mixed Results*, WALL ST. J., May 23, 1988, at 16 (sanctions had “hurt” South Africa, but had “failed to prod Pretoria, [South Africa] to dismantle apartheid”).

<sup>36</sup> See *South African Firms Avoid Sanctions, Union Charges*, WALL ST. J., June 23, 1989, at B3A.



ing a single, dramatic objective of a sanctions program may be disingenuous. For example, sanctions did not abruptly end apartheid; hence, the sanctions were ineffective. The truth is that sanctions could not have ended apartheid merely by their imposition; South Africa had to end apartheid. Sanctions, as one instrument of U.S. foreign policy with respect to the South African situation, could only change the mix of the overall circumstances, and at best perhaps affect the pace of events.

Second, typical critiques view sanctions in isolation from other drivers and attempt to test for a direct, causal relationship between the imposition of sanctions and the achievement of broadly conceived objectives. Not only does this approach neglect the inherent difficulty in establishing a causal relationship in any complex set of events, this approach implicitly assumes that the causal relationship here is a binary one, see Figure 1, and that it should be ascertainable in the short term.

Figure 1  
A Simplistic View of Causal Relationships in Sanctions Practice

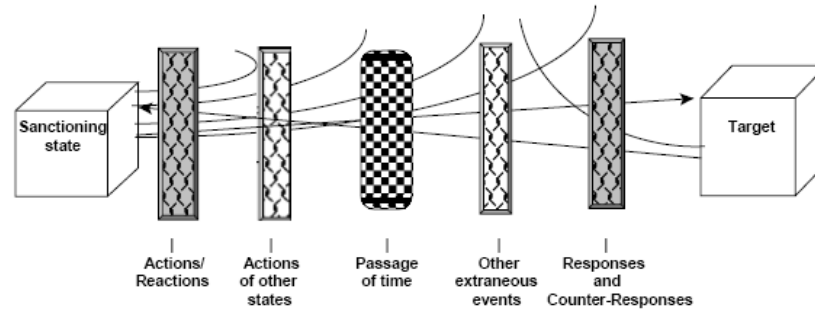


This epistemological position is open to serious question. In the midst of the events surrounding the imposition of the sanctions, the chair of the House Foreign Relations Subcommittee on Africa was reported to have said: “Sanctions aren’t a quick fix for apartheid. There is a long, protracted struggle in process, and [sanctions] are part of a pattern of developments that will shorten this time frame and accelerate the onset of negotiations.”<sup>37</sup> Externalities may have a significant impact on the causal relationship between the sanction and the target, see Figure 2, and the resultant complexities may work against the effectiveness of the policy for which sanctions have been imposed. The longer the program continues, the more graduated or disaggregated its application, the less likely it is that the sanctions will have any obvious effect on the desired policy objective

---

<sup>37</sup> Greenberger, *supra* note 33.

Figure 2 Multidimensional Causal Relationships in Sanctions Practice



It is against this multidimensional background that one must search for reliable assessment criteria with respect to the instrumental effectiveness of economic sanctions. Such criteria should be sensitive to the purposes of sanctions, but they should also be sensitive to the instrumental character of the sanctions involved.<sup>38</sup> The effectiveness of sanctions tends to be measured against broad pronouncements of policy objectives, rather than the instrumental objectives of sanctions themselves. Yet, even when evidently successful, sanctions directly result in the achievement of instrumental objectives: preventing the transfer of assets subject to the sanctioning state's jurisdiction, limiting access to foreign exchange by the target, isolating the target from international trade and financial markets, or conserving assets as a bargaining chip for an eventual resolution of the differences between the sanctioning state and the target. In a properly formulated foreign policy, these instrumental objectives have a place within a broader scheme of objectives, but they are not coincident with the latter.

What seems to be required is greater attention to the instrumental purposes of economic sanctions or perhaps a more empirical, less abstracted approach to the available data. Two relatively straightforward instrumental purposes of sanctions are limiting the flow of foreign exchange to a target and isolating a target from international trade and financial markets. These purposes should be reflected in data concerning foreign exchange holdings (FX) and volume of exports and imports. Accordingly, in this article the empirical assessment tends to focus on FX and trade data. To ensure consistency and comparability in the analysis over time and between sanctions programs, the assessment relies upon data available through the statistical sources of the International Monetary Fund. Furthermore, to test the relevance of trends in

<sup>38</sup> See, e.g., BARRY E. CARTER, INTERNATIONAL ECONOMIC SANCTIONS *supra* note 11, at 14-24 (1988) (discussing effectiveness of sanctions as function of purpose).

the data, each assessment focuses upon the base year in which a sanction program was established or terminated, or both. To place the data in an appropriate historical context, the assessment then extends analysis to data for the five years preceding and the five years following the base year or years. To test whether apparently significant movement in the year-to-year data bears any relationship to the base-year event, the eleven-year series of data is then indexed to the base year. Finally, to place the data in an appropriate socio-regional context, the indexed data is also compared to corresponding eleven-year indexed, aggregate data for the target's geographic region.

### III. DISCUSSION AND ANALYSIS: FOUR CASE STUDIES

#### *A. Zimbabwe/Southern Rhodesia*

##### 1. The Independence Crisis

U.S. participation in U.N.-mandated sanctions against Southern Rhodesia<sup>39</sup> occurred under the authority of UNPA section 5.<sup>40</sup> In November 1965, the Southern Rhodesian government of Prime Minister Ian Douglas Smith promulgated a Unilateral Declaration of Independence (UDI) from the United Kingdom.<sup>41</sup> The UDI halted the process of self-determination for the indigenous population of Southern Rhodesia, originally called for by U.N. General Assembly Resolution No. 1747 in June 1962.<sup>42</sup> Until promulgation of the UDI, the United Kingdom had resisted U.N. jurisdiction over the Southern Rhodesia situation, exercising its veto against a proposed Security Council resolution "inviting" the United Kingdom to refrain from transferring sovereignty to the white-minority government of the colony.<sup>43</sup>

Reacting to the move towards unilateral independence, the U.N. Security Council adopted Security Council Resolution No. 202 on May 6,

---

<sup>39</sup> For background on the history of Southern Rhodesia see CLAIRE PALLEY, *THE CONSTITUTIONAL HISTORY AND LAW OF SOUTHERN RHODESIA* (1966).

<sup>40</sup> 22 U.S.C. § 287(c) (2006).

<sup>41</sup> Proclamation No. 53 of 1965, Rhodesian Gov't Notice 737 N/65 (1965), *reprinted in* 2 ABRAM CHAYES ET AL., *INTERNATIONAL LEGAL PROCESS*, 1313-1315 (1969).

<sup>42</sup> G.A. Res. 1747 (XVI), U.N. GAOR, 16th Sess., Supp. No. 17a, U.N. Doc. A/5100/Add. 1, at 3 (June 28, 1962). This call was repeated later in the same year. G.A. Res. 1755 (XVII), U.N. GAOR 17th Sess., Supp. No. 17, U.N. Doc. A/5217, at 37 (Oct. 12, 1962); G.A. Res. No. 1760 (XVII), U.N. GAOR 17th Sess., Supp. No. 17, U.N. Doc. A/5217, at 38 (Oct. 31, 1968).

<sup>43</sup> See Ghana Morocco, and the Philippines: Joint Draft Resolution, U.N. Doc. S/5425/Rev. 1 (Sept. 11, 1963).

1965.<sup>44</sup> The resolution called on the United Kingdom to take “all necessary action to prevent” UDI.<sup>45</sup> Despite renewed objections from the General Assembly, the UDI proceeded.<sup>46</sup>

On November 12, 1965, the U.N. Security Council adopted Resolution No. 216,<sup>47</sup> condemning UDI and calling on states to refrain from recognizing the current regime in Southern Rhodesia.<sup>48</sup> It expanded on this mandate in Resolution No. 217 on November 20, 1965.<sup>49</sup> The United Kingdom initiated sanctions and other measures,<sup>50</sup> as did the United States,<sup>51</sup> to little effect.

Finally, on December 16, 1966, the U.N. Security Council adopted Resolution No. 232,<sup>52</sup> invoking its authority under the U.N. Charter with respect to mandatory, non-forceable sanctions,<sup>53</sup> and imposed selective prohibitions on import, export, transport, shipment and related transactions. In January 1967, the U.S. President issued Executive Order No. 11,322, invoking UNPA section 5 and implementing Security Council Resolution No. 232.<sup>54</sup> The order delegated to the U.S. Secretary of State control of exports covered by section 414 of the Mutual Security Act of 1954.<sup>55</sup> The order also delegated to the U.S. Secretary of Com-

<sup>44</sup> S.C. Res. 202, U.N. SCOR, 20th Year, U.N. Doc. S/INF/20/Rev. 1, at 6-7 (May 6, 1965).

<sup>45</sup> *Id.* at ¶ 4.

<sup>46</sup> G.A. Res. 2012 (XX), U.N. GAOR, 20th Sess., Supp. No. 14, U.N. Doc. A/6014, at 53 (Oct. 12, 1965); G.A. Res. 2022 (XX), U.N. GAOR, 20th Sess., Supp. No. 14, U.N. Doc. A/6014, at 54 (Nov. 5, 1965).

<sup>47</sup> S.C. Res. 216, U.N. SCOR, 20th Year, U.N. Doc. S/INF/20/Rev. 1, at 8 (Nov. 12, 1965).

<sup>48</sup> *Id.*

<sup>49</sup> S.C. Res. 217, U.N. SCOR, 20th Year, U.N. Doc. S/INF/20/Rev. 1, at 8-9 (Nov. 20, 1965).

<sup>50</sup> See GARY C. HUFBAUER ET AL., *ECONOMIC SANCTIONS RECONSIDERED* 285-293 (2d ed. 1990) (discussing measures).

<sup>51</sup> See, e.g., 7 C.F.R. § 817 (1967) (suspending sugar quota); 31 Fed. Reg. 85 (1966); *id.* at 4783 (1966) (export controls).

<sup>52</sup> S.C. Res. 232, U.N. SCOR, 21st Year, U.N. Doc. S/INF/21/Rev. 1, at 7 (Dec. 16, 1966).

<sup>53</sup> U.N. Charter, art. 41, ¶ 1:

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

<sup>54</sup> Exec. Order No. 11,322, 3 C.F.R. 635 (1967).

<sup>55</sup> Act of August 26, 1954, § 414, 68 Stat. 848 (1954) (codified at 22 U.S.C. §

merce control as to all other prohibited U.S. exports and delegated to the U.S. Secretary of the Treasury control as to all remaining prohibitions.

The political situation in Southern Rhodesia persisted, and on May 29, 1968, the U.N. Security Council adopted Resolution No. 253, which reaffirmed the previous resolutions.<sup>56</sup> It mandated, *inter alia*, that U.N. member states implement a total prohibition on importing commodities and products originating in Southern Rhodesia into their respective territories, as well as a prohibition on the sale or supply by their nationals or from their territories of any products or commodities of whatever national origin to, or intended for the use of, any person or body in Southern Rhodesia, and related activities and transactions.<sup>57</sup> These additional prohibitions were implemented by the United States through the issuance of Executive Order No. 11,419 in July 1968.<sup>58</sup>

Compliance with the U.N. Security Council's mandates proved to be problematic.<sup>59</sup> The United States failed to comply with respect to imports of Rhodesian-origin chrome from 1971 to 1977.<sup>60</sup> However, renewed efforts at a diplomatic resolution of the situation finally resulted in majority rule in Southern Rhodesia, now Zimbabwe.<sup>61</sup> In December 1979, the sanctions were lifted.<sup>62</sup>

The Southern Rhodesia sanctions addressed multilateral, rather than

---

1934 (1958), (repealed 1976); Pub. L. No. 94-329, § 212(b)(1), 90 Stat. 745 (1976). Regulations and other actions under section 414 current as of repeal were grandfathered. § 212(b)(2), 90 Stat. at 745. Control of exports of arms, defense articles and services are now governed by section 38 of the Arms Export Control Act, 22 U.S.C. § 2778 (1976).

<sup>56</sup> S.C. Res. 253, U.N. SCOR, 23rd Year, U.N. Doc. S/INF/23/Rev. 1, at 5 (May 29, 1968).

<sup>57</sup> This prohibition did not include "supplies intended strictly for medical purposes, educational equipment and material . . . , publications, news material and, in special humanitarian circumstances, food-stuffs." *Id.* ¶ 3(d).

<sup>58</sup> Exec. Order No. 11,419, 3 C.F.R. 125 (1969), *amended in* Exec. Order No. 11,978, 3 C.F.R. 110 (1978)

<sup>59</sup> *See, e.g.*, Eighth Report of the Security Council Committee Established In Pursuance of Resolution 253 (1968) Concerning the Question of Southern Rhodesia, U.N. Doc. S/11927/Add. 1 (1976).

<sup>60</sup> *See Diggs v. Shultz*, 470 F.2d 461, 466-67 (D.C. Cir. 1972) (discussing exception from import ban for Rhodesian chrome and holding that whether President should have chosen alternative to breaching U.N. Charter was not proper question for judicial resolution).

<sup>61</sup> *See HUFBAUER ET AL.*, *supra* note 50, at 287 (discussing efforts for a diplomatic resolution).

<sup>62</sup> Exec. Order No. 12,183, 3 C.F.R. 472 (1980). The Rhodesian Sanctions Regulations were entirely removed in January 1992. *See* 57 Fed. Reg. 1386 (1992) (removing 31 C.F.R. pt. 530).

unilateral, human rights violations which threatened international peace and security.<sup>63</sup> Multilateral sanctions were imposed, and the crisis was resolved – thirteen years after sanctions were first applied. Based upon analysis of the available empirical data, however, it would be my view that it is doubtful that the sanctions played any significant role in the resolution of the crisis.

U.S. sanctions were lifted in 1979, and that year serves as the base year for the assessment of the first part of the sanctions experience in Zimbabwe/Southern Rhodesia. Trends in the data over the eleven-year assessment period are erratic. Foreign exchange holdings were relatively limited both in the pre-1979 period of the Southern Rhodesian regime and in the post-1979 period of the emerging state of Zimbabwe, see Figure 3. Export data exhibit an upward turn following the lifting of sanctions in 1979, a characteristic post-sanctions phenomenon, but performance quickly flattens out see Figure 4. An upward turn in import data is more pronounced, but also begins to fall off soon after the base year, see Figure 5. Given these limitations, I also examined the performance of a broader economic indicator, gross domestic product (GDP), during the eleven-year period. GDP performance echoes the trends found in the export and import data, see Figure 6.

