

***Caught in the Cross-Currents:
International Economic Sanctions in Contemporary Practice****

a paper by

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

On September 11, 2009, President Obama published Presidential Determination No. 2009-27,¹ 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.²

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**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).

¹Pres. 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).

²50 U.S.C. App. § 5(b).

The immediate effect of this determination was to continue in force the Cuban Assets Control Regulations,³ which have been in effect since 1963. The broader historical effect of the determination, however, was to place the new 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.

I. Introduction

In contemporary practice, the use of economic sanctions – both unilateral (under the authority of the TWEA and its successor the International Emergency Economic Powers Act⁴) and international (implemented in U.S. practice under section 5 of the United Nations Participation Act of 1945⁵) – no longer represents a series of isolated “emergency” incidents in foreign affairs. Broadly conceived or narrowly targeted, established as generally applicable responses to pervasive problems or initiated by specific triggering events, economic sanctions have become a common feature in foreign and national security policy. Sharing as they do similar concepts and techniques, economic sanctions need to be examined systemically rather than episodically, as is usually the case even today. Of particular interest in light of the theme of this joint program, in recent years economic sanctions have been increasingly invoked as instrumentalities of both international human rights law and policy and national security policy, under generally applicable rubrics of public international law and foreign affair law.

³31 C.F.R. pt 515.

⁴50 U.S.C. §§ 1701 *et seq.*

⁵22 U.S.C. § 287c.

This paper examines situations in which, in varying combinations, economic sanctions have been invoked in the service of these two bodies of law and policy. It first identifies some shared concepts and themes, particularly the continuing discussion of the effectiveness of sanctions as an instrument of policy.⁶ 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.⁷ The paper concludes with a reflection on the contemporary use of economic sanctions,⁸ with the hope that if we gain a more focused understanding of economic sanctions as an integrated body of principles and practices, policymakers would be in a position to invoke them in a more effective manner, as well as to determine when situations of crisis in human rights policy and national security policy 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, but they are not themselves the embodiment of policy. Sanctions will have whatever instrumental effect the circumstances of their use will allow, but ultimately it is overarching policy -- domestic and foreign -- that should be judged in terms of effectiveness, not 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.

⁶See part II, *infra*, at 3-13.

⁷See part III, *infra* at 13-58.

⁸See part IV, *infra* at ?-60.

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- and national security-based programs often lead to more significant effects on the target group or state, at least in the short run, than has been the case with respect to human rights-based programs.⁹ Sanctions may be relatively more or less appropriate as an instrument depending upon practical circumstances, and depending upon how important, as a matter of policy, the realization of a particular policy goal may be (as compared with the cost of attaining it).

In a series of works over the past 20 years, I have identified some appropriate criteria of effectiveness of sanctions in the instrumental sense.¹⁰ "Effectiveness" of a sanctions program depends upon the type of policy objective the sanction is intended to

⁹Contrast, 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, UNITED STATES ECONOMIC SANCTIONS: THEORY AND PRACTICE 358-363 (Kluwer Law International: 2001) (hereinafter "THEORY AND PRACTICE"), 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*.

¹⁰See, e.g., MICHAEL P. MALLOY, ECONOMIC SANCTIONS AND U.S. TRADE (Little, Brown and Company: 1990).

serve instrumentally, whether directive,¹¹ defensive,¹² communicative,¹³ or, as has usually been the case, some combination of these objectives.¹⁴ The effectiveness of a particular sanctions program should be measured against the conformity of the outcome of program with policy objective¹⁵ and the cost of achieving that outcome.¹⁶

Of these metrics, outcome conformity "is undoubtedly the most important, but it is also the most difficult to assess."¹⁷ The difficulties of this assessment also affect the more straightforward task of measuring costs. Without a clear understanding of the policy objective of a particular sanctions program and a fundamental agreement on what outcome conformity would entail in the particular program, it is difficult to determine whether the costs of a particular program are justified.

To say that a particular sanctions program is not "effective" is often a politically

¹¹For these purposes, a *directive* sanctions objective is defined to mean "creat[ion of] economic pressure calculated to alter behavior of a target state." *Theory and Practice, supra*, at 19.

¹²For these purposes, a *defensive* sanctions objective is defined to mean "reduc[tion] or slow[ing] development of an adversary's military or strategic capabilities by raising the economic cost of acquiring imports or import substitutes." *Id.*

¹³For these purposes, a *communicative* sanctions objective is defined to mean "send[ing] a symbolic message of displeasure with another country's behavior (which may also be for internal political purposes or directed at allies." *Id.* at 20.

¹⁴See, e.g. *id.* at 26-29 (discussing varied objectives of economic sanctions and their shifts in relative importance over the life of a crisis event).

¹⁵See Bayard, Pelzman & Perez-Lopez, *Stakes and Risks in Economic Sanctions*, 6 THE WORLD ECONOMY 73, 75 (1983) (discussing outcome conformity).

¹⁶See Bayard, Pelzman & Perez-Lopez, *An Economic Model of US and Western Sanctions against the Soviet Union and Eastern Europe*, reprinted in, *The Soviet Economy in the 1980's: Problems and Prospects*, pt. 2, J. Comm. Print, 97th Cong., 2d Sess. 507 (1983) (providing quantitative model for evaluating costs associated with sanctions).

¹⁷Bayard, Pelzman & Perez-Lopez, *Stakes and Risks, supra*, at 75.

charged statement. What this may express is fundamental opposition to the overarching foreign policy with respect to the target, more than any specific objection to sanctions.¹⁸ In addition, public debate about the "effectiveness" of a particular sanctions program quickly escalates into the argument that sanctions – any sanctions – are never, or almost never, effective.¹⁹ This sort of criticism is often highly acute, if not ad hoc, and usually treats each sanctions episode as if it occurred in an instant and could be assessed absolutely in that context. Yet sanctions are applied over time, and their immediate objectives may shift in emphasis over time. In addition, tracking the effect of sanctions in any direct causal sense is not an easy matter.

The Iran hostage crisis is a case in point. Ultimately, the unilateral actions undertaken by the President did not, in themselves, resolve the crisis between the United States and Iran. Given the religious and revolutionary fervor prevalent in Iran, then and now, perhaps no unilateral action, no matter how harsh, could have effectuated a resolution of the crisis. A more speculative question concerns whether these actions, though not sufficient in themselves, might be viewed at least as necessary for such a resolution. Certainly, embargo and blocking restrictions of the type employed in that situation²⁰ have traditionally been viewed by U.S. courts as instrumental in the resolution of internationally

¹⁸See, e.g., Bartlett, *Sanctions almost Never Work*, Wall St. J., Aug. 19, 1985, at 14, col. 3 (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. Rasky, *Tough Sanctions Against Pretoria Are Sought by House Democrats*, N.Y. Times, June 6, 1988, at A8, col. 1 (noting House leader's plan to pass expanded sanctions bill just before Democratic national convention).

¹⁹See Bartlett, *supra* note 18.

²⁰See generally Michael P. Malloy, *The Iran Crisis: Law Under Pressure*, 1984 WISCONSIN INTERNATIONAL LAW JOURNAL 15 (1984). (discussing sanctions imposed on Iran in response to hostage crisis).

crises.²¹ Another feature of the President's unilateral actions in this crisis – the graduated intensification of the restrictions – exhibited a more consciously selective approach, apparently attempting to respond to the specific conditions of the moment. The selectivity of the restrictions, most pronounced in the early stages of the crisis,²² seems reminiscent of the 1956 Egyptian Assets Control Regulations,²³ 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.²⁴

The Iranian sanctions experienced a graduated intensification over a very short span of time, 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 unilateral responses of the President to the Iran crisis were no more sufficient for a resolution of that crisis than was resort by the United States to the dispute resolution mechanisms afforded by the U.N.

²¹ See, e.g., *Richardson v. Simon*, 560 F.2d 500, 505 (2d Cir. 1977); *Real v. Simon*, 510 F.2d 557, 563 (5th Cir. 1975); *Sardino v. Federal Reserve Bank of New York*, 361 F. 2d 106, 112-113 (2d Cir. 1966) (so stating). See also Malloy, *The Impact of U.S. Control of Foreign Assets on Refugees and Expatriates*, 1982 MICH. Y.B. INT'L LEG. STUD. 399, 413-414; 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 v. Khuzestan Water*, 651 F.2d 800, 807 (1st Cir. 1981); *American 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 *Electronic Data Systems v. Soc. Sec.*, 508 F. Supp. 1350, 1361 (N.D. Tex.), *vacated in part & aff'd in part*, 651 F. 2d 1007 (5th Cir. 1981).

²² See *The Iran Crisis*, 1984 Wisc. Int'l L.J. at 28-30, 34-35 (discussing graduated intensification of sanctions).

²³ 21 Fed. Reg. 5777 (1956).

²⁴ But see 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).

Security Council and the International Court of Justice.²⁵

The regulatory technique, however, was quite clear and traditional: to impose a 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. It may be argued that the broad and sweeping nature of this prohibition, which is the essence of 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, and in some significant sense the Iranian sanctions played a role in effectuated the resolution of the hostage crisis.²⁶

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, the Nicaraguan sanctions were declared to be "a flop."²⁷ 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.²⁸ Yet by the end of 1988, information from Nicaragua appeared to indicate that the

²⁵ See *The Iran Crisis, supra* at 59-68, 96-97 (discussing resort to U.N.).

²⁶ Cf. ANDREAS LOWENFELD, *TRADE CONTROL FOR POLITICAL ENDS* § 3.41, at 591 (1983) (suggesting that Iranian sanctions "may have played a part" in resolving hostage crisis).

²⁷ See Wheeler, *U.S. trade embargo against Nicaragua a flop, experts say*, *Wash. Times*, Aug. 23, 1985, at 14, col. 3.

²⁸ See Krauss, *Japan Gains From American Embargo Against Nicaragua*, *Wall St. J.*, June 12, 1987, at 10, col. 3.

country was in a state of economic decay, to some extent perhaps irrevocably so,²⁹ and this situation apparently persisted until the sanctions were lifted in 1988.³⁰

Where a political consensus, pro or con, develops with respect to a particular target, public perceptions of the effectiveness of sanctions may coalesce. Otherwise, it may seem that 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."³¹ The atmosphere of increased pressure on South Africa did have the palpable effect of hastening divestment by U.S. firms of direct South African investments.³² Still, the Government of South Africa remained at least publicly confident, and fears were expressed by South African business representatives.³³

Within a year of these pronouncements, however (and after passage of statutory sanctions over the president's veto), some commentators were claiming that the expanded sanctions were having a positive effect.³⁴ Six months later, it was becoming clearer that,

²⁹See Kinzer, *N.Y. Times*, Dec. 25, 1988, § 1, at 8, col. 1.

³⁰See, e.g., Uhlig, *Nicaragua Currency Tumbles And American Dollar Is King*, *N.Y. Times*, Feb. 5, 1989, § 1 at 1, col. 3; Uhlig, *Is Nicaraguan Piggy Bank an Endangered Species?* *N.Y. Times*, June 24, 1989, at 2, col. 1; Uhlig, *Nicaragua Study Depicts Economy In Drastic Decline*, *N.Y. Times*, June 26, 1989, at A1, col. 6.

³¹See Kilborn, *Curbs Seen as Having Mixed Effects*, *N.Y. Times*, Sept. 10, 1985, at A13, col. 4.

³²See Hume, *Continuing Anti-Apartheid Protests Hasten Pace Of Exits by U.S. Companies From South Africa*, *Wall St. J.*, Feb. 27, 1986, at 54, col. 1.

³³See Mufson, *South Africa Regime Is Confident Sanctions Could Be Circumvented*, *Wall St. J.*, June 20, 1986, at 23, col. 1.

³⁴See Lewis, *Sanctions At Work*, *N.Y. Times*, Mar. 13, 1987, at A35, col. 1 (so reporting).

while sanctions were not a "quick fix," they had a long-term role to play in resolving the situation in South Africa.³⁵ Yet enlightened elements within South Africa still argued that the admitted economic effects of the sanctions would not end apartheid, and would ultimately be counterproductive.³⁶

Sanctions continued, and by early 1988 there were clear indications that sanctions were having a palpable economic effect.³⁷ Nevertheless, as these sanctions were completing their fourth year, there was a report that South African firms were continuing to act in international commerce through cloaks or fronts, third-countries subsidiaries of South African firms.³⁸

Criticism of the effectiveness of the South African sanctions suggest two potential problems in assessing a sanctions program. First, identifying a single, dramatic objective of a sanctions program may be disingenuous. For example: sanctions have not ended apartheid; hence, sanctions are ineffective. The simple truth is that sanctions cannot end apartheid; South Africa must end apartheid. Sanctions, as a directive instrument of U.S. foreign policy, generally can only change overall circumstances and at best affect the pace of events.

