Article

Globalizing Decency: Responsible Engagement in an Era of Economic Integration

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The prevailing view in the foreign policies of many Western countries holds that “constructive” economic engagement with repressive regimes will induce human rights sensitive development. A very vigorous dissenting position, held by many opponents of “globalization,” is that economic engagement and liberalization fuel many of the very human rights abuses they are supposed to cure. The empirical evidence tends to support a nuanced approach to constructive engagement, one that might be termed “responsible engagement.” Under a responsible engagement model, there remains an important role for economic sanctions, both as a means of affecting the behavior of nation-states and to stave off the possibility that citizens of one country are contributing to the persistence of the targeted repressive regime. Responsible engagement obliges recourse to “smart sanctions.” Yet, the legal apparatus governing economic integration is, on the whole, built without an eye to a “smart sanctions” responsible engagement policy. This Article explores these assertions and concludes that a full-fledged strategy of responsible engagement obliges reconsideration and clarification of several facets of the World Trade Organization.

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I. INTRODUCTION

A fable penned by satirist Ambrose Bierce describes Moral Principle and Material Interest meeting on a bridge. Traveling in separate directions and unable to pass owing to the width of the bridge, Moral Principle and Material Interest are in conflict. Generously, Moral Principle offers to resolve the situation by lying flat and letting Material Interest walk over it. Not content with this solution, Material Interest insists that Moral Principle leave the bridge entirely and throw itself into the river.

A simple yarn, Bierce’s tale portrays the classic and familiar contradiction between profit and principle, a conflict the old cynic tells us is resolved at the expense of principle. Of course, Bierce lived in a different time, in the era before the rise of complicated free trade agreements. If Bierce were alive today, his fable would go something like this: Material Interest and its junior partner, Moral Principle, are on a team negotiating a free trade agreement with a country ruled by a repressive government. The advantages of the agreement to Material Interest are clear, but Moral Principle is concerned that the pact will exacerbate human rights abuses and the exploitation of workers in the other country. Cognizant that Moral Principle — and Material Interest’s sworn enemy, Protectionist Material Interest — have a significant number of votes in Congress, Material Interest takes Moral Principle into the back room and explains that pursuing the course of action recommended by Material Interest will, by its very nature, satisfy the quibbles of Moral Principle. After all, the rich market countries in today’s world are also the long-standing democratic nations. Trade, explains the patient Material Interest, will provide a positive catalyst for change in the repressive country. Now of the same mind, Material Interest and Moral Principle return to the negotiating room hand-in-hand and approve the agreement.

Notably, Material Interest’s conception of economic integration as social progress by other means has an impressive pedigree. In the post-War era, trade and economic integration have been justified, not simply as a method for maximizing prosperity, but ultimately as a means of serving laudable political ends. For example, the linchpin of the modern trade regime, the General Agreement on Tariffs and Trade, was the brainchild of policy makers persuaded that the prolonged Depression of the 1930s and the Second World War were, in part, the product of beggar-thy-neighbor trade policies. These policies were in turn the result of an anarchic international trade law regime. Similarly, the European Coal and Steel
Community, the precursor of the European Economic Community, and now the European Union, was explicitly an effort to internationalize control over those smokestack industries most closely associated with armament production.  

In more contemporary foreign policy circles, the position advocated by Material Interest is often called “constructive engagement.” More political ideology than economic theory, one variant of constructive engagement posits that trade with, and investment in, repressive countries will promote political liberalization and greater respect for human rights by exposing populations to liberal, human rights-supporting values. The theory, by marrying material interest and moral principle, is immensely appealing, creating a natural constituency amongst both the most myopic profit-seeking companies and the most conscientious, human rights-sensitive policy makers.

That said, there remains a very vigorous dissenting view on the moral advantages of economic engagement. Though difficult to isolate with any certainty, the shared vision of the loose amalgam of globalization opponents, labor unions and non-governmental groups protesting in the streets of Seattle, Prague, Washington, Quebec City and elsewhere, is that economic integration undermines national sovereignty, entrenches social disadvantage between social classes and between North and South, debases national labor and environmental standards, and sometimes props up repressive regimes. If true, the natural consequence of such liberalized trade and investment will be continued class and North/South exploitation, some form of political backlash and a measure of political instability.