This parallelism may suggest that trade and financial sanctions were less of a distinct factor in the economic behavior of this emerging state during and following the crisis. The indexed data examined relative to the corresponding indexed data for the African region, see Figures 7-9, suggests that the performance of the Zimbabwe data is not inconsistent with regional performance over the eleven-year assessment period. A comparison of the two sets of indexed data does not indicate any unique or significant pressures on Southern Rhodesian performance, prior to the base-year; nor does it suggest the removal of such pressures with respect to Zimbabwean performance after the base-year.

---

<sup>63</sup> See S.C. Res. 232, *supra* note 52.

FIGURE 3<sup>64</sup>  
ZIMBABWE/SOUTHERN  
RHODESIA: FOREIGN  
EXCHANGE DATA 1974-1984  
(IN US \$ MILLIONS; BASE  
YEAR 1979)

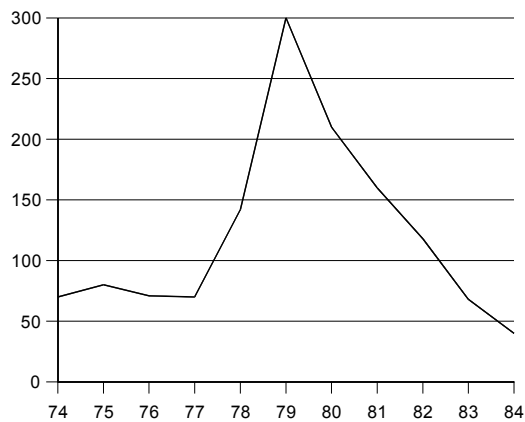
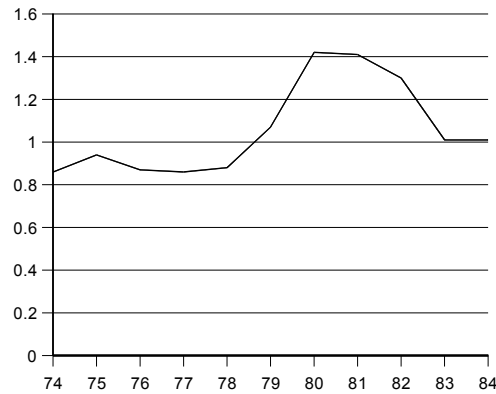


FIGURE 4<sup>65</sup>  
ZIMBABWE/SOUTHERN RHODESIA:  
EXPORTS 1974-1984  
(IN US \$ BILLIONS; BASE YEAR  
1979)

<sup>64</sup> *International Financial Statistics, International Monetary Fund eLibrary Data*, INT'L MONETARY FUND, <http://www.elibrary-data.imf.org> (follow "International Financial Statistics (IFS)" hyperlink; then select the variables "Country: Zimbabwe," "Concept: Foreign Exchange," "Unit: US Dollars," "Time: 1974-1984;" then retrieve dataset) (last visited Oct. 18, 2012).

<sup>65</sup> *International Financial Statistics, International Monetary Fund eLibrary Data*, INT'L MONETARY FUND, <http://www.elibrary-data.imf.org> (follow "International Financial Statistics (IFS)" hyperlink; then select the variables "Country: Zimbabwe," "Concept: Goods, Value of Exports," "Unit: US Dollars," "Time: 1974-1984;" then retrieve dataset) (last visited Oct. 18, 2012).

FIGURE 566  
ZIMBABWE/SOUTHERN RHODESIA:  
IMPORTS 1974-1984  
(IN US \$ BILLIONS; BASE YEAR  
1979)

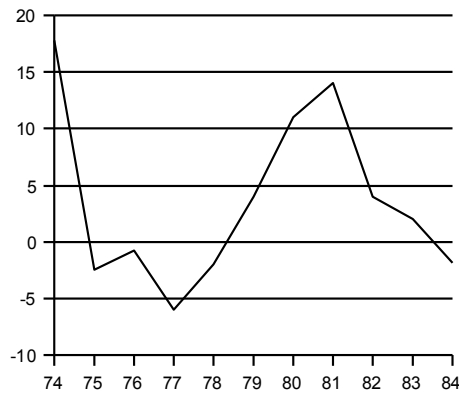


FIGURE 667  
ZIMBABWE/SOUTHERN RHODESIA:  
GDP 1974-1984  
(PERCENT CHANGE AT CONSTANT  
1980 PRICES)

<sup>66</sup> *International Financial Statistics, International Monetary Fund eLibrary Data*, INT'L MONETARY FUND, <http://www.elibrary-data.imf.org> (follow "International Financial Statistics (IFS)" hyperlink; then select the variables "Country: Zimbabwe," "Concept: Goods, Value of Imports," "Unit: US Dollars," "Time: 1974-1984;" then retrieve dataset) (last visited Oct. 18, 2012).

<sup>67</sup> *International Financial Statistics, International Monetary Fund eLibrary Data*, INT'L MONETARY FUND, <http://www.elibrary-data.imf.org> (follow "International Financial Statistics (IFS)" hyperlink; then select the variables "Country: Zimbabwe," "Concept: GDP, Real," "Unit: US Dollars," "Time: 1974-1984;" then retrieve dataset) (last visited Oct. 18, 2012).



2013] *HUMAN RIGHTS AND UNINTENDED CONSEQUENCES* 95

FIGURE 768  
ZIMBABWE/SOUTHERN RHODESIA:  
INDEXED FOREIGN EXCHANGE  
1974-1984  
(1979 = 1.00)

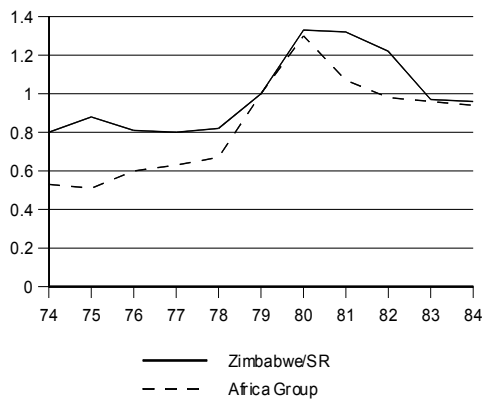
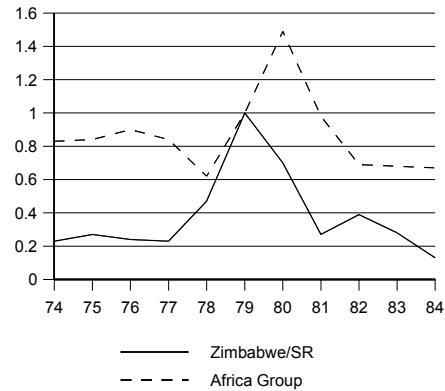
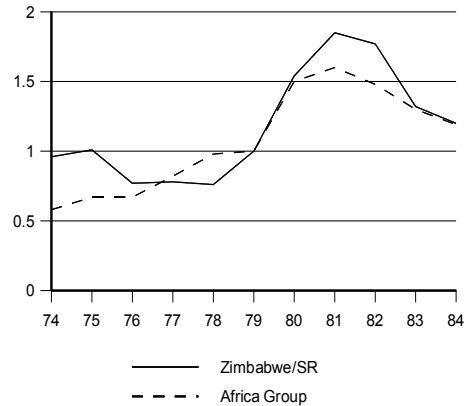


FIGURE 869  
ZIMBABWE/SOUTHERN  
RHODESIA: INDEXED EXPORTS  
1974-1984  
(1979 = 1.00)

<sup>68</sup> INT'L MONETARY FUND, *supra* note 64; *International Financial Statistics, International Monetary Fund eLibrary Data*, INT'L MONETARY FUND, <http://www.elibrary-data.imf.org> (follow "International Financial Statistics (IFS)" hyperlink; then select the variables "Country: Africa," "Concept: Total Reserves Excluding Gold," "Unit: US Dollars," "Time: 1974-1984;" then retrieve dataset) (last visited Oct. 20, 2012). Africa Group: For statistical purposes, the IMF group of developing African countries ("Africa Group") as of 1990 included: Algeria, Benin, Botswana, Burkina Faso, Cameroon, Central African Republic, Chad, Congo, Côte d'Ivoire, Equatorial Guinea, Ethiopia, Gabon, Gambia, Ghana, Kenya, Lesotho, Liberia, Madagascar, Malawi, Mali, Mauritania, Mauritius, Morocco, Niger, Nigeria, Rwanda, Senegal, Seychelles, Sierra Leone, Somalia, South Africa, Sudan, Swaziland, Tanzania, Togo, Tunisia, Uganda, Zaire, Zambia, and Zimbabwe. Indexed values of data: For any indexed base year  $b$  with a US dollar value of  $v_b$  (here, 1979), the indexed value  $V$  of any year  $x$  is as follows:  $V_y = V_x \div V_b$

<sup>69</sup> INT'L MONETARY FUND, *supra* note 65; *International Financial Statistics, International Monetary Fund eLibrary Data*, INT'L MONETARY FUND, <http://www.elibrary-data.imf.org> (follow "International Financial Statistics (IFS)" hyperlink; then select the variables "Country: Africa," "Concept: Goods, Value of Exports," "Unit: US Dollars," "Time: 1974-1984;" then retrieve dataset) (last visited Oct. 20, 2012).

FIGURE 970  
 ZIMBABWE/SOUTHERN RHODESIA: INDEXED IMPORTS 1974-1984  
 (1979 = 1.00)



## 2. Zimbabwe

### Crisis

Over the next twenty years, Zimbabwe deteriorated into a one-party, autocratic political situation in which dissent and democratic processes were suppressed by the government of Robert Mugabe. In March 2003, the U.S. President invoked the unilateral authority of the IEEPA and issued Executive Order 13,288,<sup>71</sup> blocking the property of “persons undermining democratic processes or institutions in Zimbabwe” specified in or in accordance with the order.<sup>72</sup> These included seventy-seven individual officials of the Zimbabwe Government identified in an Annex to the order, beginning with President Mugabe himself.<sup>73</sup>

How clever was this “smart sanction”?<sup>74</sup> Touching only specific,

<sup>70</sup> INT’L MONETARY FUND, *supra* note 66; *International Financial Statistics, International Monetary Fund eLibrary Data*, INT’L MONETARY FUND, <http://www.elibrary-data.imf.org> (follow “International Financial Statistics (IFS)” hyperlink; then select the variables “Country: Africa,” “Concept: Goods, Value of Imports,” “Unit: US Dollars,” “Time: 1974-1984;” then retrieve dataset) (last visited Oct. 20, 2012).

<sup>71</sup> Exec. Order No. 13,288, 3 C.F.R. 186 (2004).

<sup>72</sup> *Id.* § 1, at 187.

<sup>73</sup> *Id.* at Annex, at 188-91.

<sup>74</sup> See Peter L. Fitzgerald, *Managing “Smart Sanctions” Against Terrorism Wisely*, 36 NEW ENG. L. REV. 957, 960-61 (2001-2002) (distinguishing “traditional sanctions,” which traditionally place trade restrictions on entire target state and its nationals, and “smart sanctions,” which target specific individuals and com-

named evil-doers, and then only as to their property that might become subject to U.S. jurisdiction, it avoids any unpleasant economic spill-over into the lives of the people of Zimbabwe, and any uncomfortable confrontation with allies reluctant to take action against President Mugabe's oppressive regime. Of course, this design also means that it would be relatively easy for the named targets to avoid the prohibition by diverting assets through third parties or nominal accounts.

In what has become a consistent, and perhaps disturbing, administrative practice,<sup>75</sup> it was almost seventeen months before the U.S. Treasury published regulations implementing Executive Order 13,288,<sup>76</sup> although persons identified in the Annex to the order had already been added to Treasury's "Appendix A" of blocked or "designated" persons.<sup>77</sup> The Zimbabwe Sanctions Regulations (ZSRs) implemented the blocking and evasion prohibitions contained in sections 1 and 2 of the order.<sup>78</sup> Other provisions added detail to the stark prohibitions of the order and the implementing regulations. Any transfer of blocked property in violation of the ZSRs is considered "null and void and shall not be the basis for the assertion or recognition of any interest in or right, remedy, power, or privilege with respect to such property or property interests."<sup>79</sup> As has been the consistent procedure in Treasury sanctions programs since March 1979,<sup>80</sup> persons subject to U.S. jurisdiction in possession or control of blocked assets were required to hold blocked funds in interest-

---

panies or types of individuals and companies, reducing humanitarian costs).

<sup>75</sup> *See id.* at 966:

Each time a new set of sanctions is ordered an entirely new set of regulatory controls is created. With so many programs there are often delays in promulgating the detailed regulations implementing the new controls. For example, it took nearly eighteen months for the Taliban (Afghanistan) Sanctions Regulations to appear in the Federal Register following the President's announcement of the sanctions. Additionally, the agency interprets and applies the same regulatory wording differently in various programs, depending upon the intended target of the sanctions, making it difficult to discern a coherent approach to the controls. In fact, in the anti-terrorist sanctions and other recently published programs, OFAC now routinely states that it reserves the right to apply "differing interpretations of similar language" in each of its various sanctions programs.

(Footnotes omitted.)

<sup>76</sup> Zimbabwe Sanctions Regulations, 69 Fed. Reg. 45,246 (July 1, 2004) (codified 31 C.F.R. pt. 541 (2005)).

<sup>77</sup> 31 C.F.R. pt. 5, app. A (2004). *See* Zimbabwe Sanctions Regulations 69 Fed. Reg. at 45,247 (discussing changes to Appendix A).

<sup>78</sup> 31 C.F.R. §§ 541.201, 204 (2011).

<sup>79</sup> *Id.* § 541.202.