³⁵Greenberger, *U.S. Trade Sanctions on South Africa Starting to Pay Long-Term Dividends*, Wall St. J., Sept. 21, 1987, at 24, col. 1 (quoting Rep. Howard Wolpe, chair of House Foreign Affairs Subcommittee on South Africa).

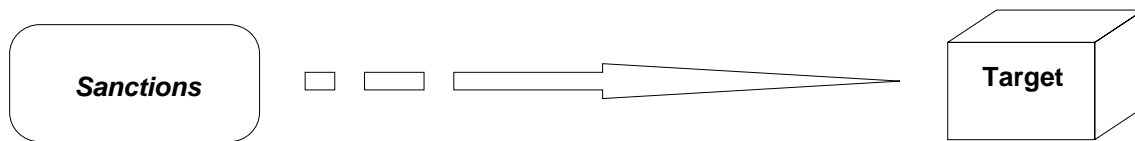
³⁶See Suzman, *Sanctions Won't End Apartheid*, N.Y. Times, Oct. 4, 1987, § 4, at 23, col. 2 (so stating).

³⁷See, e.g., *Exports by South Africa To the U.S. Fall Sharply*, Wall St. J., Mar. 9, 1988, at 23, col. 3. *But cf.* Greenberger, *supra* note 18 (sanctions had "hurt" South Africa, but had "failed to prod South Africa to dismantle apartheid").

³⁸See *South African Firms Avoid Sanctions, Union Charges*, Wall St. J., June 23, 1989, at B3A, col. 5.

Second, and related to the first problem, is the fact that much criticism views sanctions in isolation and attempts to test for a direct, causal relationship between the imposition of sanctions and the achievement of a broadly conceived, dramatic objective. Putting aside the epistemological difficulties of establishing causal relationships in any complex of events, the fact remains that such criticism implicitly assumes that the causal relationship here is a binary one (See Figure 1, *infra*), and that it should be ascertainable in the short term.

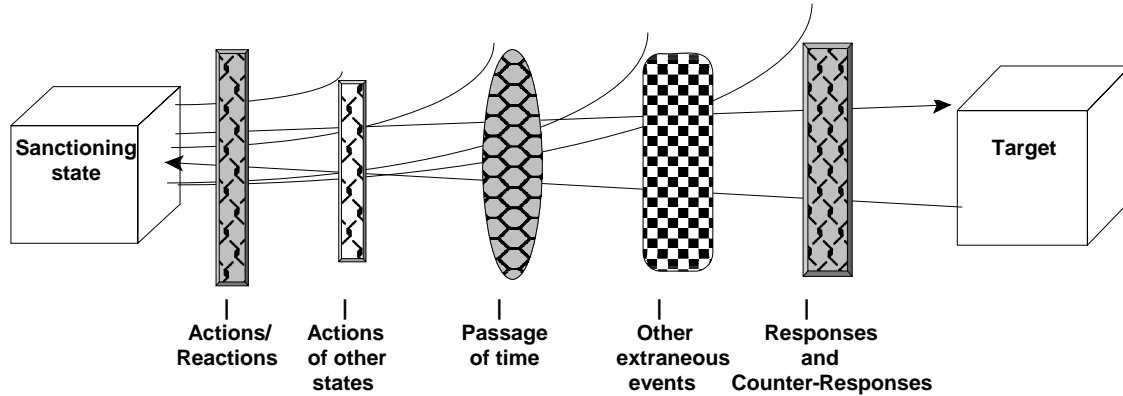
Figure 1
A Simplistic View of Causal Relationships in Sanctions Practice



These assumptions are questionable. As 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."³⁹ Often externalities or other extraneous circumstances have a significant impact on the causal relationship between sanction and target (see Figure 2, *infra*), and the complexities of that relationship may work against effectiveness. The longer the program continues, the more graduated or disaggregated its application, the less likely is it that the sanctions will contribute to the desired policy objective.

³⁹Quoted in Greenberger, *supra* note 35.

Figure 2
Multidimensional Causal Relationships in Sanctions Practice



It is against this multidimensional factual background that we must seek reliable criteria for the assessment of the instrumental effectiveness of economic sanctions. Presumably, these would be criteria that are sensitive to the purposes of sanctions,⁴⁰ but also to their instrumental character. Effectiveness or "success" of a sanctions program has tended to be measured against broad pronouncements of policy objectives, rather than the instrumental objectives of sanctions themselves. Yet sanctions themselves, if successful, only directly effect the achievement of instrumental objectives: preventing the movement or transfer of assets already subject to the sanctioning state's jurisdiction; limiting the flow of foreign exchange to the target state; isolating the target state from international trade and financial markets; and maintaining sanctions (and embargoed assets as a counter or "bargaining chip" for an eventual resolution of the differences between sanctioning and target states. In a properly formulated foreign policy, these instrumental objectives fit within a broader scheme of objectives but are not coincident with the latter.

⁴⁰See, e.g., BARRY E. CARTER, INTERNATIONAL ECONOMIC SANCTIONS 14-24 (1988) (discussing effectiveness of sanctions as function of purpose).

What may be still required are a relatively greater attention to the instrumental purposes of economic sanctions and a more directly empirical, less abstracted approach to the available data. Two relatively straightforward instrumental purposes of sanctions, to limit the flow of foreign exchange to the target and to isolate the target from international trade and financial markets, ought to be reflected in data concerning foreign exchange holdings (FX) and volume of exports and imports. Accordingly, my empirical assessment tends to focus on FX and trade data. To ensure some degree of consistency and comparability, assessment relies upon data available through the statistical sources of the International Monetary Fund. In addition, each assessment focuses upon the base year(s) in which sanctions were imposed or lifted, or both. It then extends analysis to data for the five years preceding and the five years following the base year(s), in order to place the data in context. 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, and compared to the corresponding eleven-year indexed series of aggregate data for the geographic region in which the target country is located. It is this methodology that I apply in the following part of this paper.

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 Rhodesia⁴¹ oc-

⁴¹For background on the history of Southern Rhodesia, see C. PALLEY, *THE CONSTITUTIONAL HISTORY AND LAW OF SOUTHERN RHODESIA* (1966).

curred under the authority of section 5 of the United Nations Participation Act of 1945 (UNPA).⁴² The United Nations was responding to the issuance of a Unilateral Declaration of Independence (UDI) from the United Kingdom by the Southern Rhodesian government of Prime Minister Ian Douglas Smith in November 1965.⁴³ The UDI was intended to cut off the process of self-determination for the indigenous population of Southern Rhodesia, originally called for in U.N. General Assembly Resolution No. 1747 in June 1962.⁴⁴ Until UDI, the United Kingdom had in fact resisted U.N. jurisdiction over the Rhodesian question, 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.⁴⁵

With the move towards unilateral independence commencing in mid-1965, renewed calls for Security Council action arose.⁴⁶ The result was Security Council Resolution No. 202, adopted 6 May 1965.⁴⁷ This resolution called on the United Kingdom to take "all necessary action to prevent" UDI. Nevertheless, despite renewed objections from the

⁴²22 U.S.C. § 287c. See MICHAEL P. MALLOY, U.S. ECONOMIC SANCTIONS: THEORY AND PRACTICE 162--170 (2001) (discussing UNPA as source of economic sanctions authority) (hereinafter "THEORY AND PRACTICE").

⁴³Proc. No. 53 of 1965, Rhodesian Government Notice 737 N/65 (1965), *reprinted in* 2 A. CHAYES, T. EHRLICH & A. F. LOWENFELD, INTERNATIONAL LEGAL PROCESS 1313-1315 (1969).

⁴⁴16 U.N. GAOR, Supp. 17a, at 3, U.N. Doc. A/5100/Add. 1 (1962). This call was repeated later in the same year. G.A. Res. No. 1755, 17 U.N. GAOR, Supp. 17, at 37, U.N. Doc. A/5217 (1962); G.A. Res. No. 1760, *id.* at 38.

⁴⁵18 U.N. SCOR, Supp. July-Sept. 1963, at 164, U.N. Doc. S/5425/Rev. 1 (1963).

⁴⁶See, e.g., 20 U.N. SCOR, 1194th Meeting 6-11 (1965).

⁴⁷20 U.N. SCOR, Res. & Dec. 1965, at 6-7 (1965).

General Assembly,⁴⁸ UDI proceeded.

On 12 November 1965, the Security Council adopted Resolution No. 216,⁴⁹ condemning the UDI and calling upon states to refrain from recognizing the current regime in Southern Rhodesia. Eight days later, the Security Council elaborated this position in Resolution No. 217.⁵⁰ The United Kingdom instituted its own program of sanctions and other measures to resolve the situation,⁵¹ as did the United States,⁵² but with little effect.

Accordingly, on 16 December 1966, the Security Council adopted Resolution 232,⁵³ invoking the mandatory nonforcible sanctions provision of the U.N. Charter,⁵⁴ and imposing selective prohibitions on import, export, transport, shipment and related transactions. In January 1967, the President issued Executive Order No. 11,322,⁵⁵ invoking section 5 of the UNPA and implementing Resolution No. 232 by delegation to the Secretary of State, for

⁴⁸G.A. Res. No. 2012, 20 U.N. GAOR, Supp. 14, at 53, U.N. Doc. A/6014 (1966); G.A. Res. No. 2022, *id.* at 54.

⁴⁹20 U.N. SCOR, Res. & Dec. 1965, at 8, U.N. Doc. S/INF/20/Rev. 1 (1965).

⁵⁰*Id.* at 8-9.

⁵¹See GARY C. HUFBAUER, JEFFREY J. SCHOTT, & KIMBERLY A. ELLIOTT, *ECONOMIC SANCTIONS RECONSIDERED* at 285-293 (2d ed. 1990) (discussing measures) (hereinafter "HUFBAUER").

⁵²See, e.g., 30 Fed. Reg. 15,316 (1965) (suspending sugar quota); 31 Fed. Reg. 85 (1966); *id.* at 4783 (1966) (export controls).

⁵³21 U.N. SCOR Res. & Dec. 1966, at 7-9.

⁵⁴U.N. Charter, art. 41, which provides in pertinent part:

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.

⁵⁵32 Fed. Reg. 119 (1967).

control of exports covered by section 414 of the Mutual Security Act of 1954;⁵⁶ to the Secretary of Commerce, as to all other prohibited U.S. exports, and to the Secretary of the Treasury, as to all remaining prohibitions.

The political situation in Southern Rhodesia persisted. On 29 May 1968, the Security Council adopted Resolution No. 253,⁵⁷ reaffirming its previous resolutions with respect to Southern Rhodesia and mandating, *inter alia*, the imposition by U.N. member states of a total prohibition of imports of Southern Rhodesian-origin commodities and products into their respective territories, a prohibition of the sale or supply by their nationals or from their territories of any products or commodities⁵⁸ (wherever originating) to or intended for the use of any person or body in Southern Rhodesia, and related activities and transactions. These additional prohibitions were implemented in the United States by the issuance of Executive Order No. 11,419⁵⁹ in July 1968.

Compliance with the Security Council's mandates regarding Southern Rhodesia was a continuing source of concern,⁶⁰ and the United States itself failed to comply with respect

⁵⁶Act of August 26, 1954, § 414, 68 Stat. 848 (1954) (codified at 22 U.S.C. § 1934), *repealed*, 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. *Id.* § 212(b)(2). Control of exports of arms, defense articles and services are now governed by section 38 of the Arms Export Control Act, *id.* § 212(a)(1), 90 Stat. at 744 (codified at 22 U.S.C. § 2778).

⁵⁷23 SCOR, Res. & Dec. 1968, at 5 (1970).

⁵⁸This 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).

⁵⁹33 Fed. Reg. 10,837 (1968), *amended*, Ex. Order No. 11,978, 42 Fed. Reg. 15,403 (1977).