Clearly, assessing the merits of these two contrasting visions—economic engagement as panacea versus economic engagement as villain—is an empirical exercise. Yet, the empirical evidence, such as it is, is neither entirely dismissive nor completely supportive of either position, at least when examined with an eye to human rights. Instead, these data tend to support a nuanced approach to constructive engagement, one that might be termed “responsible engagement.” In particular, engagement is appropriate so long as it does not induce the very human rights ills it is said to cure. Where constructive engagement via economic integration augments the staying power of a human rights-abusing regime, or prompts it to engage in additional human rights abuses, the net impact of that integration may not be positive. In these circumstances, the appropriate policy response will be economic disengagement. Accordingly, under a responsible engagement model, there remains an important role for economic sanctions, both as a means of affecting the behavior of nation-states and to stave off the possibility that citizens of one country are contributing to the persistence of a repressive regime in another nation.

Yet, while the objectives of “responsible engagement” are simple to articulate, achieving these goals presents a host of difficulties. Economic

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4. GEORGE BERMANN, EUROPEAN COMMUNITY LAW 5-6 (1993).
sanctions often are, after all, a blunt mechanism. Poorly tempered, these sanctions run the risk, not of penalizing elite decision-makers or centers of strategic power, but of devastating an already much-abused populace. Recent rethinking of sanctions leveled against Iraq since the Gulf War has led to new discussions at the U.N. and elsewhere about “smart sanctions”: limited and carefully tailored measures applying leverage in those areas where leverage is most important, particularly against political elites. Yet, rendering these “smart sanctions” effective raises substantial legal, economic and political questions. Not least among these problems: the legal apparatus governing economic integration is, on the whole, built without an eye to a responsible engagement policy. Developing a real policy of “responsible engagement”, therefore, demands a rethinking of the way international law governs international economic relations.

The Article that follows explores these assertions. Part II examines the economic and political merits of constructive engagement, on the one hand, and economic sanctions on the other. It highlights both the strengths and weaknesses of each approach, focusing on apartheid-era South Africa as a case study. Part III proposes a halfway approach to promoting human rights-sensitive development through economic relations: responsible engagement. It then examines the legal context in which economic relations operate and points to international legal impediments to a sophisticated system of responsible engagement. The Article concludes that a full-fledged strategy of responsible engagement obliges reconsideration and clarification of several facets of the World Trade Organization.

II. ENGAGING REPRESSIVE REGIMES

A. Constructive Engagement as a Tool of Political Liberalization

Like many terms expressing a highly politicized concept, “constructive engagement” has a mutable and sometimes very amorphous meaning. The expression seems to have originated in the mid-1970s to describe U.S. policy towards apartheid-era South Africa. In that context, the concept comprised, on the one hand, a rejection of trade and economic sanctions and, on the other, a continued diplomatic relationship with Pretoria aimed at resolving the issues of Rhodesia, Namibia and apartheid.5

Notwithstanding its region-specific origin, the term is now regularly invoked in popular discussions surrounding current U.S. relations with contemporary repressive governments. Asked in 1997 what “constructive engagement” meant in the context of the United States’ China foreign policy, then-Secretary of State Albright spoke rather obliquely of “a

relationship with [the Chinese] where they feel a part of the responsibility for the international community."  


investment in, repressive countries, it is urged, will promote political liberalization and greater respect for human rights by exposing populations to liberal, human rights-supporting values and fostering the economic growth viewed as a pre-requisite to democratization. Thus, with respect to China, business leaders have asserted, “the web of contacts between Chinese citizens and U.S. investors that develops in the course of business relationships promotes the transfer of liberal democratic values from this side of the Pacific to the East.”\(^9\) Contact with transnational businesses is also viewed as “promot[ing] greater integration of the host country in the international community, thereby enlarging its exposure to the shared values of civilized nations.”\(^10\) Companies, it is urged,

... can serve U.S. strategic, political, and economic interests by their enormous contributions to the development of emerging markets... [and] have a positive impact on: (1) basic infrastructure, such as schools, roads, electrification, and medical facilities; (2) the creation of a stable middle class that is often the first step toward attaining accountable government; (3) improved labor conditions and rights; and (4) protection of the environment.\(^11\)