<sup>80</sup> *See* 31 C.F.R. § 500.205 (1980) (requiring interest-bearing accounts for China-related blocked funds).

bearing accounts.<sup>81</sup> As to blocked physical property, the expenses incident to maintenance of such property are declared to be the responsibility of the owners and operators of such property, and are not to be netted out of the blocked property.<sup>82</sup>

By November 2005, there was little apparent effect on the behavior of the targeted individuals. At that point, the U.S. President issued a major revision of Executive Order 13,288.<sup>83</sup> The revision expanded the annexed list of blocked individuals to include 128 officials of the Mugabe Government and added 33 entities to the blocked category.<sup>84</sup> It also expanded the scope of administrative “designations” of other persons determined “to be owned or controlled by, or acting or purporting to act directly or indirectly for or on behalf of,” a listed person, to include three additional target categories to be determined by the U.S. Secretary of the Treasury, in consultation with the U.S. Secretary of State.<sup>85</sup> These new categories of administratively designated blocked persons are: (i) persons who engaged in actions or policies to undermine the democratic processes or institutions in Zimbabwe; (ii) persons who “materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services in support of,” blocked persons or undermining actions or policies; and, (iii) immediate family members of any blocked person.<sup>86</sup>

This expansion of categories of blocked persons highlights two increasingly prominent features of contemporary sanctions practice – the reliance on administrative designation and the targeting of intermediary service providers. The designation process has become a significant aspect of modern sanctions programs, where it operates as a highly flexible and informal penalty procedure.<sup>87</sup> The process has raised serious concerns over the minimal process due to designated persons,<sup>88</sup> but des-

---

<sup>81</sup> 31 C.F.R. § 541.203 (2011).

<sup>82</sup> *Id.* § 541.205(a). Blocked physical property may be subject to sale or liquidation, in the discretion of the Director of Treasury’s Office of Foreign Assets Control, with net proceeds placed in a blocked interest-bearing account in the name of the owner of the property. *Id.* § 541.205(b).

<sup>83</sup> Exec. Order No. 13,391, 3 C.F.R. 206 (2006).

<sup>84</sup> *Id.* at Annex .

<sup>85</sup> Exec. Order No. 13,288, § 1(b), 3 C.F.R. 186 (2004).

<sup>86</sup> Exec. Order No. 13,391, § 2, 3 C.F.R. 206 (2006) (amending Exec. Order 13,288 to add § 1(a)(ii)(A)-(C)).

<sup>87</sup> *See, e.g.*, 31 C.F.R. § 501.807 (2010) (setting forth procedures governing removal of names from administrative lists of designated persons); *see also id.* § 501.806 (establishing procedures for unblocking funds believed to have been blocked due to mistaken identity).

<sup>88</sup> *See, e.g.* Simon Chesterman, *UNaccountable? The United Nations, Emer-*

ignation has rarely been successfully challenged.<sup>89</sup>

The targeting of intermediary service providers has become an increasingly favored sanctions technique.<sup>90</sup> Such intermediaries often are more accessible to sanctioning states than the primary targets. The technique may also have the effect of raising the agency costs to the primary targets of the sanctions, since intermediaries are placed at risk and are in effect pressed into “uncovering and reporting . . . underlying violations [by primary targets] as promptly as possible.”<sup>91</sup>

The revision also for the first time barred donations of humanitarian aid<sup>92</sup> to blocked persons.<sup>93</sup> This may seem to raise the vexing question of tension between economic sanctions and humanitarian objectives, but this aid prohibition is actually a closed circuit.<sup>94</sup> It affects only donations to or through blocked persons, not to the intended beneficiaries of such aid.<sup>95</sup>

---

*agency Powers, and the Rule of Law*, 42 VAND. J. TRANSNAT'L L. 1509, 1533-1534 (2009) (criticizing designation process in U.N. Security Council practice); Mehrdad Payandeh & Heiko Sauer, *European Union: UN Sanctions and EU Fundamental Rights*, 7 INT'L J. CONST. L. 306 (2009) (discussing challenges in European courts claiming asset blockings without adequate legal protections).

<sup>89</sup> See, e.g., Case T-306/01, *Yusuf v. Council of the European Union*, 2005 E.C.R. II-3544, ¶ 339 (holding judicial review of decisions ultimately made by Security Council severely limited); Case C-402/05 P, *Kadi v. Council of the European Union*, 2008 E.C.R. II-A1, ¶¶ 286-288 (mandating judicial review of lawfulness of EU act implementing Security Council sanctions resolutions).

<sup>90</sup> See, e.g., S.C. Res. 661, ¶ 4, U.N. Doc. S/RES/661 (Aug. 6, 1990) (prohibiting provision of funds “or any other financial or economic resources” to Iraqi Government or “to any commercial, industrial or public utility undertaking in Iraq or Kuwait”).

<sup>91</sup> Michael P. Malloy, *Between Iraq and a Hard Place: U.S. International Banking and the Iraqi Sanctions*, 11 ANN. REV. BANKING L. 375, 415 (1992).

<sup>92</sup> See 50 U.S.C. § 1702(b)(2)(A) (2006), which provides:

(b) The authority granted to the President by this section does not include the authority to regulate or prohibit, directly or indirectly— . . .

(2) donations, by persons subject to the jurisdiction of the United States, of articles, such as food, clothing, and medicine, intended to be used to relieve human suffering, except to the extent that the President determines that such donations (A) would seriously impair his ability to deal with any national emergency declared under section 1701 of this title. . . .

<sup>93</sup> Exec. Order No. 13,391, §2, 3 C.F.R. 206 (2006) (amending Exec. Order 13,288 to add § 1(b)).

<sup>94</sup> See, e.g., Joy Gordon, *Economic Sanctions, Just War Doctrine, and the “Fearful Spectacle of the Civilian Dead,”* 49 CROSS CURRENTS 387 (1999); Michael P. Malloy, *Economic Sanctions and Human Rights: A Delicate Balance*, 3 HUM. RTS. BRIEF, Fall 1995, at 12.

<sup>95</sup> Cf. Exec. Order No. 13,391, §2, 3 C.F.R. 206 (2006) (amending Exec. Order

Political repression and corruption apparently persisted unabated. The continued actions and policies of the Zimbabwe Government undermining democratic processes or institutions were evident in the significantly flawed elections held on June 27, 2008, accompanied by acts of violence and other human rights abuses against political opponents.<sup>96</sup> In July 2008, the U.S. President revisited the situation and issued a new executive order,<sup>97</sup> supplementing the measures imposed under the previous two orders.<sup>98</sup> The new order blocked any property subject to U.S. jurisdiction of any person determined by the U.S. Secretary of the Treasury, after consultation with the U.S. Secretary of State, to be a senior official of the Zimbabwe Government.<sup>99</sup> Furthermore, in addition to the authority to designate and block any person determined to have engaged in actions or policies to undermine Zimbabwe's democratic processes or institutions,<sup>100</sup> the U.S. Secretary of the Treasury was authorized to designate and block the assets of: (i) any person determined to be owned or controlled by, directly or indirectly, the Zimbabwe Government or any official thereof;<sup>101</sup> (ii) any person determined to be responsible

---

13,288 to add § 1(c):

(c) The prohibitions in paragraph (a) of this section include but are not limited to (I) the making of any contribution or provision of funds, goods, or services by, to, or for the benefit of any person whose property and interests in property are blocked pursuant to this order, and (ii) the receipt of any contribution or provision of funds, goods, or services from any such person.

<sup>96</sup> See Exec. Order No. 13,469, 3 C.F.R. 216 (2009) (citing Zimbabwe election irregularities, continued political violence, human rights abuses, and public corruption as "unusual and extraordinary threat to the foreign policy of the United States").

<sup>97</sup> *Id.*

<sup>98</sup> See *id.* § 1(d) (declaring that provisions of Exec. Order No. 13,288 and Exec. Order No. 13,391 remain in effect, and that new order did not affect any action taken pursuant to previous orders).

<sup>99</sup> *Id.* § 1(a)(i). This category is somewhat broader than the corresponding category in each of the two previous orders. The original March 2003 order targeted specifically identified members of the Zimbabwe Government. See Exec. Order No. 13,288, Annex, 3 C.F.R. 186 (2004). The November 2005 order expanded the Annex list, and also authorized the Treasury Secretary to add (or "designate") other persons who engaged in actions or policies to undermine the democratic processes or institutions in Zimbabwe, most if not all of whom would presumably be government officials, as well as intermediaries. Exec. Order No. 13,391, §2, 3 C.F.R. 206 (2006) (amending Exec. Order 13,288 to add § 1(a)(ii)(A)). Thus, the July 2008 order adopts a different – and possibly broader – rubric for designation and blocking, status as a senior official in the Zimbabwe government.

<sup>100</sup> Exec. Order No. 13,469, § 1(a)(iii), 3 C.F.R. 216 (2009)

<sup>101</sup> *Id.* § 1(a)(ii).

for, or to have participated in, human rights abuses related to political repression in Zimbabwe;<sup>102</sup> (iii) any person determined to be engaged in, or to have engaged in, activities facilitating public corruption by senior officials of the Zimbabwe Government;<sup>103</sup> (iv) any person determined to be a spouse or dependent child of any person blocked under any of the three orders;<sup>104</sup> (v) any person determined “to have materially assisted, sponsored, or provided financial, material, logistical, or technical support for, or goods or services in support of,” the Zimbabwe Government, any senior official thereof, or any person blocked under the 2005 or 2008 order;<sup>105</sup> and (vi) any person determined to be owned or controlled by, or to have acted or purported to act for or on behalf of, directly or indirectly, any person blocked under any of the three orders.<sup>106</sup>

As of the end of 2009, the U.S. Treasury regulations implemented had still not been amended in light of the November 2005 and July 2008 executive orders, a common problem with the U.S. Treasury’s various economic sanctions programs.<sup>107</sup> However, the list of designated and blocked persons has been amended regularly,<sup>108</sup> and to that extent at

---

<sup>102</sup> *Id.* § 1(a)(iv).

<sup>103</sup> *Id.* § 1(a)(v).

<sup>104</sup> *Id.* § 1(a)(vi).

<sup>105</sup> *Id.* § 1(a)(vii).

<sup>106</sup> *Id.* § 1(a)(viii).

<sup>107</sup> *See supra* 74 and accompanying text (discussing delays).

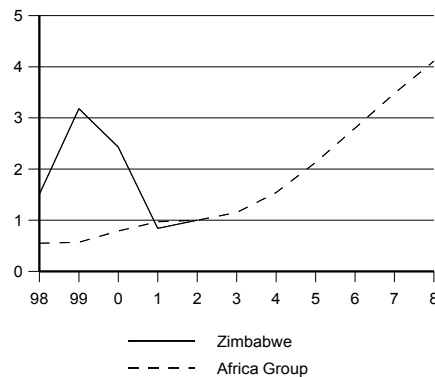
<sup>108</sup> *See, e.g.*, 73 Fed. Reg. 7364 (Jan. 30, 2008) (adding designations of blocked entities pursuant to Exec. Order No. 13,391); 73 Fed. Reg. 45,101 (July 25, 2008) (adding designations pursuant to Exec. Order No. 13,469); 73 Fed. Reg. 73,690 (Nov. 25, 2008) (additional designations). *But cf.* 76 Fed. Reg. 38,534 (June 27, 2011) (codified at 31 C.F.R. §§ 501.807, 510.201(b) notes 1-2, 515.306 note, 536.312 note, 536.408(a), 537.201(a) notes 1-3, 538.305 note, 541.201(a) notes 1-3, 542.201(a) notes 1-3, 543.201(a) notes 1-3, 544.201(a) notes 1-3, 546.201(a) notes 1-2, 547.201(a) notes 1-2, 548.201(a) notes 1-2, 549.201(a) notes 1-2, 551.201 notes 1-2, 561.201(a)(5) note, 561.202 note 1, 561.405, 562.201 notes 1-2, 576.201(a) notes 1-2, 576.512(b), 588.201(a) notes 1-2, 593.201(a) notes 1-3, 594.201 note 1, 594.201(a) notes 2-3, 595.311 note, 597.301 note, 598.314 notes 1-3, 598.408(a); revising 31 C.F.R. ch. V, app. A, 31 C.F.R. pt. 560 app. A; removing 31 C.F.R. ch. V, app. note, app. B) (amending 31 CFR chapter V to replace Appendix A list of persons with whom transactions and dealings are prohibited by various economic sanctions programs administered by OFAC with information on how to obtain up-to-date lists of such persons on OFAC Web site or by other means). For the latest comprehensive list of blocked persons, blocked vessels, specially designated nationals, specially designated terrorists, specially designated global terrorists, foreign terrorist organizations, and specially designated narcotics traffickers, see *Specially Designated Nationals List*, OFF. OF FOREIGN ASSETS CONTROL, U.S. TREASURY DEP’T, <http://www.treas.gov/ofac> (last visited Oct. 12, 2012) (hereinafter *Designation List*).



least, the U.S. Treasury has kept pace with the orders.

While the situation remains uncertain in Zimbabwe, there is little reliable empirical data available. Zimbabwe has not consistently reported financial data to the IMF – certainly a useful tactic straight out of the sanctions-evader’s playbook – and often no data is available after 2002. As of that date, however, Zimbabwe would appear to be lagging in the region, see Figures 10-13.

FIGURE 10<sup>109</sup>  
ZIMBABWE: INDEXED FOREIGN EXCHANGE 1998-2008  
(2002 = 1.00)



<sup>109</sup> *International Financial Statistics, International Monetary Fund eLibrary Data*, INT’L MONETARY FUND, <http://www.elibrary-data.imf.org> (follow “International Financial Statistics (IFS)” hyperlink; then select the variables “Country: Zimbabwe,” “Concept: Foreign Exchange,” “Unit: US Dollars,” “Time: 1998-2008;” then retrieve dataset) (last visited Oct. 20, 2012); *International Financial Statistics, International Monetary Fund eLibrary Data*, INT’L MONETARY FUND, <http://www.elibrary-data.imf.org> (follow “International Financial Statistics (IFS)” hyperlink; then select the variables “Country: Africa,” “Concept: Total Reserves Excluding Gold,” “Unit: US Dollars,” “Time: 1998-2008;” then retrieve dataset) (last visited Oct. 20, 2012). Africa Group: For statistical purposes, the IMF group of developing African countries (“Africa Group”) as of 2008 included: Algeria, Angola, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Cape Verde, Central African Republic, Chad, Comoros, Congo, Democratic Republic of Congo, Côte d’Ivoire, Djibouti, Ethiopia, Gabon, the Gambia, Ghana, Guinea, Guinea Bissau, Kenya, Lesotho, Liberia, Madagascar, Malawi, Mali, Mauritania, Mauritius, Morocco, Mozambique, Namibia, Niger, Nigeria, Rwanda, São Tomé & Príncipe, Senegal, Seychelles, Sierra Leone, Somalia, South Africa, Sudan, Swaziland, Tanzania, Togo, Tunisia, Uganda, Zambia, and Zimbabwe.