⁶⁰See, e.g., Eighth Report of the Security Council Committee, U.N. Doc. S/11927/Add. 1 (1976).

to imports of Rhodesian-origin chrome from 1971 to 1977.⁶¹ Compliance problems no doubt impeded the effectiveness of the U.N.-mandated sanctions. However, renewed efforts at diplomatic resolution of the situation⁶² led to the accession of majority rule in Southern Rhodesia, now Zimbabwe, in December 1979, and the sanctions were accordingly lifted.⁶³

Hence, the original Southern Rhodesia sanctions situation involved multilateral, rather than unilateral action – the U.N. economic sanctions against Southern Rhodesia, in which the United States participated,⁶⁴ and in common sense terms, ostensibly they appear to have been “effective.” Fundamental human rights violations threatened international peace and security, multilateral sanctions were imposed, and the crisis was resolved – some *thirteen years after* sanctions were first applied. Analysis of available empirical data, however, raises serious question whether the sanctions played any significant role in the resolution of the crisis.

Since U.S. sanctions were lifted in 1979, that year serves as the base year for purposes of the assessment of the first part of the sanctions experience in Zimbabwe/Southern Rhodesia. Performance of the data over the eleven-year assessment period is 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

⁶¹ See THEORY AND PRACTICE at 170-172 (discussing Rhodesian chrome imports under UNPA).

⁶² See HUFBAUER at 287 (discussing efforts).

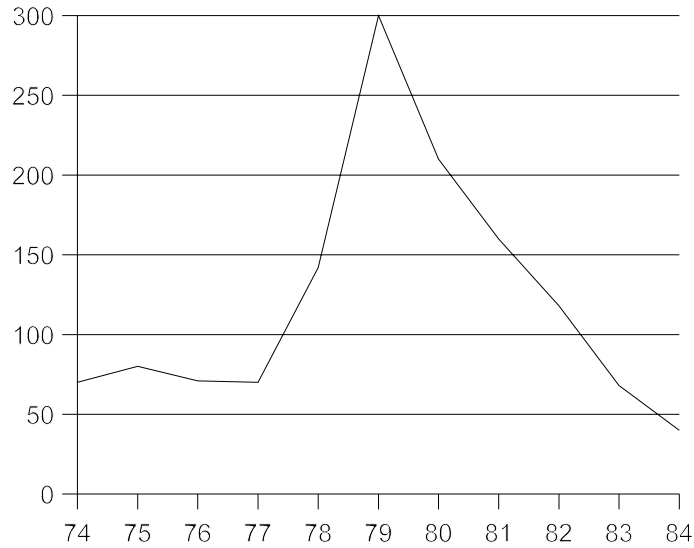
⁶³ Ex. Order No. 12,183, 44 Fed. Reg. 74,787 (1979). The Rhodesian Sanctions Regulations were entirely removed in January 1992. See 57 Fed. Reg. 1386 (1992) (removing 31 C.F.R. pt. 530).

⁶⁴ See *generally* THEORY AND PRACTICE at 87-90 (discussing history of sanctions against Southern Rhodesia).

Zimbabwe. (Figure 3, *infra*.) Export data exhibit a characteristic upward turn following the lifting of sanctions in 1979, but performance flattens out relatively quickly. (Figure 4, *infra*.) An upward turn in import data is somewhat more pronounced, but it also begins to fall off relatively soon after the base year. (Figure 5, *infra*.) Because of these ambiguities, I also examined the performance of a broader economic indicator, gross domestic product (GDP), during the first eleven-year sample, and GDP performance roughly echoes the trending found in the export and import data. (Figure 6, *infra*.)

Does this parallelism 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? Examining the data indexed relative to the base year and comparing the data with corresponding indexed data for the African region (Figures 7-9, *infra*), it would appear that the performance of the Zimbabwe data is not significantly out of line with regional performance over the eleven-year assessment period. At the very least, the comparison offers no clear indication of unique or significant pressures on Southern Rhodesian performance (pre-base-year) or of the removal of such pressures on Zimbabwe performance (post-base-year).

Figure 3
Zimbabwe/Southern Rhodesia: Foreign Exchange Data 1974-1984
(in US \$ millions; base year 1979)



Source: INTERNATIONAL MONETARY FUND, INTERNATIONAL FINANCIAL STATISTICAL SERIES

Africa Group: For statistical purposes, the IMF group of developing African countries ("Africa Group") as of 1990 included: Algeria, Benin, Botswana, Burkino 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:

$$V_x = \frac{v_x}{v_b}$$

Figure 4
Zimbabwe/Southern Rhodesia: Exports 1974-1984
(in US \$ billions; base year 1979)

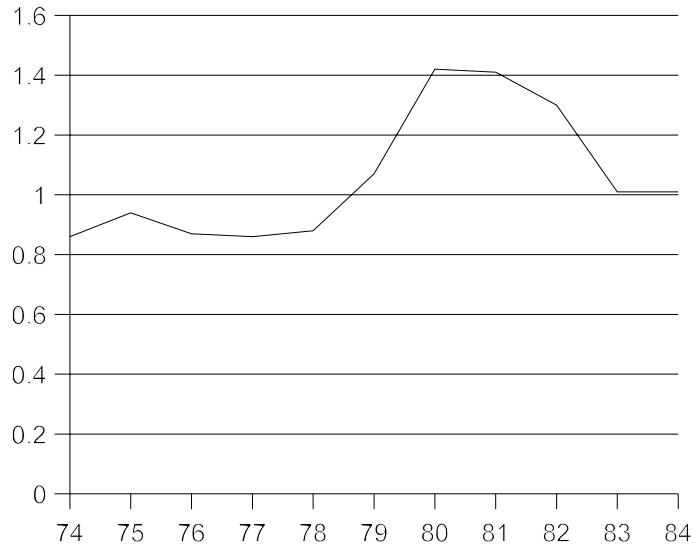


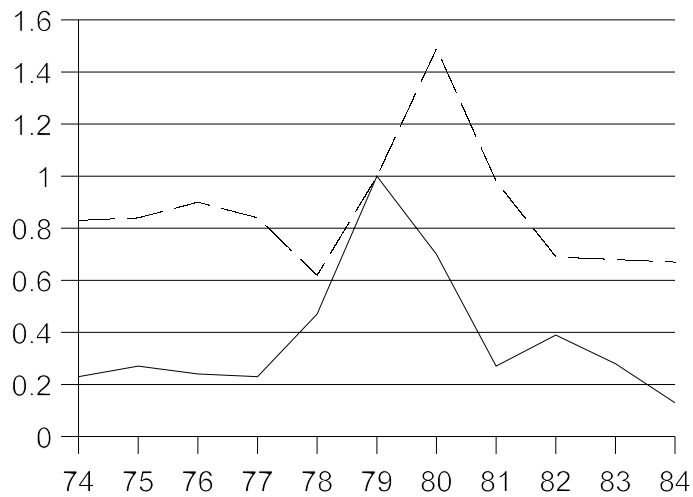
Figure 5
Zimbabwe/Southern Rhodesia: Imports 1974-1984
(in US \$ billions; base year 1979)



Figure 6
Zimbabwe/Southern Rhodesia: GDP 1974-1984
(percent change at constant 1980 prices)



Figure 7
Zimbabwe/Southern Rhodesia: Indexed Foreign Exchange 1974-1984
(1979 = 1.00)



— Zimbabwe/SR
- - - Africa Group

Figure 8
Zimbabwe/Southern Rhodesia: Indexed Exports 1974-1984
(1979 = 1.00)

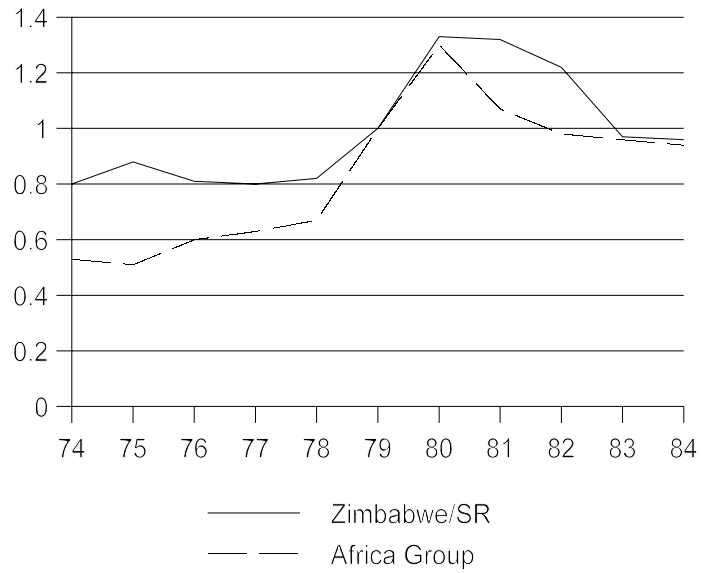
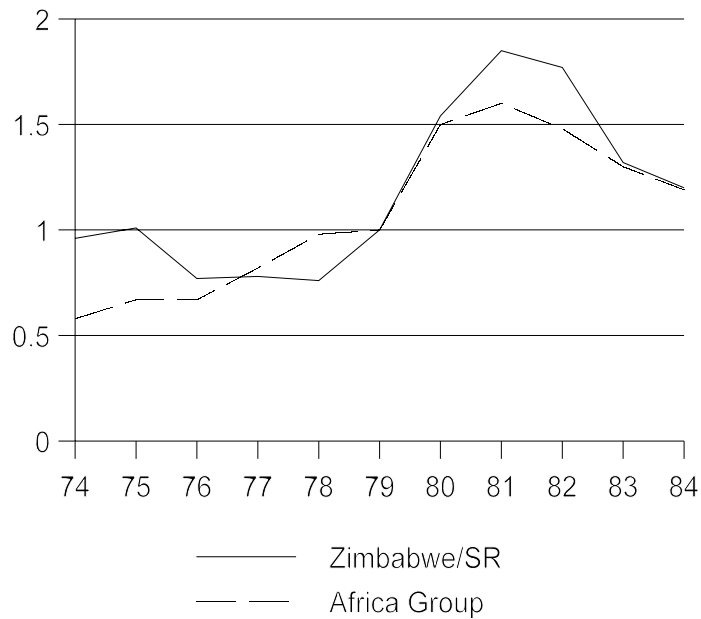


Figure 9
Zimbabwe/Southern Rhodesia: Indexed Imports 1974-1984
(1979 = 1.00)



2. Zimbabwe Crisis

Over the next two decades, Zimbabwe slid into a one-party, autocratic political situation in which dissent and democratic processes were suppressed by the government of Robert Mugabe. At the height of the growing crisis, in March 2003 the President invoked the unilateral authority of the International Emergency Economic Powers Act (IEEPA)⁶⁵ and issued Executive Order 13288,⁶⁶ blocking the property of “persons undermining democratic processes or institutions in Zimbabwe” specified in or in accordance with the order.⁶⁷ These included 77 individual officials of the Zimbabwe Government identified in an Annex to the order, beginning with President Mugabe.⁶⁸

How clever was this “smart sanction”! Touching only specific, 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 Mr. 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.

⁶⁵50 U.S.C. §§ 1701 *et seq.* On the terms and application of the IEEPA, see THEORY AND PRACTICE at 171-186.

⁶⁶68 Fed. Reg. 11,457 (March 6, 2003).

⁶⁷Ex. Order No. 13,288, § 1, 68 Fed. Reg. at 11,457.

⁶⁸Ex. Order No. 13,288, Annex, 68 Fed. Reg. at 11,459-11,461.

In what has become a consistent, if disturbing, administrative practice,⁶⁹ it was almost seventeen months before Treasury published regulations implementing Executive Order 13,288,⁷⁰ although persons identified in the Annex to the order had already been added to Treasury's "Appendix A"⁷¹ of blocked or "designated" persons. The Zimbabwe Sanctions Regulations (ZSRs) implemented the blocking and evasion prohibitions contained in sections 1 and 2 of the order.⁷² 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."⁷³ As has been the consistent procedure in Treasury sanctions programs since March 1979,⁷⁴ persons subject to U.S. jurisdiction in possession or control of blocked assets were required to hold blocked funds in interest-bearing accounts.⁷⁵ 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,

⁶⁹See THEORY AND PRACTICE at 610-612 (criticizing lengthy delays in issuance of regulations implementing sanctions programs).