The vision of “constructive engagement” as a form of subversion through economic development has been enunciated most succinctly by the U.S. anti-sanctions lobby group USA*Engage. In its paper, Economic Engagement Promotes Freedom, the organization urged that “[m]arket-oriented economic development causes social changes that impede authoritarian rule.”\(^12\) The key proxies of social change are said to include “widespread education, the opening of society to the outside world, and the development of an independent middle class.”\(^13\) An emerging middle class, fueled by economic growth, “does not depend on the state for economic advancement, and thus is far more free to challenge political control. A government faced with this change must seek the support of the middle class and must respond to middle class demands for greater political freedom, the rule of law, and the elimination of corruption.”\(^14\) Contact with the outside world, meanwhile, is said to expand “the flow of

9. Diane Orentlicher & Timothy Gelatt, Public Law, Private Actors: The Impact of Human Rights on Business Investors in China, 14 NW. J. INT’L L. & BUS. 66, 98 (1993). For example, opponents to a strong human rights stand by the U.S. administration wrote: “We in the business community... believe that our continued commercial interaction fuels positive elements for change in Chinese society. The expansion of trade and free market reforms has strengthened the pro-democratic forces in China.” Id. at 81 (quoting Letter from Business Coalition for U.S.-China Trade, to Bill Clinton, President, United States (May 12, 1993)).
10. Id. at 99.
13. Id.
14. Id.
information. The internet, television, books, newspapers, copying machines, foreign magazines, all the various forms of popular entertainment and intellectual thought begin to flow, spreading ideas like democracy, human rights, and the rule of law.\textsuperscript{15} USA*Engage further asserts that “American businesses and agricultural concerns transplant American values and culture to the host country.”\textsuperscript{16}

U.S. business is said to foster political liberalization in a number of ways. First, American companies support the rule of law by seeking “certain assurances when operating in foreign countries, including respect for the rule of law (honoring contracts, arbitration of disputes, objective legal systems, etc.), protection of intellectual property rights, and restraints on conduct that generates commercial uncertainty (corruption and nepotism).”\textsuperscript{17} Second, U.S. investment prompts the development of local infrastructure that supports business operations, resulting in “significant benefits to the locality, such as telephone systems, roads and health care facilities or even food production.”\textsuperscript{18} Third, U.S. businesses demand, and contribute to the training of, skilled workers. Executives retained by U.S. investors are usually drawn from “the class that is most opposed to a corrupt and repressive government.\textsuperscript{19} For the same reason, corporate independence from such a government frequently is essential to successful recruiting: the very fact that the corporation is American, and brings with it American values and practices, is a powerful draw.”\textsuperscript{20} Fourth, the very production systems used by American companies have an anti-authoritarian bent. In particular, “[t]he operating and productions systems of American businesses assume that employees are prepared to think and act independently, to show initiative, and to be creative... When introduced overseas, such systems require fundamentally different organizational systems and ways of thinking, particularly in formerly authoritarian workplaces.”\textsuperscript{21} Last, U.S. investment is said to prompt the development of a local supply chain run by local entrepreneurs.\textsuperscript{22}

U.S. companies are not alone in urging constructive economic engagement as a viable human rights-sensitive foreign policy. In Canada, for example, the Business Council on National Issues (BCNI), the country’s foremost business lobby group, has argued that companies should engage in more business with non-democratic countries because “trade will act as a positive catalyst for change.”\textsuperscript{23} Canadian business people have defended Canada’s policy of strong constructive engagement with China by urging

\textsuperscript{15} Id.
\textsuperscript{16} Id.
\textsuperscript{17} Id.
\textsuperscript{18} Id.
\textsuperscript{19} Id.
\textsuperscript{20} Id.
\textsuperscript{21} Id.
\textsuperscript{22} Id.
"that exposure to western products, technology and the free market will inspire Chinese citizens to pursue freedom and democracy."  