FIGURE 11<sup>110</sup>  
ZIMBABWE: INDEXED EXPORTS 2001-  
2008  
(2001 = 1.00)

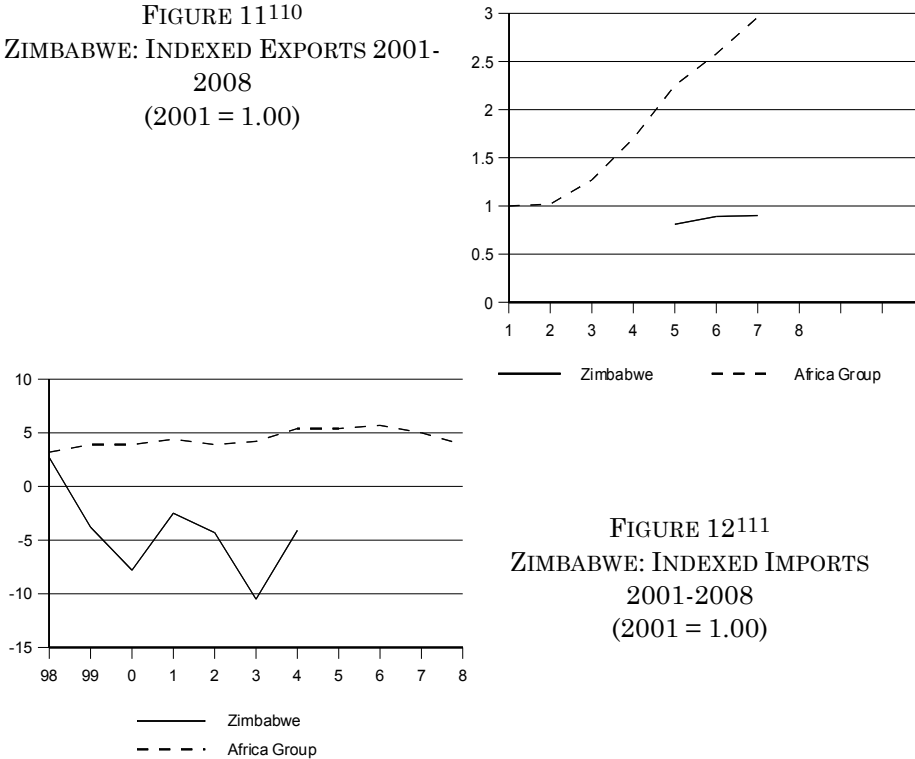
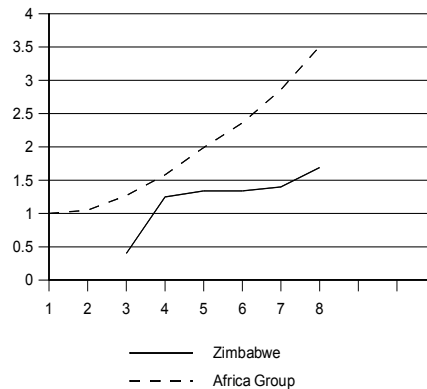


FIGURE 12<sup>111</sup>  
ZIMBABWE: INDEXED IMPORTS  
2001-2008  
(2001 = 1.00)

<sup>110</sup> *International Financial Statistics, International Monetary Fund eLibrary Data*, INT'L MONETARY FUND, <http://www.elibrary-data.imf.org> (follow "International Financial Statistics (IFS)" hyperlink; then select the variables "Country: Zimbabwe," "Concept: Goods, Value of Exports," "Unit: US Dollars," "Time: 2001-2008;" then retrieve dataset) (last visited Oct. 20, 2012); *International Financial Statistics, International Monetary Fund eLibrary Data*, INT'L MONETARY FUND, <http://www.elibrary-data.imf.org> (follow "International Financial Statistics (IFS)" hyperlink; then select the variables "Country: Africa," "Concept: Goods, Value of Exports," "Unit: US Dollars," "Time: 2001-2008;" then retrieve dataset) (last visited Oct. 20, 2012).

<sup>111</sup> *International Financial Statistics, International Monetary Fund eLibrary Data*, INT'L MONETARY FUND, <http://www.elibrary-data.imf.org> (follow "International Financial Statistics (IFS)" hyperlink; then select the variables "Country: Zimbabwe," "Concept: Value of Imports," "Unit: US Dollars," "Time: 2001-2008;" then retrieve dataset) (last visited Oct. 20, 2012); *International Financial Statistics, International Monetary Fund eLibrary Data*, INT'L MONETARY FUND, <http://www.elibrary-data.imf.org> (follow "International Financial Statistics (IFS)" hyperlink; then select the variables "Country: Africa," "Concept: Goods, Value of Imports," "Unit: US Dollars," "Time: 2001-2008;" then retrieve dataset) (last visited Oct. 20, 2012).

FIGURE 13112  
ZIMBABWE: INDEXED GDP  
1998-2008  
(PERCENT CHANGE OVER  
PREVIOUS YEAR)



### B. South Africa

The struggle to end control of Namibia (formerly the Mandate of South West Africa) by the Government of South Africa (GOSA), and the policy of apartheid in South Africa, was a painful and protracted one.<sup>113</sup> The basic shape of the sanctions applied against South Africa in the course of this struggle was determined by the United Nations. While the South African situation was at least as compelling as that involving Zimbabwe/Southern Rhodesia, the initial U.N. response to the South Africa situation was markedly more tentative. In 1963, the U.N. Security Council invited participation in a voluntary embargo of arms sales to South Africa,<sup>114</sup> and the United States complied.<sup>115</sup> Then in 1977, the

<sup>112</sup> *International Financial Statistics, International Monetary Fund eLibrary Data*, INT'L MONETARY FUND, <http://www.elibrary-data.imf.org> (follow "International Financial Statistics (IFS)" hyperlink; then select the variables "Country: Zimbabwe," "Concept: GDP, Real," "Unit: US Dollars," "Time: 1998-2008;" then retrieve dataset) (last visited Oct. 20, 2012); *International Financial Statistics, International Monetary Fund eLibrary Data*, INT'L MONETARY FUND, <http://www.elibrary-data.imf.org> (follow "International Financial Statistics (IFS)" hyperlink; then select the variables "Country: Africa," "Concept: GDP, Real," "Unit: US Dollars," "Time: 1998-2008;" then retrieve dataset) (last visited Oct. 20, 2012).

<sup>113</sup> See, e.g., Maxwell J. Mehlman et al., *United States Restrictions on Exports to South Africa*, 73 AM. J. INT'L L. 581 (1979); Kenneth W. Abbott, *Linking Trade to Political Goals: Foreign Policy Export Controls in the 1970s and 1980s*, 65 MINN. L. REV. 739, 782-787 (1980-1981) (discussing sanctions against South Africa). See also Jennifer Davis et al., *Economic Disengagement and South Africa: The Effectiveness and Feasibility of Implementing Sanctions and Divestment*, 15 LAW & POLY INT'L BUS. 529 (1983) (assessing effectiveness of South Africa sanctions).

<sup>114</sup> S.C. Res. 181, U.N. SCOR, 18th Year, U.N. Doc. S/INF/18/Rev. 1, at 7 (Aug. 7, 1963).

U.N. Security Council adopted Resolution No. 418, mandating prohibitions of exports to South Africa of arms, munitions and military equipment, as well as of material for the manufacture and maintenance thereof.<sup>116</sup> In early 1978, the United States imposed an embargo on all exports and re-exports of U.S.-origin goods and technical information to or for use by any specified military or police entity in South Africa.<sup>117</sup> These prohibitions applied to Namibia as well.<sup>118</sup>

The specialized nature of the controls, both in terms of the limited nature of the goods embargoed and of the proscribed importers, tended to minimize the impact of the controls as a sanction.<sup>119</sup> In 1985, the U.N. Security Council adopted Resolution No. 569, calling for a broader, though still relatively specialized, range of sanctions against South Africa, including suspension of new investments and export financing, and prohibition of sales of South African krugerrand, of new nuclear-related contracts, and of sales of computer equipment that could be used for military or police functions.<sup>120</sup> The U.S. President, in effect, implemented these sanctions in September 1985, under the authority of the IEEPA, forestalling threatened congressional action to mandate a broad range of sanctions.<sup>121</sup> However, the following year the U.S. Congress did act, over a presidential veto, to enact the Comprehensive Anti-Apartheid Act of 1986 (CAAA), thus broadening the sanctions and seizing the initiative from the U.S. President.<sup>122</sup>

Ostensible progress in the situation finally occurred.<sup>123</sup> In March 1990, following Namibian independence, the sanctions imposed on Namibia were lifted.<sup>124</sup> In July 1991, the U.S. President issued Executive

---

<sup>115</sup> See, e.g., 15 C.F.R. § 385.4(a)(1) (1964), *redesignated by* 53 Fed. Reg. 37,751 (Oct. 1, 1988) (recodified at 15 C.F.R. § 785.4(a)(1) (1989)).

<sup>116</sup> S.C. Res. 418, U.N. SCOR, 32nd Year, S/INF/33, at 5 (Nov. 4, 1977).

<sup>117</sup> 43 Fed. Reg. 7311 (Feb. 16, 1978) (codified at 15 C.F.R. pt. 371, 373, 379, 385, 399 (1979)).

<sup>118</sup> See 43 Fed. Reg. 43,449, 43,450 (Sept. 21, 1978) (codified at 15 C.F.R. pt. 385 supp. 2 (1979)).

<sup>119</sup> See Mehlman et. al, *supra* note 113, at 593-595.

<sup>120</sup> S.C. Res. 569, U.N. Doc. S/RES/569 (July 26, 1985).

<sup>121</sup> Exec. Order No. 12,532, 3 C.F.R. 387 (1986) (codified at 27 C.F.R. § 47.52 (1986)); Exec. Order No. 12,535, 3 C.F.R. 393 (1986).

<sup>122</sup> Comprehensive Anti-Apartheid Act of 1986 (CAAA), Pub. L. No. 99-440, 100 Stat. 1086 (1986); Joint Resolution to make corrections in the Comprehensive Anti-Apartheid Act of 1986, Pub. L. No. 99-631, 100 Stat. 3515 (1986). See Exec. Order No. 12,571, 3 C.F.R. 238 (1987) (implementing CAAA).

<sup>123</sup> See *Excerpts From Bush's Remarks on Sanctions: 'This Progress Is Irreversible,'* N.Y. TIMES, July 11, 1991, at A10 (noting dispute over fulfillment of statutory condition that political prisoners be released).

<sup>124</sup> See, e.g., South Africa Transactions Regulations, 55 Fed. Reg. 10,618

Order No. 12,769<sup>125</sup> determining that the GOSA had taken all of the steps specified in section 311(a) of the CAAA,<sup>126</sup> thus permitting termination of the sanctions specified in title III of the act. In July 1991, U.S. Treasury terminated IEEPA sanctions under the South African Transactions Regulations (SATRs),<sup>127</sup> effective 12:01 p.m., e.s.t., July 10, 1991.<sup>128</sup> The termination of the SATRs had no effect on the U.S. Treasury Department's enforcement authority with respect to acts committed prior to that date.<sup>129</sup>

U.S. Commerce Department export controls remained in effect for items controlled under the U.N. arms embargo until May 1994.<sup>130</sup> On May 25, 1994, the U.N. Security Council lifted the arms embargo against South Africa and withdrew its recommendation for other voluntary restrictions on sales to the South African military and police.<sup>131</sup> The U.N. Security Council took this action at the request of the new GOSA, since the justification for maintaining the arms embargo and other restrictions no longer existed.<sup>132</sup> In response to these developments, the U.S. Commerce Department eliminated its controls implementing the arms embargo and removed specific controls on exports to the South African military and police, effective May 25, 1994.<sup>133</sup> On August 17, 1994, the U.S. Department of State published an amendment to the International Traffic in Arms Regulations<sup>134</sup> to reflect that it was no longer U.S. policy to deny licenses, other approvals, or exports and imports of defense articles and defense services destined for or originating

---

(Mar. 21, 1990) (codified at 31 C.F.R. §§ 545.306, 545.312 (1989)).

<sup>125</sup> Exec. Order No. 12,769, 3 C.F.R. 342 (1992).

<sup>126</sup> See 22 U.S.C. § 5061(a) (1988).

<sup>127</sup> 31 C.F.R. pt. 545 (1994).

<sup>128</sup> Exec. Order No. 12,769, 3 C.F.R. 342 (codified at 31 C.F.R. § 545.599(a) (1992)).

<sup>129</sup> 31 C.F.R. § 545.599(b) (1994).

<sup>130</sup> See S.C. Res. 418, *supra* note 116; see also 15 C.F.R. pt. 778, supp. 2 (1994); S.C. Res. 919, U.N. Doc. S/RES/919 (May 25, 1994) (lifting the arms embargo against South Africa; withdrawing recommendation for other voluntary restrictions on sales to South African military and police); Exports to South Africa; Removal of Foreign Policy Controls, 59 Fed. Reg. 30,684 (May 25, 1994) (Commerce regulations; removing foreign policy controls with respect to South Africa).

<sup>131</sup> S.C. Res. 919, *supra* note 130, ¶ 1.

<sup>132</sup> See Amendment to the International Traffic in Arms Regulations, 59 Fed. Reg. 42,158 (Aug. 17, 1994) (codified at 22 C.F.R. pt. 126 (1994)) (discussing South Africa developments).

<sup>133</sup> *Id.* (removing foreign policy controls with respect to South Africa).

<sup>134</sup> 22 C.F.R. pts. 120-130 (1994).

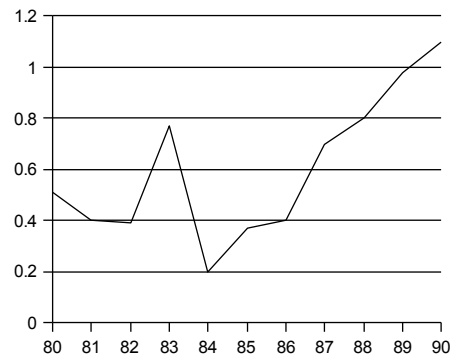
in South Africa.<sup>135</sup>

The SATRs also contained sanctions mandated by the CAAA that were to be lifted upon repeal of the authorizing provisions or terminated by Presidential determination pursuant to the act.<sup>136</sup> They were removed, effective June 29, 1995.<sup>137</sup> Again, removal did not affect ongoing enforcement proceedings, nor did it prevent initiation of enforcement proceedings where the relevant statute of limitations had not run.<sup>138</sup>

The South Africa sanctions, particularly those imposed in 1985-1986, involved actions that were, as a practical matter if not as a technical legal matter, multilateral, though they were initiated unilaterally by each sanctioning state.<sup>139</sup> In assessing the empirical effects of these sanctions, 1985 has been chosen as the base year.