⁷⁰*Zimbabwe Sanctions Regulations*, 69 Fed. Reg. 45,246 (2004) (codified at 31 C.F.R. pt. 541).

⁷¹31 C.F.R. ch. V, app. A (2004). See 69 Fed. Reg. at 45,247 (discussing changes to Appendix A).

⁷²31 C.F.R. §§ 541.201, 541.204.

⁷³*Id.* § 541.202.

⁷⁴See 44 Fed. Reg. 11,766, (1979) (codified at 31 C.F.R. § 500.205) (requiring interest-bearing accounts for China-related blocked funds).

⁷⁵31 C.F.R. § 541.203.

and are not to be netted out of the blocked property.⁷⁶

By November 2005, there was little apparent effect on the behavior of the targeted individuals. At that point, the president issued a major revision of Executive Order 13,288.⁷⁷ 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.⁷⁸ It also expanded the scope of administrative “designation” of other persons determined “to be owned or controlled by, or acting or purporting to act directly or indirectly for or on behalf of,”⁷⁹ a listed person, to include three additional target categories to be determined by the Treasury Secretary, in consultation with the Secretary of State. 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.⁸⁰

This expansion of categories of blocked persons highlights two increasingly prominent features of contemporary sanctions practice – the reliance on administrative

⁷⁶*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).

⁷⁷Ex. Order No. 13,391, *Blocking Property of Additional Persons Undermining Democratic Processes or Institutions in Zimbabwe*, 70 Fed. Reg. 71,201 (2005).

⁷⁸Ex. Order No. 13,391, Annex, 70 Fed. Reg. at 71,203.

⁷⁹Ex. Order No. 13,288, § 1(b), 68 Fed. Reg. at 11,457.

⁸⁰Ex. Order No. 13,391, §2, 70 Fed. Reg. at 71,201 (amending Ex. Order 13,288 to add § 1(a)(ii)(A)-(C)).

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.⁸¹ The process has raised serious concerns over the minimal process due to designated persons,⁸² but designation has rarely been successfully challenged.⁸³

The targeting of intermediary service providers has become an increasingly favored sanctions technique.⁸⁴ These intermediaries are often 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.”⁸⁵

⁸¹ See, e.g., 31 C.F.R. § 501.807 (setting forth procedures governing removal of names from administrative lists of designated persons). Cf. *id.* § 501.806 (establishing procedures for unblocking funds believed to have been blocked due to mistaken identity).

⁸² Cf. Simon Chesterman, *Unaccountable? The United Nations, Emergency 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 CONST. L.J. 306 (2009) (discussing challenges in European courts claiming asset blockings without adequate legal protections).

⁸³ Cf., e.g., *Yusuf v. Council of the European Union*, 2005 E.C.R. T-306/01, ¶ 339 (holding judicial review of decisions ultimately made by Security Council severely limited); *Kadi v. Council of the European Union*, and *Al Barakat Int'l Found. v. Council of the European Union*, 2008 E.C.R. 299, ¶¶ 286-288 (mandating judicial review of lawfulness of EU act implementing Security Council sanctions resolutions).

⁸⁴ See, e.g., S.C. Res. 661, ¶ 4, U.N. SCOR, 45th Sess., 2933d mtg., U.N. Doc. S/RES/661 (1990), reprinted in 29 INT'L LEGAL MATERIALS 1325 (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).

⁸⁵ 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).

The revision also for the first time barred donations of humanitarian aid⁸⁶ to blocked persons.⁸⁷ This may seem to raise the vexing question of tension between economic sanctions and humanitarian objectives,⁸⁸ but this aid prohibition is actually a closed circuit. It affects only donations to or through blocked persons, not to the intended beneficiaries of such aid.⁸⁹

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 27 June 2008, accompanied by acts of violence and other human rights abuses against political opponents.⁹⁰ In July 2008, the President revisited the situation and issued a new executive

⁸⁶Per 50 U.S.C. § 1702(b)(2)(A), 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. . . .

⁸⁷Ex. Order No. 13,391, §2, 70 Fed. Reg. at 71,201 (amending Ex. Order 13,288 to add § 1(b)).

⁸⁸See, 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 12 (1995).

⁸⁹Cf. Ex. Order No. 13,391, §2, 70 Fed. Reg. at 71,202 (amending Ex. Order 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.

⁹⁰See Ex. Order No. 13,469, 73 Fed. Reg. 43,841 (2008) (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").

order,⁹¹ supplementing the measures imposed under the previous two orders.⁹² The new order blocked any property subject to U.S. jurisdiction of any person determined by the Treasury Secretary, after consultation with the Secretary of State, to be a senior official of the Zimbabwe Government.⁹³ 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,⁹⁴ the Treasury Secretary 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;⁹⁵ (ii) any person determined to be responsible for, or to have participated in, human rights abuses related to political repression in Zimbabwe;⁹⁶ (iii) any person determined to be engaged in, or to have engaged in, activities facilitating public corruption by senior officials of the Zimbabwe

⁹¹Ex. Order No. 13,469, *supra* note 90.

⁹²See *id.* § 1(d), 73 Fed. Reg. at 43,842 (declaring that provisions of Ex. Order No. 13,288 and Ex. Order No. 13,391 remain in effect, and that new order did not affect any action taken pursuant to previous orders).

⁹³*Id.* § 1(a)(i), 73 Fed. Reg. at 43,841. 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 Ex. Order No. 13,288, Annex, 68 Fed. Reg. at 11,459-11,461. 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. Ex. Order No. 13,391, §2, 70 Fed. Reg. at 71,201 (amending Ex. 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.

⁹⁴Ex. Order No. 13,469, § 1(a)(iii), 73 Fed. Reg. at 43,841.

⁹⁵*Id.* § 1(a)(ii).

⁹⁶*Id.* § 1(a)(iv).

Government;⁹⁷ (iv) any person determined to be a spouse or dependent child of any person blocked under any of the three orders;⁹⁸ (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;⁹⁹ 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.¹⁰⁰

As of year-end 2009, the implementing Treasury regulations have still not been amended in light of the November 2005 and July 2008 executive orders, a common problem with Treasury’s various economic sanctions programs.¹⁰¹ However, the list of designated and blocked persons has been amended regularly,¹⁰² and to that extent at least Treasury has kept pace with the orders.

While it is obvious that the situation remains uncertain in Zimbabwe, there is little reliable empirical data available. Zimbabwe has not consistently reported financial data to

⁹⁷ *Id.* § 1(a)(v).

⁹⁸ *Id.* § 1(a)(vi).

⁹⁹ *Id.* § 1(a)(vii).

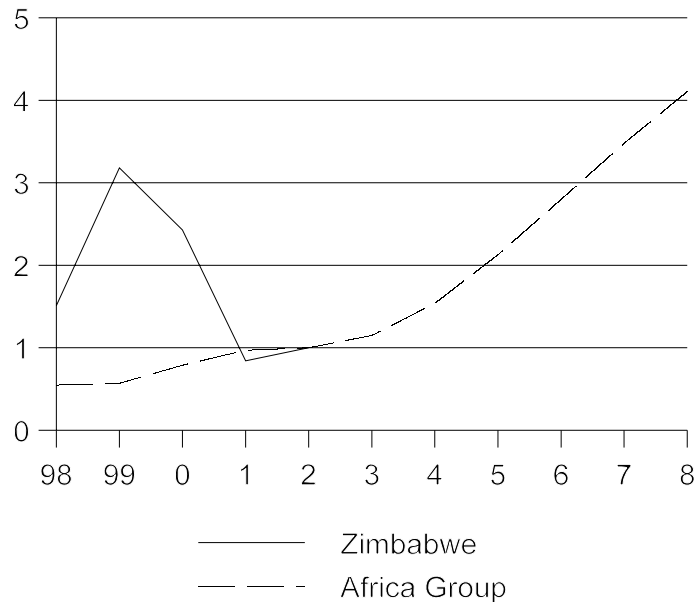
¹⁰⁰ *Id.* § 1(a)(viii), 73 Fed. Reg. at 43,841-43,841.

¹⁰¹ See text and accompanying note 69 (discussing delays).

¹⁰² See, e.g., 73 Fed. Reg. 7364 (2008) (adding designations of blocked entities pursuant to Ex. Order No. 13,391); 73 Fed. Reg. 45,101 (2008) (adding designations pursuant to Ex. Order No. 13,469); 73 Fed. Reg. 73,690 (2008) (additional designations). For the latest comprehensive revision of Appendix A, see Office of Foreign Assets Control, *Alphabetical Listing of Blocked Persons, Blocked Vessels, Specially Designated Nationals, Specially Designated Terrorists, Specially Designated Global Terrorists, Foreign Terrorist Organizations, and Specially Designated Narcotics Traffickers*, 74 Fed. Reg. 29,742 (2009) (codified at 31 C.F.R. ch. V, app. A), available at <http://www.treas.gov/ofac> (hereinafter *Designation List*).

the IMF, 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, *infra*.)

Figure 10
Zimbabwe: Indexed Foreign Exchange 1998-
(2002 = 1.00)



Source: INTERNATIONAL MONETARY FUND, INTERNATIONAL FINANCIAL STATISTICAL SERIES

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
Zimbabwe: Indexed Exports 2001-2008
(2001 = 1.00)

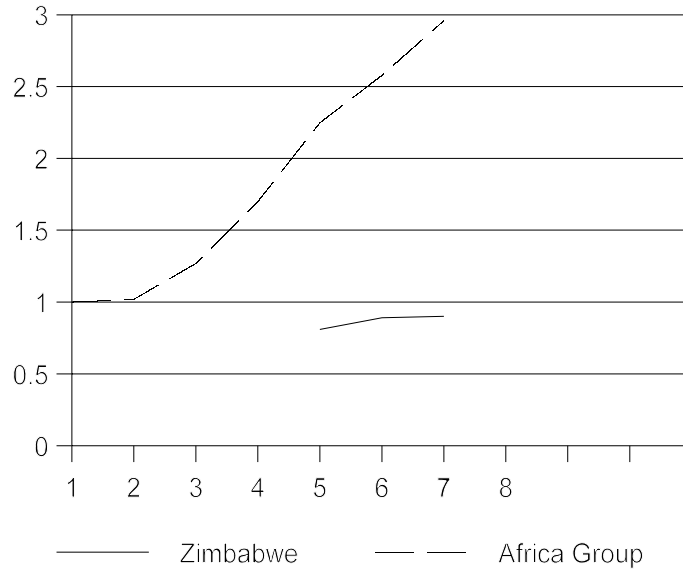


Figure 12
Zimbabwe: Indexed Imports 2001-2008
(2001 = 1.00)

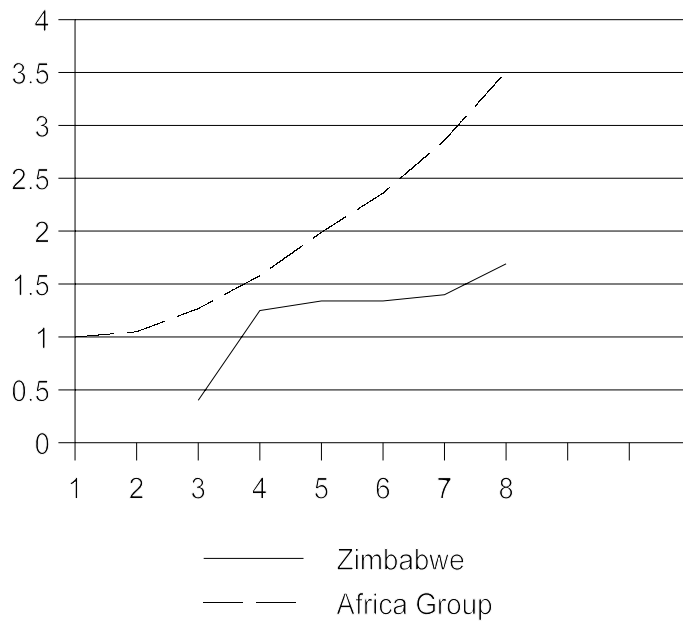
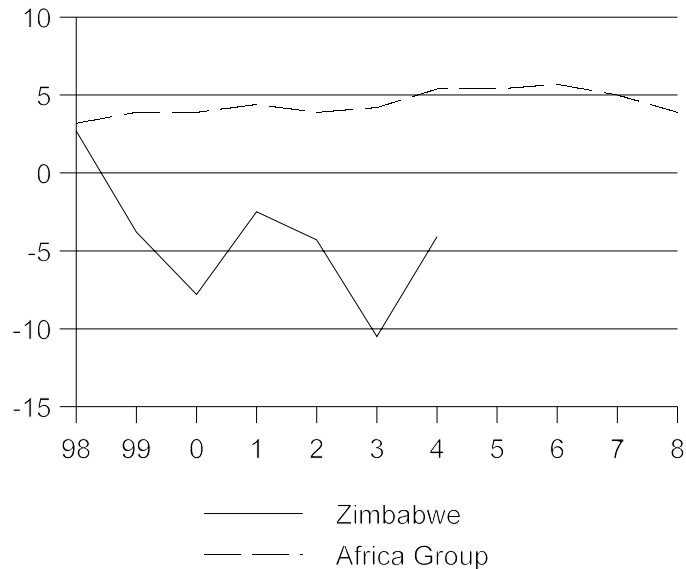