1. Constructive Engagement and Causality

Although persuasive on its face, the constructive engagement thesis presents a difficult empirical question. As USA*Engage correctly notes in its paper, there is a "strong correlation between per capita income and freedom." The wealthier Northern countries are, generally speaking, more democratic and more respectful of human rights than are their poorer Southern counterparts. Unfortunately, as statisticians repeatedly remind, correlation does not prove causality. Thus, noted political scientist Samuel Huntington, though generally supportive of constructive engagement, has observed that while "[a]n overall correlation exists between the level of economic development and democracy...no level or pattern of economic development is in itself either necessary or sufficient to bring about democratization." Other scholars have gone even further, concluding, "democracy and respect of human rights are not linked to economic development."

Governments have taken varying positions on this question of causality, a point the United Kingdom Foreign Office made recently in setting out its own view:

[S]ome governments, particularly from parts of the developing world, assert that economic development can and should come before political freedom... But human rights have a profound impact on economies and societies. It is possible for a country's economy to grow in the short term even when its human rights record is poor. But the evidence is that those economies where the rule of law is respected and government is transparent and accountable grow more quickly and more sustainably. Regimes that govern by fear and repression stifle creativity and innovation. Without a solid basis of transparent rules and good governance, markets cannot function effectively and investors - both domestic and foreign - will shy away. Respect for political rights is not a luxury of growth, but a condition of that growth.

Reflecting a mild resistance to the simple economic determinism of the USA*Engage approach, the U.K. vision has been shared by other countries. Thus, in a 1999 speech, President Clinton observed, "[g]lobalization is not

25. USA*Engage, supra note 12.

https://digitalcommons.law.yale.edu/yhrdlj/vol5/iss1/1
an unmixed blessing. In fact, the benefits of globalization—openness and opportunity—depend on the very things globalization alone cannot guarantee—peace, democracy, the stability of markets, social justice, the protection of health and the environment. . . . Globalization can bring repression and human rights violations and suffering into the open, but it cannot prevent them.”

Similarly, in a 1996 speech, then-Canadian Foreign Affairs Minister Axworthy urged, “both trade and the promotion of human rights can serve the same purpose—namely bettering the well-being of individuals,” but then noted in a November 1998 statement:

The issue [of the relationship between trade and human rights] has never been a crude trade-off between promoting commerce or human rights. They are not mutually exclusive but mutually reinforcing. The promotion of good governance, democracy and human rights are essential to the creation of a climate for sustainable economic development which benefits everyone. Economic prosperity in turn enhances the prospects for stable societies that allow human rights to flourish. The Asian crisis shows what can happen when this equation is out of balance.

The Australian government, for its part, took the following position in its 1997 foreign policy White Paper:

There are grounds for some confidence that human rights improve with economic growth. Respect for human rights is generally a force for stability, not least because it tends to moderate political behaviour. At the same time, the relationship between economic growth and political freedoms is a complex one and should not be reduced to a simple equating of economic growth with political liberalisation.


2. The Empirical Case for Constructive Engagement

The empirical record largely supports the policy view that simple maximization of economic integration is insufficient to prompt human rights-sensitive development. A theory adopted by the famous political sociologist Seymour Lipset and cited with approval by USA*Engage posits that if developing nations were to become as rich as their developed counterparts, it is most probable that they would become democracies. If true, this position suggests “transitions to democracy would be more likely when authoritarian regimes reach higher levels of development.”

However, as at least one recent empirical study has concluded, “transitions are increasingly likely as per capita income of dictatorships rises but only until it reaches a level of about $6,000. Above that, dictatorships become more stable as countries become more affluent.” This study also found that “the causal power of economic development in bringing dictatorships down appears paltry” and that “there are no grounds to believe that economic development breeds democracies.” On the other hand, once democracies are established, economic growth does seem to increase their prospects of surviving. In summarizing its findings, the study concluded that

[t]he emergence of democracy is not a by-product of economic development. Democracy is or is not established by political actors pursuing their goals, and it can be initiated at any level of development. Only once it is established do economic constraints play a role: the chances for the survival of democracy are greater when the country is richer.