It would be difficult to argue on the basis of available data that the sanctions had any significant instrumental effect. Foreign exchange holdings, in readily available data, trended upward from the base year, see Figure 14. Though comparatively less dramatic, the trends in both export data, see Figure 15, and import data, see Figure 16, were relatively positive. Comparative indexed data, see Figures 17-19, confirm these findings.

FIGURE 14<sup>140</sup>  
SOUTH AFRICA: FOREIGN  
EXCHANGE DATA 1980-1990  
(IN US \$ BILLIONS; BASE YEAR  
1985)



<sup>135</sup> Amendment to the International Traffic in Arms Regulations, 59 Fed. Reg. at 42,158 (codified at 22 C.F.R. § 126.1(a), (c) (1994)).

<sup>136</sup> Foreign Funds Control Regulations, 60 Fed. Reg. 33,725 (June 29, 1995) (removing 31 C.F.R. pts. 520, 540, 545, 555, 565, 570 & 580).

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 33,726.

<sup>139</sup> See 31 C.F.R. § 545.203 (1986) (varying effective dates of South African sanctions).

<sup>140</sup> *International Financial Statistics, International Monetary Fund eLibrary Data*, INT'L MONETARY FUND, <http://www.elibrary-data.imf.org> (follow "International Financial Statistics (IFS)" hyperlink; then select the variables "Country: South Africa," "Concept: Foreign Exchange," "Unit: US Dollars," "Time: 1980-1990;" then retrieve dataset) (last visited Oct. 18, 2012).

FIGURE 15<sup>141</sup>  
SOUTH AFRICA: EXPORTS 1980-1990  
(IN US \$ BILLIONS; BASE YEAR 1985)

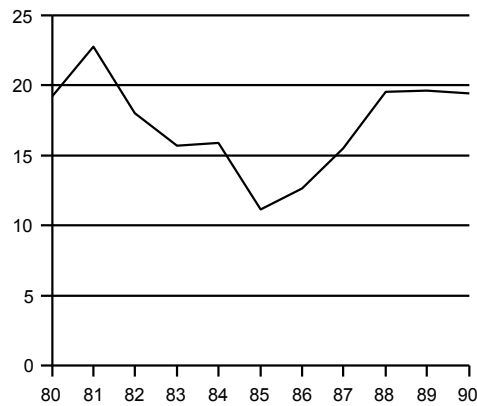
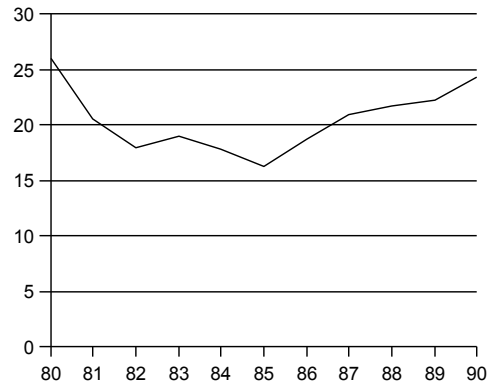


FIGURE 16<sup>142</sup>  
SOUTH AFRICA: IMPORTS 1980-  
1990  
(IN US \$ BILLIONS; BASE YEAR  
1985)

<sup>141</sup> *International Financial Statistics, International Monetary Fund eLibrary Data*, INT'L MONETARY FUND, <http://www.elibrary-data.imf.org> (follow "International Financial Statistics (IFS)" hyperlink; then select the variables "Country: South Africa," "Concept: Goods, Value of Exports," "Unit: US Dollars," "Time: 1980-1990;" then retrieve dataset) (last visited Oct. 18, 2012).

<sup>142</sup> *International Financial Statistics, International Monetary Fund eLibrary Data*, INT'L MONETARY FUND, <http://www.elibrary-data.imf.org> (follow "International Financial Statistics (IFS)" hyperlink; then select the variables "Country: South Africa," "Concept: Goods, Value of Imports," "Unit: US Dollars," "Time: 1980-1990;" then retrieve dataset) (last visited Oct. 18, 2012).

FIGURE 17<sup>143</sup>  
SOUTH AFRICA: INDEXED  
FOREIGN EXCHANGE 1980-  
1990  
(1985 = 1.00)

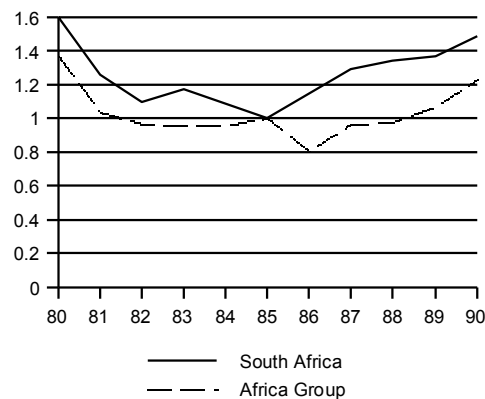
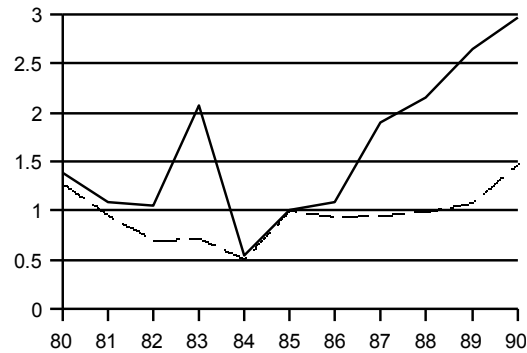


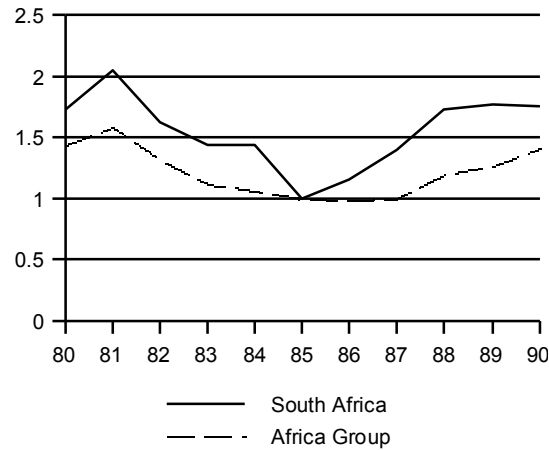
FIGURE 18<sup>144</sup>  
SOUTH AFRICA: INDEXED  
EXPORTS 1980-1990  
(1985 = 1.00)

<sup>143</sup> INT'L MONETARY FUND, *supra* note<sup>140</sup>; *International Financial Statistics, International Monetary Fund eLibrary Data*, INT'L MONETARY FUND, <http://www.elibrary-data.imf.org> (follow "International Financial Statistics (IFS)" hyperlink; then select the variables "Country: Africa," "Concept: Total Reserves excluding Gold," "Unit: SDRs," "Time: 1980-1990;" then retrieve dataset) (last visited Oct. 19, 2012). Africa Group: For statistical purposes, the IMF group of developing African countries ("Africa Group") as of 1990 included: Algeria, Benin, Botswana, Burkina Faso, Cameroon, Central African Republic, Chad, Congo, Côte d'Ivoire, Equatorial Guinea, Ethiopia, Gabon, Gambia, Ghana, Kenya, Lesotho, Liberia, Madagascar, Malawi, Mali, Mauritania, Mauritius, Morocco, Niger, Nigeria, Rwanda, Senegal, Seychelles, Sierra Leone, Somalia, South Africa, Sudan, Swaziland, Tanzania, Togo, Tunisia, Uganda, Zaire, Zambia, and Zimbabwe. Indexed values of data: For any indexed base year  $b$  with a US dollar value of  $v_b$  (here, 1985), the indexed value  $V$  of any year  $x$  is as follows:  $V_y = V_x \div V_b$

<sup>144</sup> INT'L MONETARY FUND, *supra* note 141; *International Financial Statistics, International Monetary Fund eLibrary Data*, INT'L MONETARY FUND, <http://www.elibrary-data.imf.org> (follow "International Financial Statistics (IFS)" hyperlink; then select the variables "Country: Africa," "Concept: Goods, Value of Exports," "Unit: US Dollars," "Time: 1980-1990;" then retrieve dataset) (last visited Oct. 19, 2012).



FIGURE 19<sup>145</sup>  
SOUTH AFRICA: INDEXED IMPORTS 1980-1990  
(1985 = 1.00)



### C. Myanmar

As a result of the persistent suppression of democracy and political opposition by a military junta in Myanmar (formerly Burma), beginning in 1988, the United States denied economic aid to the country.<sup>146</sup> The United States voted against multilateral development bank assistance to Myanmar, declined to promote U.S. commercial investment or trade with Myanmar, and refrained from selling arms to Myanmar.<sup>147</sup> During this same period, however, regional trade with Myanmar increased.<sup>148</sup> Despite the application of such “soft” sanctions by the United States, human rights violations and political repression by the military junta in

<sup>145</sup> INT’L MONETARY FUND, *supra* note 142; *International Financial Statistics, International Monetary Fund eLibrary Data*, INT’L MONETARY FUND, <http://www.elibrary-data.imf.org> (follow “International Financial Statistics (IFS)” hyperlink; then select the variables “Country: Africa,” “Concept: Goods, Value of Imports,” “Unit: US Dollars,” “Time: 1980-1990,” then retrieve dataset) (last visited Oct. 19, 2012).

<sup>146</sup> *Burma Freedom and Democracy Act of 1995-S.1511: Hearing Before the S. Comm. on Banking, Hous., and Urban Affairs*, 104th Cong. 55 (1996) (statement of Kent Wiedemann, Deputy Assistant Sec’y of State, Bureau of East Asian and Pac. Affairs)

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

Myanmar continued.<sup>149</sup>

By May 1996, the U.S. Department of State Department was characterizing conditions in Myanmar as a “political stalemate” between the junta and the National League for Democracy, the democratic opposition, in which “[e]gregious human rights violations continue[d].”<sup>150</sup> At that point, the Burma Freedom and Democracy Act was proposed in response to the arrest of several opposition figures by the Myanmar Government.<sup>151</sup> Approximately fifty percent of the Myanmar national budget was committed to military expenditures. Investment in Myanmar in effect subsidized the junta’s anti-democratic and human rights violations, and U.S. investors constituted the fourth largest source of that investment.<sup>152</sup> The bill would have imposed mandatory sanctions in an effort to isolate the junta,<sup>153</sup> but the U.S. Department of State viewed mandatory sanctions as too restrictive.<sup>154</sup> It wanted more flexibility to respond to ongoing events in Myanmar.<sup>155</sup> The oil company Unocal, which retained a 28.6 percent interest in a major Myanmar-French joint venture, also argued that mandatory sanctions would only harm U.S. investors as foreign direct investment from other states continued to flow despite U.S. sanctions.<sup>156</sup>

---

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 54.

<sup>151</sup> S. 1511, 104th Cong. (1995).

<sup>152</sup> Steven Erlanger, *U.S. Weighs Tougher Reaction to Burmese Crackdown*, N.Y. TIMES, Oct. 5, 1996, at 4.

<sup>153</sup> *Burma Freedom and Democracy Act of 1995-S.151*, *supra* note 146, at 20 (statement of Sen. McConnell).

<sup>154</sup> *Id.* at 56 (statement of Kent Wiedemann, Deputy Assistant Sec’y of State, Bureau of East Asian and Pac. Affairs).

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 56 (statement of John F. Imle, Jr., President, Unocal Corp.). Ironically, whatever the effect of the sanctions themselves on foreign direct investment, U.S. firms investing in Myanmar have been exposed to significant litigation risk for their alleged complicity in human rights violations by the Myanmar Government. *See, e.g., Doe v. Unocal Corp.*, 963 F. Supp. 880 (C.D. Cal. 1997) (granting in part and denying in part motion to dismiss), *aff’d in part, rev’d in part*, 395 F.3d 932 (9th Cir. 2002), *reh’g en banc*, 403 F.3d 708 (9th Cir. 2005) (granting parties’ stipulated motion to dismiss in light of settlement); *cf. Doe v. Unocal Corp.*, 27 F. Supp. 2d 1174 (C.D. Cal. 1998) (granting French corporation codefendant’s motion to dismiss for lack of personal jurisdiction). *See generally* Laura Bowersett, Casenote, *Doe v. Unocal: Torturous Decision for Multinationals Doing Business in Politically Unstable Environments*, 11 TRANSNAT’L LAW. 361 (1998) (discussing litigation risks); Saman Zia-Zarifi, *Suing Multinational Corporations in the U.S. for Violating International Law*, 4 UCLA J. INT’L L. & FOREIGN AFF. 81, 96-98 (1999) (discussing *Unocal*); Shaw W. Scott, Note, *Taking Riggs Seriously: The ATCA Case Against a Corporate Abettor of Pinochet Atroci-*

Mandatory sanctions were ultimately rejected by the U.S. Congress, but a hybrid sanctions provision was inserted into the Omnibus Consolidated Appropriations Act of 1997 (OCA),<sup>157</sup> via the Cohen amendment.<sup>158</sup> OCA § 570 was an odd blend of mandatory, congressionally-imposed sanctions and discretionary authority for presidential sanctions. Until the U.S. President determined and certified to the U.S. Congress that Myanmar had made “measurable and substantial progress in improving human rights practices and implementing democratic government,” the following mandatory sanctions were to apply: (i) withholding of U.S. aid, except for humanitarian assistance; counter-narcotics assistance; and assistance promoting human rights and democratic values;<sup>159</sup> (ii) negative U.S. votes in international financial institutions<sup>160</sup> against any loan or other funding to or for Myanmar;<sup>161</sup> and (iii) denial of entry visas to any Myanmar Government official.<sup>162</sup>

On the discretionary side, the U.S. President was given the authority to prohibit “new investment” in Myanmar by U.S. persons. This could occur if the U.S. President determined and certified to the U.S. Congress that, after enactment of OCA, the Myanmar Government had “physically harmed, re-arrested for political acts, or exiled” Daw Aung San Suu Kyi, the leader of the National League for Democracy, or had engaged in “large-scale repression or violence against the democratic opposition.”<sup>163</sup> Any such sanctions would apply until the U.S. President de-

---

*ties*, 89 MINN. L. REV. 1497, 1521-1524 (2005) (discussing implications of *Unocal*).