Figure 13
Zimbabwe: Indexed GDP 1998-2008
(percent change over previous year)



B. South Africa

The convoluted history of the international 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 itself is painful and protracted.¹⁰³ The contours of sanctions applied against South Africa have often been shaped by initiatives, however modest, emanating from the United Nations. While the South African situation was at least as compelling as that which involved Zimbabwe/Southern Rhodesia, the U.N. response here was markedly more tentative. In 1963, the U.N. Security Council invited participation in a

¹⁰³See, e.g., Mehlman, Milch & Toumanoff, *United States Restrictions on Exports to South Africa*, 73 Am. J. Int'l L. 581 (1979); Abbott, *Linking Trade to Political Goals: Foreign Policy Export Controls in the 1970s and 1980s*, 65 Minn. L. Rev. 739, 782-787 (1981) (discussing sanctions against South Africa). See also Davis, Cason & Hovey, *Economic Disengagement and South Africa: The Effectiveness and Feasibility of Implementing Sanctions and Divestment*, 15 L. & Pol. Int'l Bus. 529 (1983) (assessing effectiveness of South Africa sanctions).

voluntary embargo of arms sales to South Africa.¹⁰⁴ The United States complied with this invitation early on.¹⁰⁵ In 1977, the Security Council adopted Resolution No. 418,¹⁰⁶ mandating prohibitions of exports to South Africa of arms, munitions and military equipment, as well as of material for the manufacture and maintenance thereof. The United States went so far in early 1978 as to embargo all exports and reexports of U.S.-origin goods and technical information to or for use by any specified military or police entity in South Africa.¹⁰⁷ These prohibitions applied as well to Namibia.¹⁰⁸ However, 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 effectiveness of the controls as a sanction.¹⁰⁹

In 1985, the Security Council adopted Resolution No. 569,¹¹⁰ 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. Such sanctions were in effect imple-

¹⁰⁴Security Council Resolution No. 181, 18 U.N. SCOR, Res. & Dec. 1963, at 7, U.N. Doc. S/Res/181, S/Inf/18/Rev. 1 (1963).

¹⁰⁵See, e.g., 15 C.F.R. § 385.4(a)(1) (1964), *redesignated*, 53 Fed. Reg. 37,751 (1988) (recodified at 15 C.F.R. § 785.4(a)(1)).

¹⁰⁶32 U.N. SCOR 1, Res. & Dec. 1977 at 5, U.N. Doc. S/Res/418, S/Inf/33 (1977).

¹⁰⁷43 Fed. Reg. 7311 (1978).

¹⁰⁸See *id.* at 7311, 43,450.

¹⁰⁹See Mehlman, Milch & Toumanoff, *supra* at 593-595.

¹¹⁰U.N. Doc. S/Res/569 (1985).

mented by the President in September 1985,¹¹¹ under the authority of the IEEPA, forestalling threatened congressional action to mandate a broad range of sanctions. However, the following year the Congress did act, over a presidential veto, to enact the Comprehensive Anti-Apartheid Act of 1986 (CAAA),¹¹² thus broadening the sanctions and seizing the initiative from the President.

Ostensible progress occurred in the situation, though its positive nature may be disputed.¹¹³ In March 1990, following Namibian independence, the sanctions imposed on Namibia were lifted.¹¹⁴ In July 1991, the President issued Executive Order No. 12,769¹¹⁵ determining that the GOSA had taken all of the steps specified in section 311(a) of the CAAA,¹¹⁶ thus permitting termination of the sanctions specified in title III of the act. In July 1991, Treasury terminated IEEPA sanctions under the South African Transactions Regulations (SATRs),¹¹⁷ effective 12:01 p.m., e.s.t., 10 July 1991.¹¹⁸ The termination of the SATRs had no effect on the Treasury Department's enforcement authority with respect to acts

¹¹¹Ex. Order No. 12,532, 50 Fed. Reg. 36,861 (1985); Ex. Order No. 12,535, 50 Fed. Reg. 40,325 (1985).

¹¹²Pub. L. No. 99-440, 100 Stat. 1086 (1986); Pub. L. No. 99-631, 100 Stat. 3515 (1986). See Ex. Order No. 12,571, 51 Fed. Reg. 39,505 (1986) (implementing CAAA).

¹¹³See *Excerpts From Bush's Remarks on Sanctions: 'This Progress Is Irreversible'*, N.Y. Times, July 11, 1991, at A10, col. 1, 3 (noting dispute over fulfillment of statutory condition that political prisoners be released).

¹¹⁴See, e.g., 55 Fed. Reg. 10,618 (1990) (codified at 31 C.F.R. §§ 545.306, 545.312).

¹¹⁵56 Fed. Reg. 31,855 (1991).

¹¹⁶22 U.S.C. § 5061(a).

¹¹⁷31 C.F.R. pt. 545.

¹¹⁸56 Fed. Reg. 32,056 (1991) (codified at 31 C.F.R. § 545.599(a)).

committed prior to 10 July 1991.¹¹⁹

Commerce Department export controls remained in effect for items controlled under the United Nations arms embargo until May 1994.¹²⁰ On 25 May 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.¹²¹ The Council took this action at the request of the new South African Government, since the justification for maintaining the arms embargo and other restrictions no longer existed.¹²² In response to these developments, Commerce eliminated its controls implementing the arms embargo and removed specific controls on exports to the South African military and police, effective 25 May 1994.¹²³ On 17 August 1994, the State Department published an amendment to the International Traffic in Arms Regulations¹²⁴ to reflect that it was no longer U.S. policy to deny licenses, other approvals, exports and imports of defense articles and defense services, destined for or originating in South Africa.¹²⁵

The SATRs also contained sanctions mandated by the CAAA that were to be lifted

¹¹⁹31 C.F.R. § 545.599(b).

¹²⁰See U.N. Sec. Council Res. No. 418, Dec. 13, 1977. See also 15 C.F.R. pt. 779, Supp. No. 2 (1994). See also U.N. Sec. Council Res. No. 919, May 25, 1994 (lifting arms embargo against South Africa; withdrawing recommendation for other voluntary restrictions on sales to South African military and police); 59 Fed. Reg. 30,684 (1994) (Commerce regulations; removing foreign policy controls with respect to South Africa).

¹²¹U.N. Sec. Council Res. No. 919, *supra* note 120.

¹²²See 59 Fed. Reg. at 30,684 (discussing South Africa developments).

¹²³*Id.* (removing foreign policy controls with respect to South Africa).

¹²⁴22 C.F.R. pts. 120-130.

¹²⁵59 Fed. Reg. 42,158 (1994) (codified at 22 C.F.R. § 126.1(a), (c)).

upon repeal of the authorizing provisions or terminated by Presidential determination pursuant to the act;¹²⁶ they were removed effective 29 June 1995.¹²⁷ However, removal did not affect ongoing enforcement proceedings, nor did it prevent initiation of enforcement proceedings where the relevant statute of limitations had not run.¹²⁸

The South Africa sanctions, particularly those imposed in 1985-1986,¹²⁹ 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. 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 the available data that the sanctions had any significant instrumental effect. Foreign exchange holdings, on the readily available data, trended upward from the base year. (Figure 14, *infra*.) Though comparatively less dramatic, the trends in both export data (Figure 15, *infra*) and import data (Figure 16, *infra*) were relatively positive. Comparative indexed data in this regard (Figures 17-19, *infra*) confirm these findings.

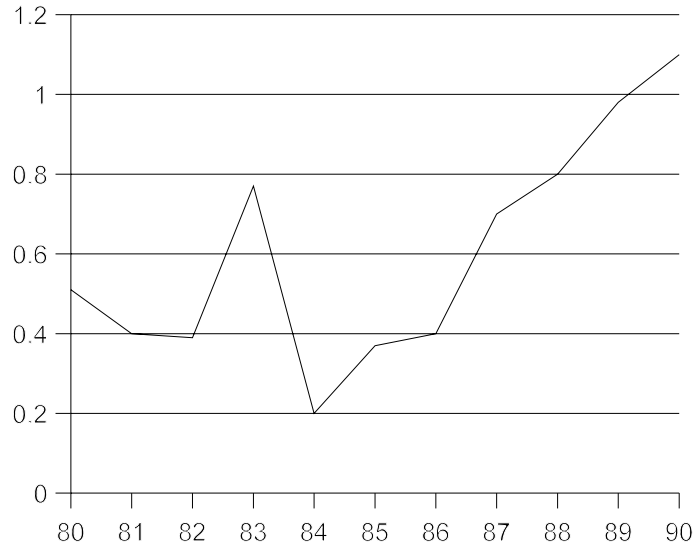
¹²⁶60 Fed. Reg. 33,725, 33725 (1995) (removing 31 C.F.R. pts. 520, 540, 545, 555, 565, 570 & 580).

¹²⁷*Id.*

¹²⁸*Id.*

¹²⁹See 31 C.F.R. § 545.203 (1986) (varying effective dates of South African sanctions).

Figure 14
South Africa: Foreign Exchange Data 1980-1990
 (in US \$ billions; base year 1985)



Source: INTERNATIONAL MONETARY FUND, INTERNATIONAL FINANCIAL STATISTICAL SERIES

Africa Group: For statistical purposes, the IMF group of developing African countries ("Africa Group") as of 1990 included: Algeria, Benin, Botswana, Burkino 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:

$$V_x = \frac{v_x}{v_b}$$

Figure 15
South Africa: Exports 1980-1990
(in US \$ billions; base year 1985)

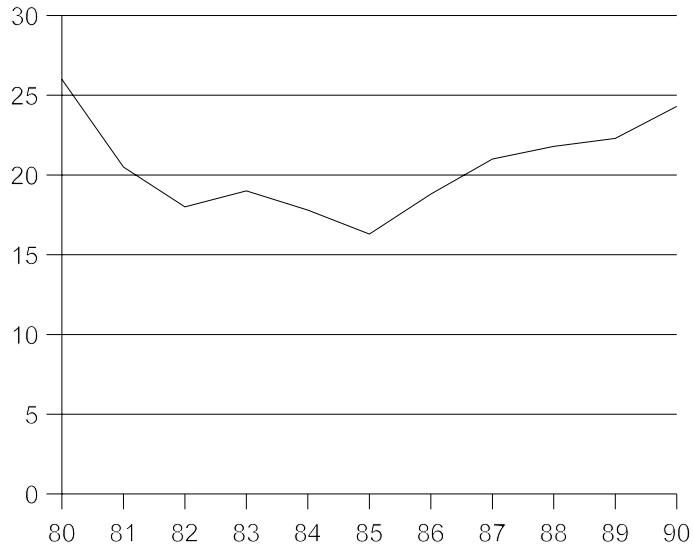


Figure 16
South Africa: Imports 1980-1990
(in US \$ billions; base year 1985)