Other studies have come to similar conclusions. Londregan and Poole, in their 1996 research, found “that even after correcting for many features of the political and historical context, the democratizing effect of income remains as a significant factor promoting the emergence of democratic political institutions. However, the small magnitude of our estimated income effect suggests the democratizing effects of high income are modest.” Accordingly, they hold that policies directed at increasing “the economic development of countries with authoritarian governments as a means of changing them into democracies, such as the current policy of many democracies towards China, may take more years to have an effect

34. Id. at 159.
35. Id. at 160.
36. Id. at 165.
37. Id. at 166.
38. Id. at 177.
than current policymakers imagine."\(^{40}\)

Taken together, these conclusions suggest that unalloyed economic integration, even when it prompts significant economic growth, is no guarantee of political liberalization. Indeed, these findings suggest that over a certain per capita threshold, further economic growth reduces the chances of a transition from dictatorship to democracy. This position is consistent with the "dissenting view," harbored by some civil society groups that engagement in the form of trade and investment can augment the staying power of repressive regimes. In other words, constructive engagement may prolong dictatorships rather than undermine them.

3. Where Engagement is not Constructive

If the answer to the question "does constructive engagement via economic integration work?" is "not always", there is a clear need to isolate instances where the policy is inappropriate. In other words, under what specific circumstances will economic engagement exacerbate repressive regimes and human suffering? Clearly, this is an enormous question, one that cannot be dealt with definitively in the context of this paper. Nevertheless, it is possible to cite instances when economic engagement prompts behavior strongly inconsistent with the constructive engagement thesis. Speaking broadly, there are instances when economic integration causes governments to engage in human rights abuses and instances when engagement enhances a repressive government's capacity to fend off politically liberalizing elements.

\(i. \text{ Repressive Activity}\)

Past experience suggests that there are several ways in which economic integration with a nation with an oppressive government can encourage the regime to increase its repressive activity and engage in human rights abuses that would otherwise not occur. For example, the regime may use repressive means to produce infrastructure designed for use by multinational business. In Burma, for example, the military dictatorship – now known as the State Peace and Development Council (SPDC) – has been accused of using forced labor to build infrastructure for the Yadana pipeline, a project involving major U.S. and French multinational companies.\(^{41}\)

Further, the regime may use repressive means to guarantee a firm access to resources. In Sudan, a November 1999 report from the U.N. Rapporteur on Sudan indicated that the Sudanese regime has used its

\(^{40}\) Id.

military to “clear a 100-kilometre area around the oilfields” operated by a consortium of multinational companies. More recently, the Canadian government-sponsored “Harker mission” to Sudan concluded that “there has been, and probably still is, major displacement of civilian populations related to oil extraction . . . Sudan is a place of extraordinary suffering and continuing human rights violations, even though some forward progress can be recorded, and the oil operations in which a Canadian company is involved add more suffering.” Amnesty International confirmed these findings very graphically in May 2000. In its report, Amnesty noted that Sudanese forces have used ground attacks, helicopter gunships and indiscriminate high-altitude bombardment to clear the local population from oil-rich areas. Government troops, notes Amnesty, have reportedly committed mass executions of male villagers. Women and children are said to have been nailed to trees with iron spikes. There are reports from villages north and south of the oilfields that soldiers slit the throats of children and killed male prisoners who had been interrogated by hammering nails into their foreheads.

In Colombia, meanwhile, Human Rights Watch criticized two major multinational oil consortiums in the late 1990s for retaining the services of the Colombian military to protect their pipelines. These security forces have been implicated in massive human rights abuses, including killings, beatings and arrests. In Indonesia, government army officials hired as security at a mining site on Irian Jaya have been accused of torturing and extra-judicially executing local people opposed to the mine. In Nigeria,

oil companies have been implicated in "the systematic suppression by Nigerian security forces of protesting local communities." In Burma, Burmese forces providing security for the massive Yadana pipeline are said to have committed "violations against villagers along the pipeline route, including killings, torture, rape, displacement of entire villages, and forced labor." In Chad and Cameroon, a coalition of European and African environmental groups and German parliamentarians have pointed to a "noticeable increase in human rights violations" in the region surrounding another multinational corporation pipeline project. In particular, through the first eight months of 1998, there were persistent reports of "increased ... killings of civilians by government forces" in this area. More recently, in India, Human Rights Watch has accused the multinational firm Enron of being complicit in efforts by security forces to quash protest against its power project. Specifically, the company benefited directly from an official policy of suppressing dissent through misuse of the law, harassment of anti-Enron protest leaders and prominent environmental activists, and police practices ranging from arbitrary to brutal . . . . The company . . . paid the abusive state forces for the security they provided to the company.