<sup>157</sup> Omnibus Consolidated Appropriations Act of 1997 (OCA), Pub. L. No. 104-208, § 570, 110 Stat. 3009, 3009-166 (1997).

<sup>158</sup> 142 Cong. Rec. S8868-02 (daily ed. July 25, 1996).

<sup>159</sup> OCA § 570(a)(1)(A)-(C).

<sup>160</sup> *I.e.*, the International Bank for Reconstruction and Development (World Bank), World Bank affiliates, the Asian Development Bank, and the International Monetary Fund. *Id.* § 570(f)(1).

<sup>161</sup> *Id.* § 570(a)(2).

<sup>162</sup> *Id.* § 570(a)(3). This prohibition does not include any action required by treaty or to staff the Myanmar mission to the United States. *Id.*

<sup>163</sup> *Id.* § 570(b). For these purposes, “new investment” is defined to mean: any of the following activities if such an activity is undertaken pursuant to an agreement, or pursuant to the exercise of rights under such an agreement, that is entered into with the Government of Burma [*i.e.*, Myanmar] or a non-governmental entity in Burma [*sic*], on or after the date of the certification under subsection (b):

(A) the entry into a contract that includes the [economic] development of resources located in Burma [*sic*], or the entry into a contract providing for the general supervision and guarantee of another person’s performance of such a contract;

terminated that “measurable and substantial progress in improving human rights practices and implementing democratic government” had occurred.<sup>164</sup> The U.S. President also had authority to waive any sanction (mandatory or discretionary) if application of the sanction would be contrary to U.S. national security interests.<sup>165</sup>

OCAA required the U.S. President to seek multilateral support from ASEAN member states and other trading partners of Myanmar to bring democracy to and to improve the human rights practices and quality of life in Myanmar.<sup>166</sup> It also required U.S. presidential reports every six months on Myanmar’s progress toward democratization and on the pursuit of a multilateral strategy.<sup>167</sup>

In May 1997, the President issued Executive Order 13,047, invoking OCAA § 570 and IEEPA.<sup>168</sup> The order prohibited: (i) new investment in Myanmar by U.S. persons;<sup>169</sup> (ii) approval or other facilitation by a U.S. person, wherever located, of a transaction by a foreign person, if the transaction constituted prohibited “new investment” in Myanmar if engaged in by a U.S. person or within the United States;<sup>170</sup> and (iii) any transaction by a U.S. person, or within the United States, that evaded

---

(B) the purchase of a share of ownership, including an equity interest, in that development; [or,]

(C) the entry into a contract providing for the participation in royalties, earnings, or profits in that development, without regard to the form of the participation:

Provided, That the term “new investment” does not include the entry into, performance of, or financing of a contract to sell or purchase goods, services, or technology.

*Id.* § 570(f)(2). Since this discretionary sanction was time-limited to post-OCAA investment, it did not appear that it had any effect on the significant participation of, for example, Unocal in its joint venture with Total and the Myanmar Government. *Cf.* Bowersett, *supra* note 156 (discussing private litigation concerning Unocal activities in Myanmar).

<sup>164</sup> OCAA § 570(a), 110 Stat. at 3009-166.

<sup>165</sup> *Id.* § 570(e).

<sup>166</sup> *Id.* § 570(d).

<sup>167</sup> *Id.*

<sup>168</sup> Exec. Order No. 13,047, 3 C.F.R. 202 (1998) (codified at 31 C.F.R. pt. 537 (1998)).

<sup>169</sup> *Id.* § 1. For these purposes, the term “United States person” is defined to mean “any United States citizen, permanent resident alien, juridical person organized under the laws of the United States (including foreign branches), or any person in the United States. *Id.* § 4(c), at 203.

<sup>170</sup> *Id.* § 2(a), at 202. It may be argued that extending the prohibition to a transaction by a “foreign person” may be beyond the intended scope of OCAA § 570(b), but the order’s invocation of IEEPA would seem to give sufficiently overlapping authority to cover such an extension of the prohibition.

or avoided, or had the purpose of evading or avoiding, or attempted to violate, any prohibition of the order.<sup>171</sup> The order did not prohibit entry into, or performance or finance of, a contract to sell or purchase goods, services, or technology, with specified exceptions.<sup>172</sup> The order did prohibit such contractual activity if it was for the general supervision and guarantee of another person's performance of a contract for the economic development of resources located in Myanmar.<sup>173</sup> The order also applied to a contract if payment under the contract, in whole or in part, was in shares of ownership in the economic development of resources located in Myanmar,<sup>174</sup> or through participation in royalties, earnings, or profits from the economic development of resources located in Myanmar.<sup>175</sup>

As has now become a typical pattern in recent U.S. sanctions practice,<sup>176</sup> a year passed before U.S. Treasury published implementing regulations, the Burmese Sanctions Regulations (BSRs).<sup>177</sup> The regulations did little more than codify the terms of the order. By 2001, only one substantive provision had been added to the BSRs, a general license<sup>178</sup> authorizing divestiture of a U.S. person's investment in favor of a foreign buyer, notwithstanding the facilitation prohibition.<sup>179</sup>

Despite the OCAA mandatory and discretionary sanctions, the situation within Myanmar did not change, and in July 2003 the Burmese Freedom and Democracy Act of 2003 (BFD Act)<sup>180</sup> was signed into law to restrict the financial resources of the junta. The BFD Act required the U.S. President to ban U.S. importation of Myanmar products beginning thirty days after enactment and to consider blocking the assets of junta members and preventing further financial or technical assistance to

---

<sup>171</sup> *Id.* § 2(b). OCAA § 570 does not explicitly deal with attempts, evasions, or avoidance, but IEEPA authority is probably broad enough to cover such a secondary prohibition. *Cf. supra* note 170 (discussing role of IEEPA).

<sup>172</sup> Exec. Order No. 13,047, § 3, 3 C.F.R. 202, 203.

<sup>173</sup> *Id.* § 3(a). For these purposes, the term "economic development of resources located in" Myanmar does not include nonprofit educational, health, or other humanitarian programs or activities. *Id.* § 4(f), at 28,302.

<sup>174</sup> *Id.* § 3(b)(i).

<sup>175</sup> *Id.* § 3(b)(ii).

<sup>176</sup> *See supra* note 75 (discussing administrative delays).

<sup>177</sup> Burmese Sanctions Regulations, 63 Fed. Reg. 27,846 (May 21, 1998) (codified at 31 C.F.R. pt. 537).

<sup>178</sup> 31 C.F.R. § 537.504 (2001).

<sup>179</sup> *See id.* § 537.202 (prohibiting facilitation of transaction by foreign person).

<sup>180</sup> Burmese Freedom and Democracy Act of 2003 (BFD Act) of 2003, Pub. L. No. 108-61, 117 Stat. 864 (2003) (codified at 50 U.S.C. § 1701 note).

Myanmar until specified conditions were met.<sup>181</sup> To implement the BFD Act, and to take additional steps in response to the junta's continued repression of the democratic opposition, the U.S. President again invoked the authority of IEEPA to block assets subject to U.S. jurisdiction of specified persons and to prohibit certain transactions.<sup>182</sup> The order imposed an asset blocking of all property subject to U.S. jurisdiction<sup>183</sup> of four governmental entities listed in an Annex to the order, beginning with the ruling State Peace and Development Council.<sup>184</sup> This list was to be supplemented by U.S. Treasury "designations" of persons determined by the U.S. Secretary of the Treasury, after consultation with the Secretary of State, to fall into either of the following two categories: (i) a senior official of the Myanmar Government, the State Peace and Development Council, the Union Solidarity and Development Association, or any successor entity to any of these;<sup>185</sup> and (ii) any person "owned or controlled by, or acting or purporting to act for or on behalf of, directly or indirectly," any person listed in the Annex or designated by the Secretary.<sup>186</sup> The "designation" process itself may be troubling in terms of due process expectations.<sup>187</sup> The order expressly provided that listed

---

<sup>181</sup> *Id.*

<sup>182</sup> Exec. Order No. 13,310, 3 C.F.R. 241 (2004). The order revoked the operative provisions of Exec. Order No. 13,407 to the extent that they were inconsistent with the new order. *Id.* § 12, at 244. However, the order does not affect the continued effectiveness of any rules, regulations, orders, licenses, or other administrative action issued, taken, or continued under the BSRs, except to the extent expressly terminated, modified, or suspended by the order. *Id.* § 11, at 243. The sanctions program was further modified in October 2007 by Exec. Order No. 13,448, 3 C.F.R. 304 (2008), in April 2008 by Exec. Order No. 13,464, 3 C.F.R. 189 (2009), and in July 2012 by Exec. Order No. 13,619, 77 Fed. Reg. 41,243 (July 11, 2012).

<sup>183</sup> For these purposes the concept "property subject to U.S. jurisdiction" is expressed in the order as "all property and interests in property . . . that are in the United States, that hereafter come within the United States, or that are or hereafter come within the United States, or that are or hereafter come within the possession or control of United States persons, including their overseas branches." Exec. Order No. 13,310, § 1, 3 C.F.R. 241. The term "United States person" was defined by the order to mean "any United States citizen, permanent resident alien, entity organized under the laws of the United States or any jurisdiction within the United States (including foreign branches), or any person in the United States." *Id.* § 5(c), at 242.

<sup>184</sup> *Id.* § 1(a).

<sup>185</sup> *Id.* § 1(b)(i).

<sup>186</sup> *Id.* § 1(b)(ii).

<sup>187</sup> For an excellent discussion of the due process issues (and other constitutional concerns) raised by contemporary U.S. sanctions practice, see Laura K. Donohue, *Constitutional and Legal Challenges to the Anti-Terrorist Finance Re-*

and designated persons “who might have a constitutional presence in the United States,”<sup>188</sup> were to be accorded no prior notice of any listing or designation.<sup>189</sup> The U.S. Treasury’s generally applicable procedures with respect to post hoc challenges to designation are minimal at best,<sup>190</sup> and the BSRs themselves contained no guidance in this regard.<sup>191</sup>

In a somewhat unusual move for U.S. sanctions practice, the U.S. President also formally determined, pursuant to the requirement of IEEPA § 203(b)(2),<sup>192</sup> that the making of donations of articles of humanitarian aid “by, to, or for the benefit of any person” listed in or designated pursuant to the order would seriously impair his ability to deal with the declared national emergency, and he therefore prohibited such donations.<sup>193</sup> In addition, the order prohibited: (i) “exportation” or “re-exportation,” directly or indirectly, to Myanmar of any financial services either from the United States or by a U.S. person, wherever located;<sup>194</sup>

---

*gime*, 43 WAKE FOREST L. REV. 643, 662-667 (2008).

<sup>188</sup> Note that persons without a “constitutional presence” presumably do not have standing to raise due process concerns. *People’s Mojahedin Org. of Iran v. Dep’t of State*, 182 F.3d 17, 22 (D.C. Cir. 1999). *Cf.* *Nat’l Council of Resistance of Iran v. Dep’t of State*, 251 F.3d 192, 196 (D.C. Cir. 2001) (holding process under Antiterrorism and Effective Death Penalty Act “material support” procedures statutorily inadequate as to entity with “constitutional presence”).

<sup>189</sup> Exec. Order No. 13,310, § 7, 3 C.F.R. 241, 243. The explicit justification for this lack of prior notice is the President’s finding that “because of the ability to transfer funds or other assets instantaneously, prior notice to such persons of measures to be taken pursuant to this order would render these measures ineffectual.” *Id.*

<sup>190</sup> See 31 C.F.R. § 501.807 (2001) (setting forth procedures for removal of names from appendices); *cf. id.* § 501.806 (establishing procedures for unblocking funds as blocked due to mistaken identity).

<sup>191</sup> *But see id.* § 537.101 (incorporating by reference procedures of 31 C.F.R. pt. 501).

<sup>192</sup> 50 U.S.C. §1702(b)(2) (1988).

<sup>193</sup> Exec. Order No. 13,310, § 6, 3 C.F.R. 241, 243.

<sup>194</sup> *Id.* § 2(a)(i)-(ii), at 242. The order does not explain what the “exportation” of a financial service would entail. Does this mean that the service must be provided to or for the use of a person in Myanmar? Or could it mean merely the provision of a service provided for use anywhere in the world, for the benefit of a person in Myanmar? The revised BSRs defines the term “exportation or reexportation of financial services to Burma [*sic*]” to encompass both meanings:

(a) The transfer of funds, directly or indirectly, from the United States or by a U.S. person, wherever located, to Burma; or

(b) The provision, directly or indirectly, to persons in Burma of insurance services, investment or brokerage services (including but not limited to brokering or trading services regarding securities, debt, commodities, options or foreign

and (ii) the approval, financing, facilitation, or guarantee by a U.S. person, wherever located, of a transaction by a foreign person, if the transaction by the latter would be prohibited under the order when performed by a U.S. person or within the United States.<sup>195</sup> In addition, except to the extent excluded by the order or otherwise licensed under implementing regulations, the order prohibited U.S. importation of any article that was a product of Myanmar.<sup>196</sup> Except for this import prohibition, the order grandfathered “any activity, or any transaction incident to an activity, undertaken pursuant to an agreement, or pursuant to the exercise of rights under such an agreement,” entered into by a U.S. person with the Myanmar Government or a non-governmental entity in Myanmar prior to 12:01 a.m. eastern daylight time on May 21, 1997.<sup>197</sup>

In the original version of U.S. sanctions against Myanmar, effectiveness was open to serious question. Given the resolve of Myanmar’s regional neighbors to foster increased trade and economic growth, Myanmar was not without significant trading partners.<sup>198</sup> It was also unclear

---

exchange), banking services, money remittance services; loans, guarantees, letters of credit or other extensions of credit; or the service of selling or redeeming traveler’s checks, money orders and stored value.