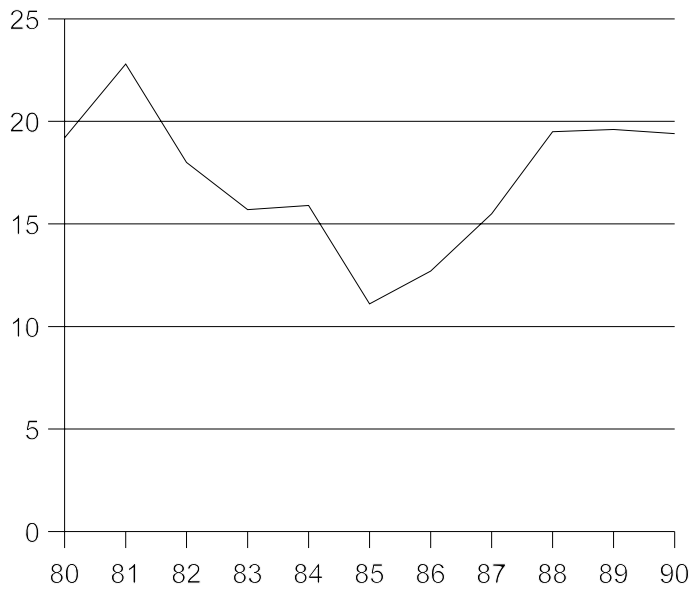


Figure 17
South Africa: Indexed Foreign Exchange 1980-1990
(1985 = 1.00)

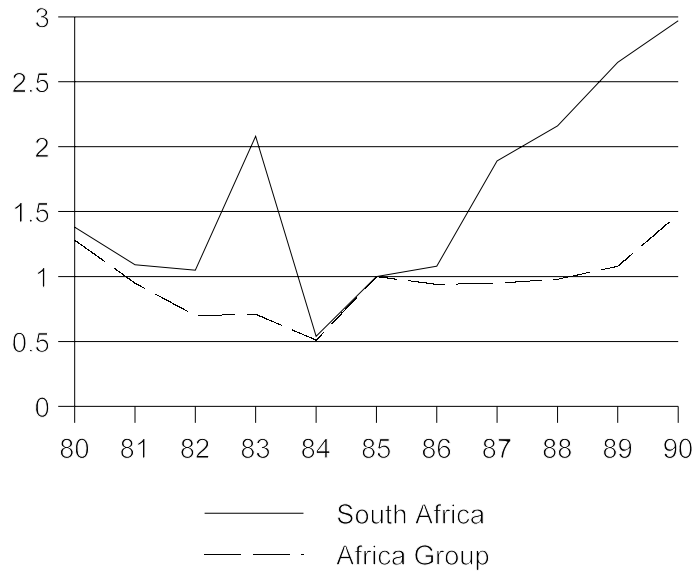


Figure 18
South Africa: Indexed Exports 1980-1990
(1985 = 1.00)

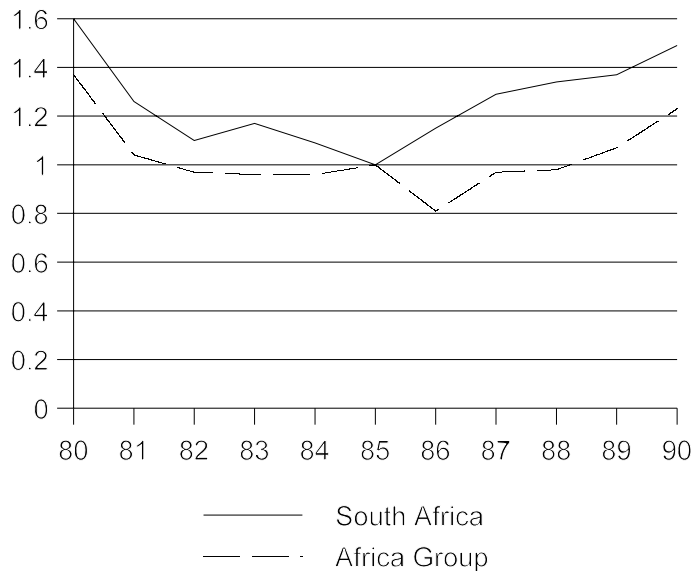
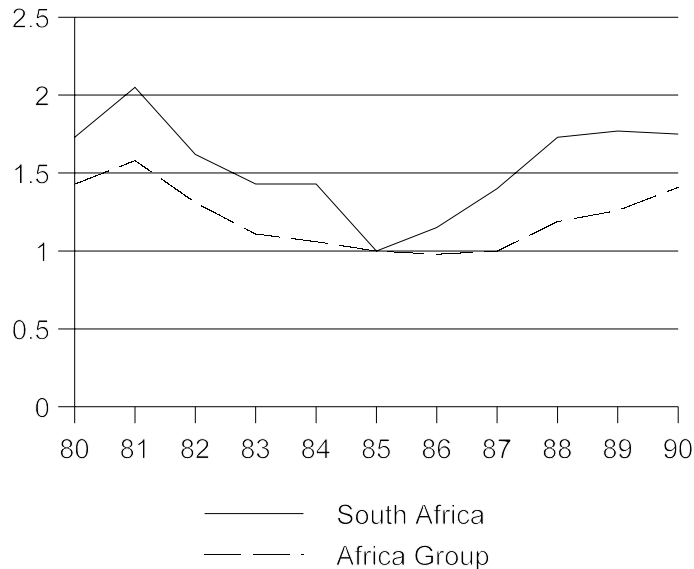


Figure 19
South Africa: Indexed Imports 1980-1990
(1985 = 1.00)



C. Myanmar

Since 1988, the United States has denied economic aid to Myanmar (formerly Burma).¹³⁰ The United States has voted against multilateral development bank assistance to Myanmar, declined to promote U.S. commercial investment or trade with Myanmar, and has refrained from selling arms to Myanmar.¹³¹ During this same period, however, regional trade with Myanmar increased.¹³² Despite the application of such “soft” sanctions by the United States, human rights violations and political repression by the military junta in

¹³⁰*U.S. Policy Toward Burma*, S. 1511, Before the Senate Banking, Housing and Urban Affairs Comm., 104th Cong., 2d Sess. (statement of Kent Wiedermann, Deputy Assistant Secretary of State, Bureau of East Asian and Pacific Affairs).

¹³¹*Id.*

¹³²*Id.*

Myanmar continued.¹³³

By May 1996, the 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 “egregious human rights violations” continued.¹³⁴ At that point, the Burma Freedom and Democracy Act¹³⁵ was proposed in response to the arrest of several opposition figures by the Myanmar Government. 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.¹³⁶ The bill would impose mandatory sanctions in effort to isolate the junta,¹³⁷ but the State Department viewed mandatory sanctions as too restrictive.¹³⁸ It wanted more flexibility to respond to ongoing events in Myanmar.¹³⁹ 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

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ S. 511, 104th Cong., 2d Sess. (1996).

¹³⁶ Steven Erlanger, *U.S. Weighs Tougher Reaction to Burmese Crackdown*, N.Y. Times, Oct. 5, 1996, at 1, 4.

¹³⁷ *Burma Freedom and Democracy Act Before the Senate Banking Comm.*, 104th Cong., 2d Sess. (1996) (statement of Sen. McConnell).

¹³⁸ *U.S. Policy Toward Burma Before the Senate Banking Comm.* (1996) (statement of Deputy Assistant Secretary Wiedemann).

¹³⁹ *Id.*

as foreign direct investment from other states continued to flow despite U.S. sanctions.¹⁴⁰

Mandatory sanctions were ultimately rejected by the Congress, but a hybrid sanctions provision was inserted into the Omnibus Consolidated Appropriations Act of 1997 (OCA),¹⁴¹ via the Cohen amendment.¹⁴² OCA § 570 is an odd blend of mandatory, congressionally-imposed sanctions and discretionary authority for presidential sanctions. Until the President determines and certifies to the Congress that Myanmar has made “measurable and substantial progress in improving human rights practices and implementing democratic government,” the following mandatory sanctions apply: (i) withholding of U.S. aid, except for humanitarian assistance, counter-narcotics assistance, and assistance promoting human rights and democratic values;¹⁴³ (ii) negative U.S. votes in international financial institutions¹⁴⁴ against any loan or other funding to or for Myanmar;¹⁴⁵ and, (iii) denial

¹⁴⁰*Burma Sanctions Before the Senate Banking Comm.*, 104th Cong., 2d Sess. (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), *affirmed in part and reversed in part*, 395 F.3d 932 (9th Cir. 2002), *on rehearing 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, Note, *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’LL. & FOREIGN AFF. 81, 96-98 (1999) (discussing *Unocal*); Shaw W. Scott, *Taking Riggs Seriously: The ATCA Case Against a Corporate Abettor of Pinochet Atrocities*, 89 MINN. L. REV. 1497, 1521-1524 (2005) (discussing implications of *Unocal*).

¹⁴¹Pub. L. No. 104-208, § 570, 110 Stat. 3009, 3009-166 (1997).

¹⁴²142 Cong. Rec. S8868-02 (July 25, 1996).

¹⁴³OCA, § 570(a)(1)(A)-(C).

¹⁴⁴*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).

¹⁴⁵*Id.* § 570(a)(2).

of entry visas to any Myanmar Government official.¹⁴⁶

On the discretionary side, the President is given the authority to prohibit “new investment” in Myanmar by U.S. persons, if the President determines and certifies to the Congress that, after enactment of OCAA, the Myanmar Government has “physically harmed, rearrested for political acts, or exiled” Daw Aung San Suu Kyi, the leader of the National League for Democracy, or has engaged in “large-scale repression or violence against the democratic opposition.”¹⁴⁷ Any such sanctions would apply until the President determined that “measurable and substantial progress in improving human rights practices and implementing democratic government” had occurred.¹⁴⁸ The President also has authority to waive any sanction (mandatory or discretionary) if application of the sanction would be contrary to U.S. national security interests.¹⁴⁹

OCAA requires the President to seek multilateral support from ASEAN member

¹⁴⁶*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.*

¹⁴⁷*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 nongovernmental 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;

(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 is time-limited to post-OCAA investment, it does not appear that it has any effect on the significant participation of, for example, Unocal in its joint venture with Total and the Myanmar Government. *Cf.* note 140 (discussing private litigation concerning Unocal activities in Myanmar).

¹⁴⁸142 Cong. Rec. H11644-01 (Oct. 3, 1996).

¹⁴⁹OCAA, § 570(e).

states and other trading partners of Myanmar to bring democracy to and to improve the human rights practices and quality of life in Myanmar.¹⁵⁰ It also requires presidential reports every six months on Myanmar's progress toward democratization and on the pursuit of a multilateral strategy.¹⁵¹

In May 1997 the President issued Executive Order 13,047,¹⁵² invoking OCAA § 570 and IEEPA. The order prohibited: (i) new investment in Myanmar by U.S. persons;¹⁵³ (ii) approval or other facilitation by a U.S. person, wherever located, of a transaction by a *foreign person*, if the transaction would constitute prohibited "new investment" in Myanmar if engaged in by a U.S. person or within the United States;¹⁵⁴ and, (iii) any transaction by a U.S. person or within the United States that evades or avoids, or has the purpose of evading or avoiding, or attempts to violate, any prohibition of the order.¹⁵⁵ The order does not prohibit entry into or performance or financing of, a contract to sell or purchase goods, services, or technology, with specified exceptions.¹⁵⁶ The order does prohibit such contractual activity

¹⁵⁰*Id.* § 570(d).

¹⁵¹*Id.*

¹⁵²62 Fed. Reg. 28,301 (1997).

¹⁵³Ex. Order No. 13,047, § 1, 62 Fed. Reg. at 28,301. 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), 62 Fed. Reg. at 28,301-28,302.

¹⁵⁴*Id.* § 2(a), 62 Fed. Reg. at 28,301. 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.

¹⁵⁵Ex. Order No. 13,407, § 2(b), 62 Fed. Reg. at 28,301. 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.* note 154, *supra* (discussing role of IEEPA).

¹⁵⁶Ex. Order No. 13,407, § 3, 62 Fed. Reg. at 28,301.

if it is for the general supervision and guarantee of another person's performance of a contract for the economic development of resources located in Myanmar.¹⁵⁷ The order also applies to a contract if payment under the contract, in whole or in part, is in shares of ownership in the economic development of resources located in Myanmar,¹⁵⁸ or through participation in royalties, earnings, or profits from the economic development of resources located in Myanmar.¹⁵⁹

As has now become a typical pattern in recent U.S. sanctions practice,¹⁶⁰ a year passed before Treasury published implementing regulations, the Burmese Sanctions Regulations (BSRs).¹⁶¹ 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 license¹⁶² authorizing divestiture of a U.S. person's investment in favor of a foreign buyer, notwithstanding the facilitation prohibition.¹⁶³

Despite the OCAA mandatory and discretionary sanctions, nothing changed in the situation within Myanmar, and in July 2003 the Burmese Freedom and Democracy Act of

¹⁵⁷*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), 62 Fed. Reg. at 28,302.