Finally, and most visibly, regimes may resort to repressive means of keeping labor cheap and pliable for international firms. The OECD, in a 1996 study, found "evidence that some governments felt that restricting certain core labor standards would help attract inward FDI." In addition, the OECD conceded that some firms may in fact respond to the cost advantages of repression. The OECD noted that "in a number of . . . countries which are among the primary destination for OECD investment, the record of compliance with core labor standards is tarnished, particularly with respect to freedom-of-association rights, although to different degrees." According to the OECD, "there is no definitive evidence on the extent to which FDI responds to the level of core labor

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48. HUMAN RIGHTS WATCH, WORLD REPORT 1999, supra note 45.

49. Id.


52. Id. at 118.
standards." In fact, "low or non-existent labor standards may have a detrimental effect on FDI decisions. They indicate a risk of future social discontent and unrest, and include the risk of consumer boycotts." However, "it is readily admitted that expectations of high profitability due to the economic environment provided in host countries may be able to outweigh some of the concerns foreign investors [have] about low levels of observance of core labor standards by host government[s]." Further, while the OECD was not able to identify what impacts multinationals had on core labor rights, it did note that multinationals employ most of the workers in the world's export processing zones (EPZs). As such, "the radically lower degree of unionization in EPZs in comparison with the domestic economy as a whole could suggest that [multinational businesses] do not contribute to the improvement of the practical situation of unions" and, one might infer from other practices in these zones, of labor rights generally.

ii. Repressive capacity

Similarly, there are several ways in which a firm's activities may bolster the repressive capacity and the staying power of a regime that systematically violates human rights. First, the firm may produce products used by the regime that increase its repressive capacity. Provisioning repressive governments with arms is an obvious example. Trade in dual military and civilian use equipment also raises series issues. In Sudan, for example, Antonov cargo planes have been converted to carry three 500-pound bombs on each side of their fuselages. As noted above, the Sudanese government has been very vigorous in using these modified planes as medium range bombers targeting civilian centers in southern Sudan.

Second, the firm may be a major source of revenue that increases a regime's repressive capacity. For example, the Yadana pipeline project in Burma backed by U.S., French and Thai companies will provide the

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53. According to the OECD, "empirical evidence on the direct relationship between FDI and core labour standards . . . remains open to different interpretations." Id. at 123.
54. Id. at 120.
55. Id.
56. Id. at 123.
58. For a list of products controlled by the Department of Commerce having both military and civilian uses, see 15 C.F.R. pt. 774 (Supp. 1 1997).
Burmese junta with its largest source of foreign capital. In 1993, a Canadian oil company abandoned its Burmese operations, but not before facing intense criticism for having paid the Burmese regime a non-refundable CAD$6 million cash "signing bonus" for permission to conduct oil explorations. More recently, a Canadian mining firm announced in November 1998 the start-up of a U.S. $300 million copper mine in Burma, one that is jointly owned by the regime's mining company. Non-governmental groups insist that the project is "destined to be one of the country's biggest single foreign exchange earners" and will generate substantial royalty revenue for the military regime, a government U.S. officials say "is so single-minded that whatever money they might obtain from foreign sources they pour straight into the army while the rest of the country is collapsing." In Sudan, key Sudanese government officials have now gone on record saying that the government would use earnings on oil pumped by multinational companies in its oilfields to finance munitions factories. In fact, the Sudanese military revealed in July 2000 "Sudan will be capable of producing all the weapons and ammunition it needs by the end of the year thanks to its growing oil industry." Meanwhile, the Canadian government "Harker" mission to Sudan concluded that "[i]t is difficult to imagine a cease-fire while oil extraction continues, and almost impossible to do so if revenues keep flowing to the [oil consortium company] partners and the [Government of Sudan] as currently arranged.