31 C.F.R. § 537.305 (2011). This was the first use of the technical term in Treasury’s Office of Foreign Assets Control regulations, and it was “specifically tailored to further the goals of the sanctions prohibitions set forth in” the BSRs. *Id.* § 537.305 note.

<sup>195</sup> Exec. Order No. 13,310, § 2(b), 3 C.F.R. 241, 242.

<sup>196</sup> *Id.* § 3. In the national interest of the United States, the order waives BFD Act importation prohibitions with respect to:

any and all articles that are a product of [Myanmar] to the extent that prohibiting the importation of such articles would conflict with the international obligations of the United States under the Vienna Convention on Diplomatic Relations, the Vienna Convention on Consular Relations, the United Nations Headquarters Agreement, and other legal instruments providing equivalent privileges and immunities.

*Id.* § 8, at 243. For additional licensing of importations under the BSRs, see 31 C.F.R. §§ 537.511-537.516 (2011) (licensing, respectively, of accompanying baggage, importation for official or personal use by foreign diplomatic and consular officials, importation and exportation of diplomatic pouches, importation of certain personal and household effects, importation of information or informational materials, and importation of Myanmar-origin articles and incidental transactions purchased and shipped prior to effective date). *See also* Burmese Sanctions Regulations, 72 Fed. Reg. 34,376 (June 22, 2007) (codified at 31 C.F.R. § 537.527 (2007)) (amending BSRs to provide for specific license applications for U.S. importation of Myanmar-origin animals and specimens in sample quantities).

<sup>197</sup> Exec. Order No. 13,310, § 13, 3 C.F.R. 241, 244.

<sup>198</sup> *See, e.g.,* Seth Mydans, *The World: Just What is the Burmese Problem?*, N.Y. TIMES, Oct. 13 1996, at 4 (discussing regional situation).



whether the United States had any practical leverage to ameliorate the policies and practices of the Myanmar Government.<sup>199</sup> The more aggressive, less selective sanctions eventually put in place by the United States may simply have been too delayed in coming to have a substantial impact.<sup>200</sup> The empirical data appears to support this view. Given the range of sanctions involved with the enactment of the BFD Act in 2003, this analysis examines foreign exchange, export, and import data,

---

<sup>199</sup> *Id.*

<sup>200</sup> The situation remained fragile well into 2012, at which point the president stated in Exec. Order No. 13,619:

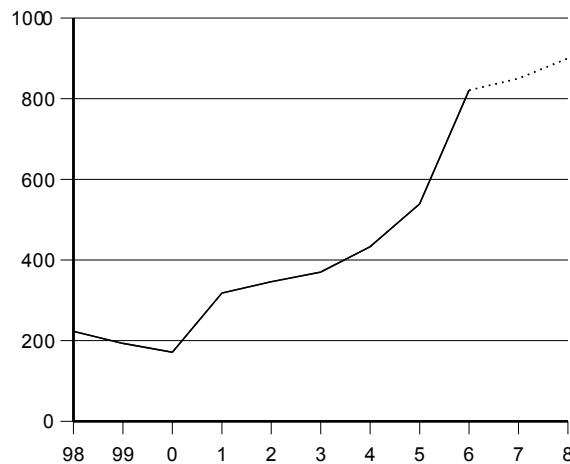
The Government of Burma has made progress towards political reform in a number of areas, including by releasing hundreds of political prisoners, pursuing ceasefire talks with several armed ethnic groups, and pursuing a substantive dialogue with the democratic opposition. Recognizing that such reform is fragile, I hereby find that the continued detention of political prisoners, efforts to undermine or obstruct the political reform process, efforts to undermine or obstruct the peace process with ethnic minorities, military trade with North Korea, and human rights abuses in Burma particularly in ethnic areas, effectuated by persons within or outside the Government of Burma, constitute an unusual and extraordinary threat to the national security and foreign policy of the United States.

Exec. Order No. 13,619, 77 Fed. Reg. 41,243 (July 11, 2012). This was widely viewed as an easing of sanctions, relatively speaking, putting in place a more narrowly targeted blocking of persons obstructing progress in Myanmar, with persons subject to U.S. jurisdiction still prohibited from engaging in transactions with specially designated nationals or businesses that they control. *Id.* § 1(a). See, e.g., Annie Lowrey, *U.S. Sanctions on Myanmar Formally Eased*, N.Y. TIMES, July 12, 2012, <http://www.nytimes.com/2012/07/12/world/asia/us-sanctions-on-myanmar-formally-eased.html> (discussing “targeted easing” of sanctions). It should be noted that, in light of significant political and economic changes that the new civilian government of Myanmar had recently made, the United States had already moved to restore full diplomatic relations with Myanmar in January 2012. See Steven Lee Myers & Seth Mydans, *U.S. Restores Full Ties to Myanmar After Rapid Reforms*, N.Y. TIMES, Jan. 14, 2012, <http://www.nytimes.com/2012/01/14/world/asia/united-states-resumes-diplomatic-relations-with-myanmar.html> (reporting on diplomatic developments). Nevertheless, in May 2012, the President continued the 1997 national emergency with respect to Myanmar (referred to as Burma) declared under IEEPA in Executive Order 13,047. Continuation of the National Emergency With Respect to Burma, 77 Fed. Reg. 29,851 (May 17, 2012). Meanwhile, in April 2012, the British prime minister expressed support for suspension, but not termination, of EU sanctions against Myanmar, “to reflect the perceived fragility of [political] reforms and the threat of hard-line elements in the country rolling them back.” Thomas Fuller, *British Premier Against Lifting Of Sanctions On Myanmar*, N.Y. TIMES, Apr. 14, 2012, at A4. Canada, Australia and the European Union have also recently eased sanctions with respect to Myanmar. Lowrey, *supra*.

organized around the base year of 2003.

Following the asset blocking in 2003, foreign exchange holdings appear to have dramatically increased for Myanmar, see Figure 20, but at a rate not inconsistent with performance in the region, see Figure 23. Though the available data are incomplete, it appears that exports also increased significantly following the base year, see Figure 21, and in this case Myanmar was significantly out-performing the region, see Figure 24. Although imports also increased markedly after the base year, see Figure 22, these increases did not appear to be substantially out of line with import performance for the region, see Figure 25. In brief, the empirical data do not present the picture of a target state noticeably impacted by the constraints of sanctions.

FIGURE 20<sup>201</sup>  
MYANMAR: FOREIGN EXCHANGE DATA 1998-2008  
(IN SDR MILLIONS; BASE YEAR 2003)



<sup>201</sup> *International Financial Statistics, International Monetary Fund eLibrary Data*, INT'L MONETARY FUND, <http://www.elibrary-data.imf.org> (follow "International Financial Statistics (IFS)" hyperlink; then select the variables "Country: Myanmar," "Concept: Foreign Exchange," "Unit: Special Drawing Rights (SDR)," "Time: 1998-2008;" then retrieve dataset) (last visited Oct. 18, 2012).

FIGURE 21<sup>202</sup>  
 MYANMAR: EXPORTS 1998-2008  
 (IN US \$ BILLIONS; BASE YEAR  
 2003)

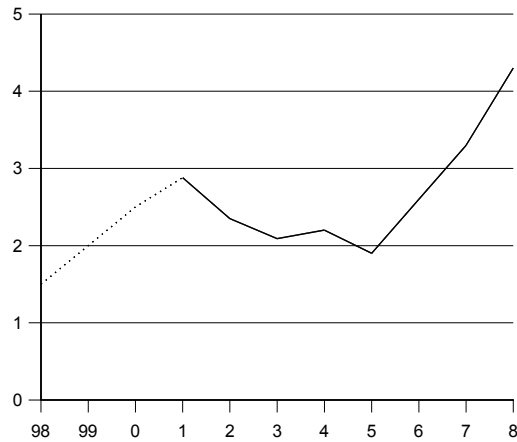
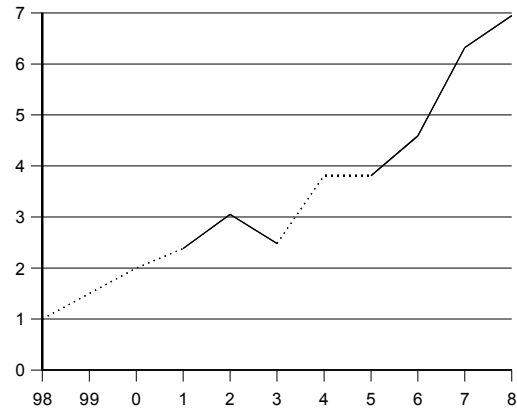


FIGURE 22<sup>203</sup>  
 MYANMAR: IMPORTS 1998-  
 2008  
 (IN US \$ BILLIONS; BASE YEAR  
 2003)

<sup>202</sup> *International Financial Statistics, International Monetary Fund eLibrary Data*, INT'L MONETARY FUND, <http://www.elibrary-data.imf.org> (follow "International Financial Statistics (IFS)" hyperlink; then select the variables "Country: Myanmar," "Concept: Goods, Value of Exports," "Unit: US Dollars," "Time: 1998-2008;" then retrieve dataset) (last visited Oct. 18, 2012).

<sup>203</sup> *International Financial Statistics, International Monetary Fund eLibrary Data*, INT'L MONETARY FUND, <http://www.elibrary-data.imf.org> (follow "International Financial Statistics (IFS)" hyperlink; then select the variables "Country: Myanmar," "Concept: Goods, Value of Imports," "Unit: US Dollars," "Time: 1998-2008;" then retrieve dataset) (last visited Oct. 19, 2012).

FIGURE 23<sup>204</sup>  
 MYANMAR: INDEXED FOREIGN  
 EXCHANGE 1998-2008  
 (2003 = 1.00)

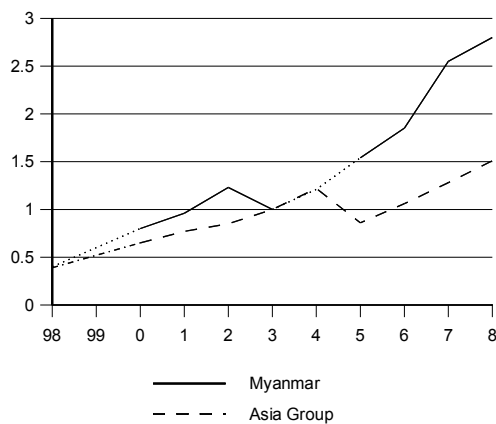
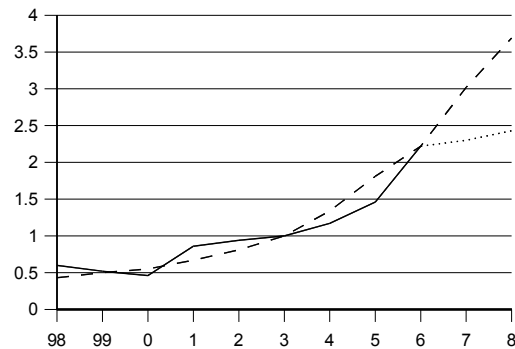
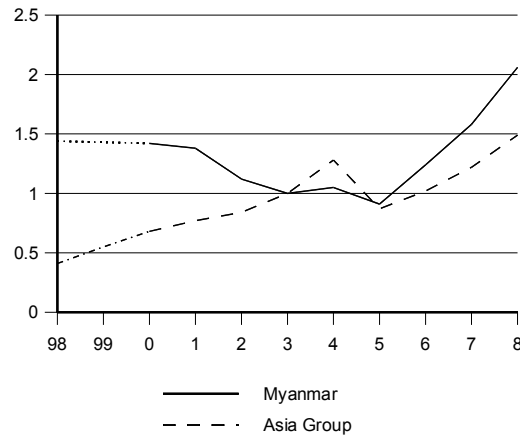


FIGURE 24<sup>205</sup>  
 MYANMAR: INDEXED EXPORTS  
 1998-2008  
 (2003 = 1.00)

<sup>204</sup> INT'L MONETARY FUND, *supra* note 201; *International Financial Statistics, International Monetary Fund eLibrary Data*, INT'L MONETARY FUND, <http://www.elibrary-data.imf.org> (follow "International Financial Statistics (IFS)" hyperlink; then select the variables "Country: Developing Asia," "Concept: Total Reserves excluding Gold," "Unit: SDRs," "Time: 1998-2008;" then retrieve dataset) (last visited Oct. 19, 2012). Asia Group: For statistical purposes, the IMF group of developing Asian countries ("Asia Group") as of 2008 included: Afghanistan, Bangladesh, Bhutan, Brunei Darussaleem, Cambodia, China (mainland and Macao), Fiji, India, Indonesia, Laos, Malaysia, Maldives, Micronesia, Myanmar, Nepal, Pakistan, Papua New Guinea, Philippines, Samoa, Solomon Islands, Sri Lanka, Thailand, Timor-Leste, Tonga, -Vanuatu, and Vietnam. Indexed values of data: For any indexed base year b with a US dollar value of  $v_b$  (here, 2003), the indexed value V of any year x is as follows:  $V_x = V_x \div V_b$

<sup>205</sup> INT'L MONETARY FUND, *supra* note 202; *International Financial Statistics, International Monetary Fund eLibrary Data*, INT'L MONETARY FUND, <http://www.elibrary-data.imf.org> (follow "International Financial Statistics (IFS)" hyperlink; then select the variables "Country: Developing Asia," "Concept: Goods, Value of Exports," "Unit: US Dollars," "Time: 1998-2008;" then retrieve dataset) (last visited Oct. 19, 2012).

FIGURE 25<sup>206</sup>  
 MYANMAR: INDEXED IMPORTS 1998-2008  
 (2003 = 1.00)



#### D. Belarus

Beginning with the dismissal and indictment of the reform-minded premier of the Republic of Belarus in 1994, political and civil rights in Belarus have been eclipsed by a revanchist regime.<sup>207</sup> By 2006, political repression in Belarus, a former Soviet Republic,<sup>208</sup> had reached a critical mass, with “fundamentally undemocratic March 2006 elections,” reports of human rights abuses related to political repression, detentions

<sup>206</sup> INT’L MONETARY FUND, *supra* note 203; *International Financial Statistics, International Monetary Fund eLibrary Data*, INT’L MONETARY FUND, <http://www.elibrary-data.imf.org> (follow “International Financial Statistics (IFS)” hyperlink; then select the variables “Country: Developing Asia,” “Concept: Goods, Value of Imports,” “Unit: US Dollars,” “Time: 1998-2008;” then retrieve dataset) (last visited Oct. 19, 2012).