¹⁵⁸*Id.* § 3(b)(i), 62 Fed. Reg. at 28,301.

¹⁵⁹*Id.* § 3(b)(ii).

¹⁶⁰See *supra* note 69 (discussing administrative delays).

¹⁶¹63 Fed. Reg. 27,846 (1998) (codified at 31 C.F.R. pt. 537).

¹⁶²31 C.F.R. § 537.504.

¹⁶³See *id.* § 537.202 (prohibiting facilitation of transaction by foreign person).

2003 (BFD Act)¹⁶⁴ was signed into law, to restrict the financial resources of the junta. The BFD Act required the President to ban U.S. importation of Myanmar products, beginning 30 days after enactment of the act, and to consider blocking the assets of junta members and preventing further financial or technical assistance to Myanmar until specified conditions were met. To implement the BFD Act, and to take additional steps in response to the junta's continued repression of the democratic opposition, the President again invoked the authority of IEEPA to block assets subject to U.S. jurisdiction of specified persons and to prohibit certain transactions.¹⁶⁵ The order imposed an asset blocking of all property subject to U.S. jurisdiction¹⁶⁶ of four governmental entities listed in an Annex to the order, beginning with the ruling State Peace and Development Council.¹⁶⁷ This list was to be supplemented by Treasury "designations" of persons determined by the Treasury Secretary, 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

¹⁶⁴Pub. L. No. 108-61, 117 Stat. 864 (2003) (codified at 50 U.S.C. § 1701 note).

¹⁶⁵Ex. Order No. 13,310, *Blocking Property of the Government of Burma and Prohibiting Certain Transactions*, 68 Fed. Reg. 44,853 (2003). The order revoked the operative provisions of Ex. Order No. 13,407 to the extent that they were inconsistent with the new order. *Id.* § 12, 68 Fed. Reg. at 44,855. 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.

¹⁶⁶For 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." *Id.* § 1. 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), 68 Fed. Reg. at 44,854.

¹⁶⁷*Id.* § 1(a), 68 Fed. Reg. at 44,853.

Solidarity and Development Association, or any successor entity to any of these;¹⁶⁸ 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.¹⁶⁹ The “designation” process itself may be troubling in terms of due process expectations.¹⁷⁰ The order expressly provides that listed and designated persons “who might have a constitutional presence in the United States,”¹⁷¹ are to be accorded no prior notice of any listing or designation.¹⁷² Treasury’s generally applicable procedures with respect to *post hoc* challenges to designation are minimal at best,¹⁷³ and the BSRs themselves contain no guidance in this regard.¹⁷⁴

In a somewhat unusual move for U.S. sanctions practice, the President also formally determined, pursuant to the requirement of IEEPA § 203(b)(2),¹⁷⁵ that the making of

¹⁶⁸*Id.* § 1(b)(i).

¹⁶⁹*Id.* § 1(a)(ii).

¹⁷⁰For 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 Regime*, 43 WAKE FOREST L. REV. 643, 662-667 (2008).

¹⁷¹Note that persons without a “constitutional presence” presumably do not have standing to raise due process concerns. *People’s Mojahedin Org. of Iran v. U.S. 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”).

¹⁷²Ex. Order No. 13,310, § 7, 68 Fed. Reg. at 44,854. 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.*

¹⁷³See 31 C.F.R. § 501.807 (setting forth procedures for removal of names from appendices). *Cf. id.* § 501.806 (establishing procedures for unblocking funds as blocked due to mistaken identity).

¹⁷⁴*But see id.* § 537.101 (incorporating by reference procedures of 31 C.F.R. pt. 501).

¹⁷⁵50 U.S.C. §1702(b)(2).

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.¹⁷⁶ In addition, the order prohibited: (i) “exportation” or “reexportation,” directly or indirectly, to Myanmar of any financial services either from the United States or by a U.S. person, wherever located;¹⁷⁷ 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.¹⁷⁸ In addition, except to the extent excluded by the order or otherwise licensed under implementing regulations, the order prohibits U.S. importation of any article that is a product of Myanmar.¹⁷⁹ Except for this import prohibition, the order grandfathers “any activity, or any

¹⁷⁶Ex. Order No. 13,310, § 6, 68 Fed. Reg. at 44,854.

¹⁷⁷*Id.* § 2(a)(i)-(ii), 68 Fed. Reg. at 44,853. 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 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. This was the first use of the technical term in Treasury’s 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.

¹⁷⁸Ex. Order No. 13,310, § 2(b), 68 Fed. Reg. at 44,853.

¹⁷⁹*Id.* § 3, 68 Fed. Reg. at 44,853-44,854. 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

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 nongovernmental entity in Myanmar prior to 12:01 a.m. eastern daylight time on May 21, 1997.¹⁸⁰

In their original version, the effectiveness of the Myanmar sanctions were 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.¹⁸¹ It was also unclear whether the United States had any practical leverage to ameliorate the policies and practices of the Myanmar Government.¹⁸² 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.¹⁸³ The empirical data appear to support this view. Given the range of sanctions involved with the enactment of the BFD Act in 2003, this

Relations, the Vienna Convention on Consular Relations, the United Nations Headquarters Agreement, and other legal instruments providing equivalent privileges and immunities.

Id. § 8, 68 Fed. Reg. at 44,854. For additional licensing of importations under the BSRs, see 31 C.F.R. §§ 537.511-537.516 (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 72 Fed. Reg. 34,376 (2007) (codified at 31 C.F.R. § 537.527) (amending BSRs to provide for specific license applications for U.S. importation of Myanmar-origin animals and specimens in sample quantities only)

¹⁸⁰Ex. Order No. 13,310, § 13, 68 Fed. Reg. at 44,855.

¹⁸¹See, e.g., Seth Mydans, *The World: Just What is the Burmese Problem?*, N.Y. Times, Oct. 13 1996, at 4 (discussing regional situation).

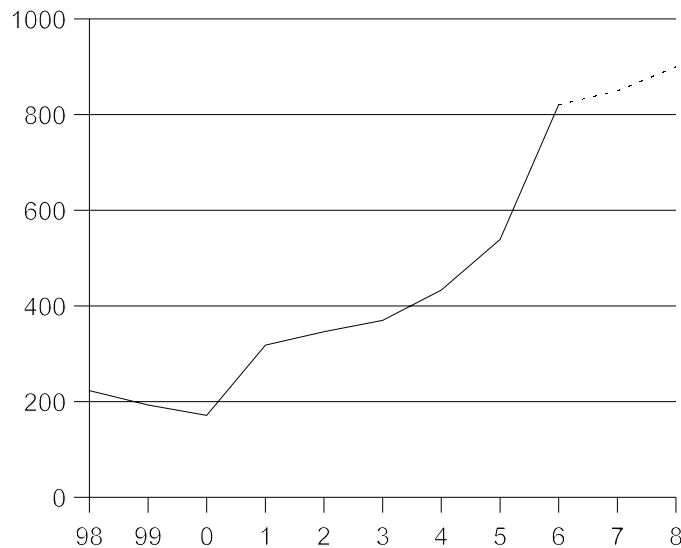
¹⁸²*Id.*

¹⁸³Contrast this situation, for example, with the intensification of sanctions in the Iran hostages crisis, set in place within a period of five months. See THEORY AND PRACTICE at 90-96 (discussing extensive range of sanctions applied to Iran during crisis). Accordingly, “the blocking [of Iranian Government assets], combined with the effects of the full trade embargo . . . , manifestly had a very significant impact upon Iran.” *Id.* at 358 (footnotes omitted).

analysis examines foreign exchange, export, and import data, organized around the base year of 2003.

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

Figure 20
Myanmar: Foreign Exchange Data 1998-2008
(in SDR millions; base year 2003)



Source: INTERNATIONAL MONETARY FUND, INTERNATIONAL FINANCIAL STATISTICAL SERIES

Asia Group: For statistical purposes, the IMF group of developing Asian countries ("Asia Group") as of 2008 included: Afghanistan, Bangladesh, Bhutan, Brunei Darussalam, 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:

$$V_x = \frac{v_x}{v_b}$$

Figure 21
Myanmar: Exports 1998-2008
(in US \$ billions; base year 2003)

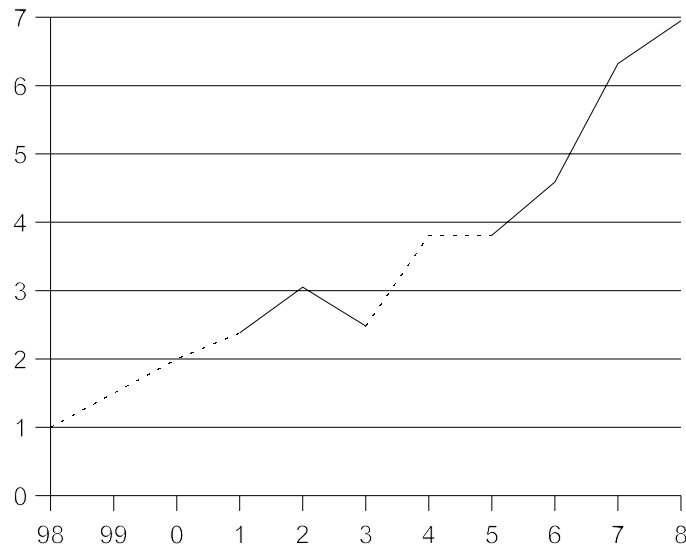


Figure 22
Myanmar: Imports 1998-2008
(in US \$ billions; base year 2003)

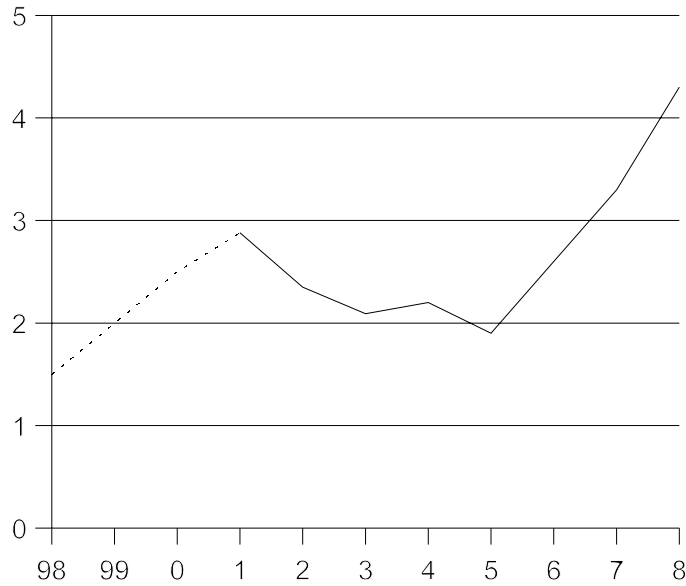


Figure 23
Myanmar: Indexed Foreign Exchange 1998-2008
(2003 = 1.00)

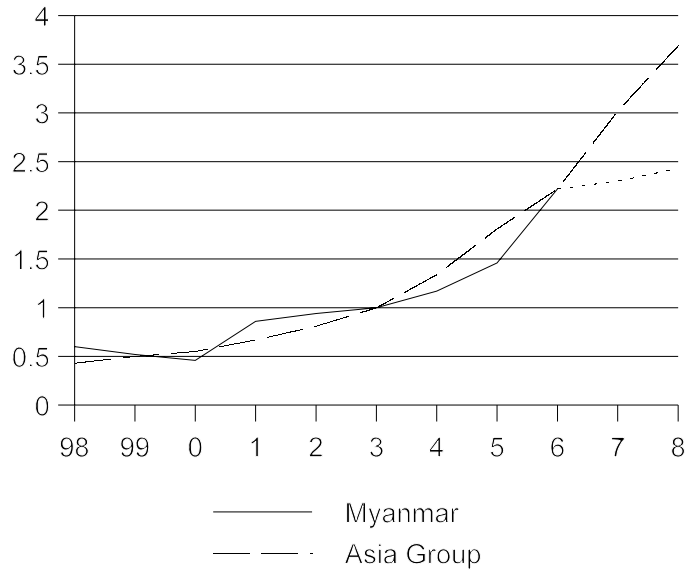


Figure 24
Myanmar: Indexed Exports 1998-2008
(2003 = 1.00)

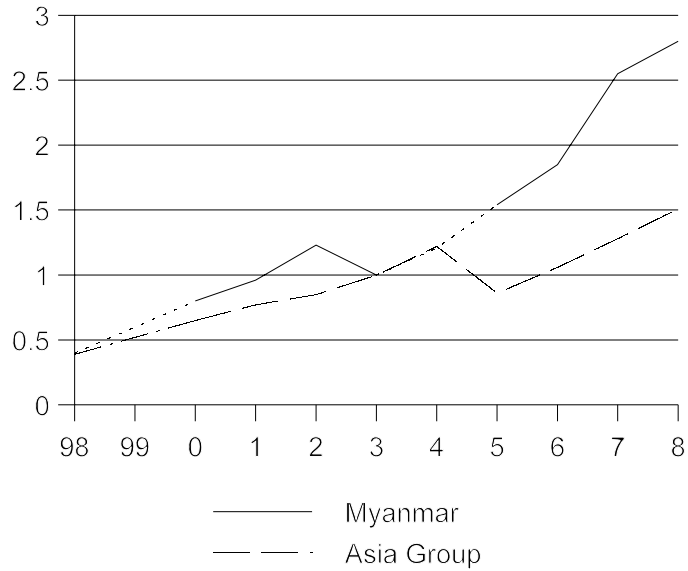
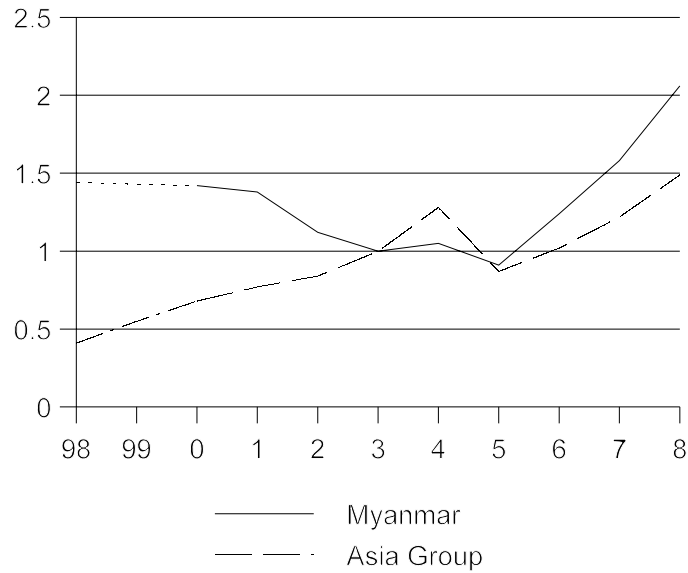


Figure 25
Myanmar: Indexed Imports 1998-2008
(2003 = 1.00)



D. Belarus

Beginning with the dismissal and indictment of the reform-minded premier of the Republic of Belarus in 1994,¹⁸⁴ political and civil rights have been eclipsed by a revanchist regime. By 2006, political repression in Belarus, a former Soviet Republic,¹⁸⁵ had reached a critical mass, with “fundamentally undemocratic March 2006 elections,” reports of human rights abuses related to political repression, detentions and “disappearances,” and allegedly rampant public corruption.¹⁸⁶ In response, in June 2006 the President invoked IEEPA and declared a national emergency with respect to Belarus.¹⁸⁷ The President’s order relied upon the now familiar device of an asset blocking of all property subject to U.S. jurisdiction¹⁸⁸ of ten persons listed in an Annex to the order, beginning with the current Belarus president, Alyaksandr Lukashenka.¹⁸⁹ This list was to be supplemented by Treasury “designations” determined by the Treasury Secretary, after consultation with the Secretary of State, to fall

¹⁸⁴See *Belarus Parliament Ousts Leader*, N.Y. Times, Jan. 27, 1994, at A6, col. 1 (reporting ouster of Stanislav Shushkevich, Chairman of Parliament).

¹⁸⁵For 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).

¹⁸⁶See Ex. Order No. 13,405, *Blocking Property of Certain Persons Undermining Democratic Processes or Institutions in Belarus*, 71 Fed. Reg. 35,485, 35,485 (2006) (reciting presidential findings with respect to Belarus).

¹⁸⁷*Id.*, 71 Fed. Reg. at 35,485.

¹⁸⁸Characteristically, 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.” *Id.* § 1(a). 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), 71 Fed. Reg. at 35,486.

¹⁸⁹*Id.* § 1(a)(i), 71 Fed. Reg. at 35,485.

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;”¹⁹⁰ (ii) any person “responsible for, or to have participated in, human rights abuses related to political repression in Belarus;”¹⁹¹ (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;¹⁹² (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 Treasury Secretary under the order;”¹⁹³ 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.¹⁹⁴ These current and future asset blockings included both the making of any contribution or provision of funds, goods, or services by, to, or for the benefit of any listed or designated person *and* the receipt of any contribution or provision of funds, goods, or services *from* any listed or designated person.¹⁹⁵ In addition, in what is still a relatively unusual step, the President formally determined, pursuant to the requirement of IEEPA § 203(b)(2),¹⁹⁶ that the making of donations of articles of humanitarian aid “by, to, or for the

¹⁹⁰*Id.* § 1(a)(ii)(A).

¹⁹¹*Id.* § 1(a)(ii)(B).

¹⁹²*Id.* § 1(a)(ii)(C).

¹⁹³*Id.* § 1(a)(ii)(D).

¹⁹⁴*Id.* § 1(a)(ii)(E).

¹⁹⁵*Id.* § 1(c), 71 Fed. Reg. at 35,486.

¹⁹⁶50 U.S.C. §1702(b)(2).

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.¹⁹⁷

This “designation” process, which is becoming a common feature of U.S. sanctions programs, nevertheless remains troubling in terms of due process expectations.¹⁹⁸ As with the Myanmar sanctions,¹⁹⁹ 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.²⁰⁰ Treasury’s generally applicable procedures with respect to *post hoc* challenges to designation are minimal at best,²⁰¹ and – perhaps even more disturbing – Treasury has still not issued regulations specifically implementing the Belarus order, more than three years after its issuance. Based on the order, however, Treasury has included on its designation list sixteen individuals (including the ten listed in the Annex to the order) and five entities.²⁰²

Given the comparatively minimal level of engagement by the U.S. Government in this

¹⁹⁷Ex. Order No. 13,405, § 1(b), 71 Fed. Reg. at 35,485.

¹⁹⁸See *supra* text and accompanying notes 170-174 (discussing due process concerns).

¹⁹⁹See *supra* text and accompanying note 171 (discussing Myanmar order).

²⁰⁰Ex. Order No. 13,405, § 4, 71 Fed. Reg. at 35,486. 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.*

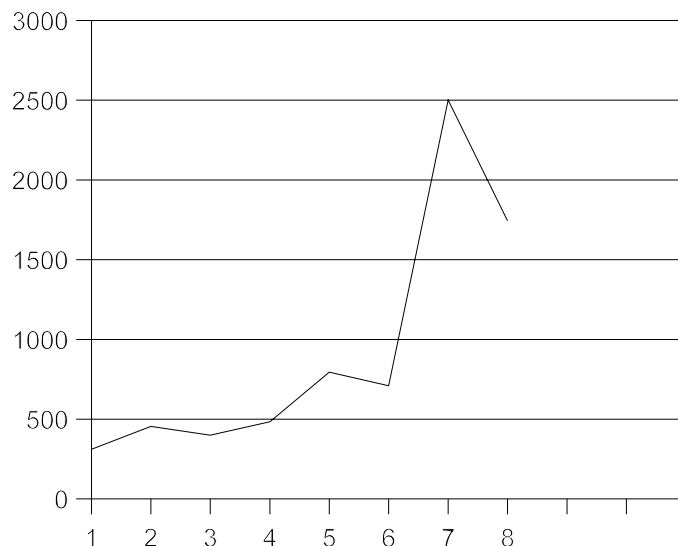
²⁰¹See 31 C.F.R. § 501.807 (setting forth procedures for removal of names from appendices). *Cf. id.* § 501.806 (establishing procedures for unblocking funds as blocked due to mistaken identity).

²⁰²See *Designation List*, *supra* note 102. See also 73 Fed. Reg. 31,005 (2008) (changing identifying information of Belarusian Oil Trade House, designated May 15, 2008).

program, rising almost to inattentiveness, one might wonder how serious this human rights sanctions program is. Another question, obviously, is whether the program – another narrowly targeted “smart sanction” – has had any appreciable impact on Belarus.

The data examined below is built 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 (Figure 26, *infra*). Looking at the data relative to performance of the Central and Eastern European region indexed to the base year (Figure 27, *infra*), we confront a situation in which target country performance mirrors that of the region as a whole, but dramatically out-performs the region once sanctions are imposed. This is certainly not an endorsement for the instrumental effectiveness of narrowly targeted, “smart” sanctions.

Figure 26
Belarus: Foreign Exchange Data 2001-2008
(in SDR millions; base year 2006)



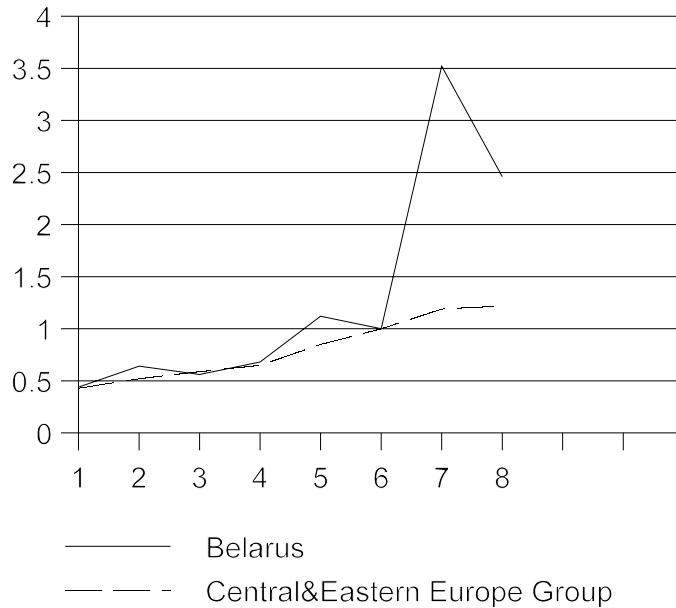
Source: INTERNATIONAL MONETARY FUND, INTERNATIONAL FINANCIAL STATISTICAL SERIES

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:

$$V_x = \frac{v_x}{v_b}$$

Figure 27
Belarus: Indexed Foreign Exchange 2001-2008
(2006 = 1.00)



IV. Observation and Reflection

One circumstance should be obvious from a review of the case studies in the preceding part of this paper – the technical design in contemporary sanctions programs exhibit striking similarities, regardless of whether they originate in unilateral or multilateral

initiatives. The asset blocking technique has exhibited itself 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, 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.²⁰³

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 create unpredictable externalities into international commerce and finance.

The sanctions programs in our case studies have fundamentally been concerned with vindication of important principles of human rights law. The encouraging feature here is that these principles are now taken as seriously as they are, a fact that is evident from these case studies. The discouraging feature, however, is that in each of these cases we may detect a lack of focused purpose or of urgency. Inordinate delays in administrative implementation of the program, poor technical design, and a protracted gradualism in

²⁰³On the current financial crisis, see Michael P. Malloy, *The Subprime Mortgage Crisis: An International and Regional Threat in Need of a Solution*, in DAVID A. FRENKEL & CARSTEN GERNER-BEUERLE (eds.), CHALLENGES OF THE LAW IN A PERMEABLE WORLD 9 (Athens Institute for Education and Research: 2009).

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 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.²⁰⁴ 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 paper. 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.

²⁰⁴ See, e.g., note 9 (contrasting Iran hostage sanctions and Zimbabwe/Southern Rhodesia).