<sup>207</sup> See *Belarus Parliament Ousts Leader*, N.Y. TIMES, Jan. 27, 1994, at A6, col. 1 (reporting ouster of Stanislav Shushkevich, Chairman of Parliament).

<sup>208</sup> For background on the post-Soviet transition in Belarus, see Michael P. Malloy, *Shifting Paradigms: Institutional Roles in a Changing World*, 62 FORDHAM L. REV. 1911, 1924-1928 (1994).

and “disappearances,” and allegedly rampant public corruption.<sup>209</sup> In June 2006 the U.S. President responded by invoking IEEPA and declaring a national emergency with respect to Belarus, which currently is continued through June 2013.<sup>210</sup> The U.S. President’s order relied upon the now familiar device of an asset blocking of all property subject to U.S. jurisdiction<sup>211</sup> of ten persons listed in an Annex to the order, beginning with the current Belarus president, Alyaksandr Lukashenka.<sup>212</sup> This list was to be supplemented by U.S. Treasury “designations” determined by the U.S. Secretary of Treasury, after consultation with the U.S. Secretary of State, to fall into any of the following categories: (i) any person “responsible for, or to have participated in, actions or policies that undermine democratic processes or institutions in Belarus;”<sup>213</sup> (ii) any person “responsible for, or to have participated in, human rights abuses related to political repression in Belarus;”<sup>214</sup> (iii) any senior-level official, family member thereof, or person “closely linked to such an official” responsible for or engaging in public corruption related to Belarus;<sup>215</sup> (iv) any person who “materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services in support of, any person listed in the annex, or any other person designated by the U.S. Secretary of the Treasury under the order;”<sup>216</sup> and (v) any person “owned or controlled by, or acting or purporting to act for or on behalf of, directly or indirectly,” any person listed in the annex or designated by the Secretary.<sup>217</sup> These current and future asset blockings included making any contribution or provision of funds, goods, or services by, to, or for the benefit of any listed or designated person and included

---

<sup>209</sup> See Exec. Order No. 13,405, 3 C.F.R. 231 (2007) (reciting presidential findings with respect to Belarus).

<sup>210</sup> *Id.* For the latest presidential action continuing the national emergency declared in Ex. Order 13,405, see Notice, 77 Fed. Reg. 36,113 (June 14, 2012).

<sup>211</sup> Characteristically, for these purposes “property subject to U.S. jurisdiction” effectively meant “all property and interests in property that are in the United States, that hereafter come within the United States, or that are or hereafter come within the possession or control of any United States person, including any overseas branch.” Exec. Order No. 13,405, § 1, 3 C.F.R. 231. The term “United States person” was defined by the order to mean “any United States citizen, permanent resident alien, entity organized under the laws of the United States or any jurisdiction within the United States (including foreign branches), or any person in the United States.” *Id.* § 3(c), at 232.

<sup>212</sup> *Id.* § 1(a)(i), at 231.

<sup>213</sup> *Id.* § 1(a)(ii)(A).

<sup>214</sup> *Id.* § 1(a)(ii)(B).

<sup>215</sup> *Id.* § 1(a)(ii)(C).

<sup>216</sup> *Id.* § 1(a)(ii)(D), at 231-32.

<sup>217</sup> *Id.* § 1(a)(ii)(E), at 232.

receipt of any contribution or provision of funds, goods, or services from any listed or designated person.<sup>218</sup> In addition, in what is still a relatively unusual step, the U.S. President formally determined, pursuant to the requirement of IEEPA § 203(b)(2),<sup>219</sup> that making donations of articles of humanitarian aid “by, to, or for the benefit of any person listed in or designated pursuant to [the] order” would seriously impair his ability to deal with the declared national emergency, and he therefore prohibited such donations.<sup>220</sup>

This “designation” process, which is becoming a common feature of U.S. sanctions programs, nevertheless remains troubling in terms of due process expectations.<sup>221</sup> As with the Myanmar sanctions,<sup>222</sup> the Belarus order expressly provides that listed and designated persons “who might have a constitutional presence in the United States,” are to be accorded no prior notice of any listing or designation.<sup>223</sup> The U.S. Treasury’s generally applicable procedures with respect to post hoc challenges to designation are minimal at best,<sup>224</sup> and – perhaps even more disturbing – the U.S. Treasury did not issue regulations specifically implementing the Belarus order until February 2010, almost four years after its issuance.<sup>225</sup> Based on the order, however, U.S. Treasury had included on its designation list sixteen individuals (including the ten listed in the annex to the order) and five entities.<sup>226</sup>

---

<sup>218</sup> *Id.* § 1(c).

<sup>219</sup> 50 U.S.C. § 1702(b)(2) (1988).

<sup>220</sup> Exec. Order No. 13,405, § 1(b), 3 C.F.R. 231, 232.

<sup>221</sup> *See supra* notes 187-191 and accompanying text (discussing due process concerns).

<sup>222</sup> *See supra* note 189 and accompanying text (discussing Myanmar order).

<sup>223</sup> Exec. Order No. 13,405, § 4, 3 C.F.R. 231, 232. The explicit justification for this lack of prior notice is the President’s finding that “because of the ability to transfer funds or other assets instantaneously, prior notice to such persons of measures to be taken pursuant to this order would render these measures ineffectual.” *Id.*

<sup>224</sup> *See* 31 C.F.R. § 501.807 (1998) (setting forth procedures for removal of names from appendices). *Cf. id.* § 501.806 (establishing procedures for unblocking funds as blocked due to mistaken identity).

<sup>225</sup> *See* Belarus Sanctions Regulations, 75 Fed. Reg. 5502 (Feb. 3, 2010) (codified at 31 C.F.R. pt. 548), *amended by* 75 Fed. Reg. 73,958 (Nov. 30, 2010) (codified at 31 C.F.R. § 548.509(a)) (authorizing transactions with certain blocked persons); 76 Fed. Reg. 5482 (Feb. 11, 2011) (revoking 31 C.F.R. § 548.509) (responding to violence against some opposition candidates and their supporters after December 19, 2010 presidential elections in Belarus and announcement by state-run media that President Lukashenko had received approximately 80 percent of vote).

<sup>226</sup> *See Designation List, supra* note 108; *see also* Changes to Identifying In-

Given the comparatively minimal level of engagement by the U.S. Government in this program, rising almost to inattentiveness, one might wonder how serious this human rights sanctions program is. Another question is whether the program – another narrowly targeted “smart sanction” – has had any appreciable impact on Belarus. There is no indication that the behavior of the Government of Belarus, with respect to human rights, has improved over the six years that the sanctions have been in place.<sup>227</sup>

The data examined below are centered around 2006 as the base year, since that is the year in which the order imposed sanctions. Because the program is limited to an asset blocking, I have confined the analysis to foreign exchange data, as a rough indicator of the economic effects of the prohibition on Belarus. The results are, to say the least, perplexing. Data performance actually improves dramatically once the sanction is put in place, see Figure 26. Looking at the data relative to performance of the Central and Eastern European region indexed to the base year, see Figure 27, we confront a situation in which the target country performance mirrors that of the region as a whole, but dramatically outperforms the region once sanctions are imposed. This is certainly not an endorsement for the instrumental effectiveness of narrowly targeted, “smart” sanctions.

---

formation of Entity Designated on May 15, 2003, Pursuant to Executive Order 1312978 [sic], 73 Fed. Reg. 31,005 (May 20, 2008) (changing identifying information of Belarusian Oil Trade House, designated May 15, 2008).

<sup>227</sup> As the U.S. President explained in continuing the national emergency, in 2012 Belarus:

continued its crackdown against political opposition, civil society, and independent media. The government arbitrarily arrested, detained, and imprisoned citizens for criticizing officials or for participating in demonstrations; imprisoned at least one human rights activist on manufactured charges; and prevented independent media from disseminating information and materials.

Notice, 77 Fed. Reg. 36,113 (June 14, 2012).



FIGURE 26<sup>228</sup>  
 BELARUS: FOREIGN EXCHANGE DATA  
 2001-2008  
 (IN SDR MILLIONS; BASE YEAR 2006)

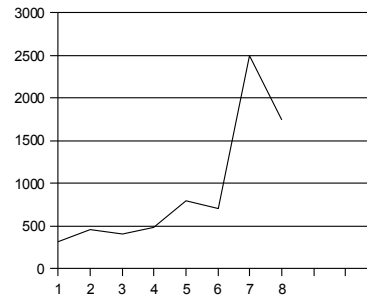
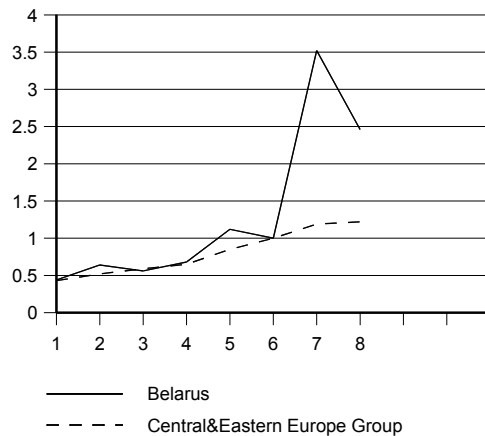


FIGURE 27<sup>229</sup>  
 BELARUS: INDEXED FOREIGN  
 EXCHANGE 2001-2008  
 (2006 = 1.00)

<sup>228</sup> *International Financial Statistics, International Monetary Fund eLibrary Data*, INT'L MONETARY FUND, <http://www.elibrary-data.imf.org> (follow "International Financial Statistics (IFS)" hyperlink; then select the variables "Country: Belarus," "Concept: Foreign Exchange," "Unit: Special Drawing Rights (SDR)," "Time: 2001-2008;" then retrieve dataset) (last visited Oct. 18, 2012).

<sup>229</sup> *International Financial Statistics, International Monetary Fund eLibrary Data*, INT'L MONETARY FUND, <http://www.elibrary-data.imf.org> (follow "International Financial Statistics (IFS)" hyperlink; then select the variables "Country: Belarus," "Concept: Foreign Exchange," "Unit: US Dollars," "Time: 2001-2008;" then retrieve dataset) (last visited Oct. 19, 2012); *International Financial Statistics, International Monetary Fund eLibrary Data*, INT'L MONETARY FUND, <http://www.elibrary-data.imf.org> (follow "International Financial Statistics (IFS)" hyperlink; then select the variables "Country: Central and eastern Europe," "Concept: Total Reserves excluding Gold," "Unit: SDRs," "Time: 2001-2008;" then retrieve dataset) (last visited Oct. 19, 2012). Central & Eastern Europe Group: For statistical purposes, the IMF group of developing Central and Eastern European countries ("Central & Eastern Europe Group") as of 2008 included: Albania, Armenia, Azerbaijan, Belarus, Bosnia & Herzegovina, Bulgaria, Croatia, Czech Republic, Estonia, Georgia, Hungary, Kazakhstan, Kosovo, Kyrgyz Republic, Latvia, Lithuania, Macedonia, Moldova, Mongolia, Montenegro, Poland, Romania, Russia, Serbia, Tajikistan Turkey, and Ukraine. Indexed values of data: For any indexed base year  $b$  with an SDR value of  $v_b$  (here, 2006), the indexed value  $V$  of any year  $x$  is as follows:  $V_y = V_x \div v_b$

## IV. OBSERVATION AND REFLECTION

One circumstance should be obvious from a review of the case studies in the preceding part of this article: the technical design in contemporary sanctions programs appears to exhibit striking similarities, regardless of whether they originate in unilateral or multilateral initiatives. The asset blocking technique is present in a variety of these programs, and it is a feature of sanctions that can be traced to pre-World War II practice. It remains an important contemporary feature of sanctions, despite its predictability, because of the prominent role played by U.S. financial markets in international financial services. This interrelationship should caution care and restraint in the deployment of asset blockings, because vulnerability to future blocking may create risk factors that could inhibit continuing prominence for U.S. financial services markets, especially at a time when those markets are still recovering from the international financial crisis precipitated by the meltdown of the U.S. residential mortgage market.<sup>230</sup>

Another technique that has gained prevalence in current practice is the increased focus on intermediary service providers as targets of sanctions. The practical advantages of this indirect assault on access of the primary target to markets for goods and services are obvious, but overuse of this technique could inject unpredictable externalities into international commerce and finance.

The sanctions programs in these case studies have fundamentally been concerned with vindication of important principles of human rights law and policy. It is encouraging that such principles are now taken seriously, a fact evident from the case studies. Yet it is still discouraging that in each of these cases we may detect a lack of focused purpose or urgency. Inordinate delays in administrative implementation of the program, poor technical design and a protracted gradualism in application of sanctions appears to undercut the effectiveness of many of these programs.

In terms of effectiveness itself, a consensus on the appropriate metrics for evaluation of the effectiveness of sanctions programs may remain elusive. However, empirical analysis of immediate and discrete instrumental effects, evident in these case studies, suggests that the design

---

<sup>230</sup> On the current financial crisis, see MICHAEL P. MALLOY, *ANATOMY OF A MELTDOWN* (2010); see also Michael P. Malloy, *The Subprime Mortgage Crisis: An International and Regional Threat in Need of a Solution*, in *CHALLENGES OF THE LAW IN A PERMEABLE WORLD* 9 (David A. Frenkel & Carsten Gerner-Beuerle eds., 2009) (arguing that current crisis exhibits “structural” flaws in financial services markets).

2013] *HUMAN RIGHTS AND UNINTENDED CONSEQUENCES* 129

and content of national security-based programs often lead to more significant effects on the target group or state, at least in the short run, than is the case with respect to human rights-based programs.<sup>231</sup> Based on available empirical data, the relatively successful sanctions programs appear to be those that apply a wide range of sanctions, rigorously and in coordination with a range of other seriously initiated foreign policy measures. That has generally not been the approach of the sanctions programs involved in the case studies considered in this article. To the contrary, they appear to demonstrate that the relatively ineffective sanctions programs may be those that apply a constricted range of sanctions diffidently or with little serious coordination. The values at stake in human rights law and policy deserve more than this.

---

<sup>231</sup> See, e.g., Malloy, *supra* note 10 (contrasting Iran hostage sanctions and Zimbabwe/Southern Rhodesia sanctions).