Third, the firm may create infrastructure in the form of roads, railways, power stations, oil refineries, communications or the like, that increases a

60. See EARTHRIGHTS INTERNATIONAL & SOUTHEAST ASIAN INFORMATION NETWORK, TOTAL DENIAL, supra note 41; Lucien Dhooge, A Close Shave in Burma: Unocal Corporation and Private Enterprise Liability for International Human Rights Violations, 24 N.C. J. INT'L L. & COM. REG. 1 (1998). Note, however, that while "revenues from the pipeline were supposed to bolster and support the weak Burmese economy by mid-1998", the IMF has reported that the "Junta has already mortgaged its projected revenues of $200 million a year to repay new loans and finance its 15 percent stake in the project." Profits from the project are expected to be delayed until 2002. See HUMAN RIGHTS WATCH, WORLD REPORT 1999, supra note 45.


66. Sudan to Achieve Self-sufficiency in Weapons: Spokesman, AGENCE FR. PRESSE, July 1, 2000; see also HUMAN RIGHTS WATCH, WORLD REPORT 2001 - Sudan, supra note 42 ("The government announced that its new oil revenue, constituting 24 percent of its 2000 revenue, would be used for defense, including an arms factory near Khartoum. Defense spending in dollars increased 96 percent from 1998 to 2000. Not coincidentally, government use of air power and bombing increased.").

regime's repressive capacity. In Burma, a country where telephones and faxes are closely controlled by the government, several international telecommunications companies have supplied, directly or indirectly, telephone equipment to the military government. Human rights groups say that this technology has been monopolized by the military regime to conduct its affairs.68 In Sudan, the Harker mission found that airfields and roads built, used and sometimes operated by oil companies have been employed by the Sudanese military in attacks against civilian populations.69 The mission was “told that the contractual obligation under which Talisman labours more or less provides that the oilfield facilities can be used for military purposes....”70 “[F]lights clearly linked to the oil war have been a regular feature of life at the Heglig airstrip, which is...operated by the [oil] consortium.”71

Finally, the presence of the firm in the country may provide international credibility to an otherwise discredited regime. Opponents of foreign investment in Burma argue that

[j]each new foreign enterprise that sets up shop in Burma only serves to validate the regime's belief that it can get away with resorting to slave-like practices to build the infrastructure these companies need. And above all, it is political legitimacy that [the regime] is after. It's the reason why, every time another Western business executive signs an investment deal with the Burmese military power, he or she is feted in the state-run media with a laudatory story and pictures with top army officials, everyone smiling in the camera.72

In Nigeria, Royal Dutch/Shell was accused of providing “both increased financial investment and a diplomatic public relations shield for the Nigerian [military] government.”73 In Afghanistan, a major U.S. oil company concluded a pipeline agreement with the Taliban de facto regime and reportedly lobbied the U.S. State Department to extend formal diplomatic recognition to the Taliban, despite the group's poor record on human rights.74 In Canada, Talisman has made statements accusing human rights groups of exaggerating human rights problems in Sudan.75

In all these instances, never squarely addressed by the constructive engagement model, the presence of the firm has a negative human rights

69. HARKER, supra note 43, at 48.
70. Id. at 48.
71. Id. at 64.
72. CANADIAN FRIENDS OF BURMA, supra note 64, at 12.
73. HUMAN RIGHTS WATCH, WORLD REPORT 1997, supra note 42, at 360.
75. See David Olive, The Brightest Stars in Canada's Oilpatch, NAT'L POST (Can.), June 13, 2000, at C8 (quoting Talisman CEO as deriding reports of human rights abuses in the area around the oilfields as "lurid and exaggerated").
impact. In many instances, this negative human rights impact may outweigh the positive spin-offs predicted by the constructive engagement model. Indeed, it is entirely possible for firms to have the limited positive, human rights-supporting effects predicted by constructive engagement, while at the same time bolstering repressive regimes.

B. Sanctions as a Tool of Political Liberalization

While the conclusions noted above are strongly critical of the constructive engagement position, they cannot be read as necessarily supporting the "disengagement" view. To conclude that constructive engagement and economic growth are no guarantee of political liberalization and that trade and investment can prop up repressive regimes is not to say that measures designed to reduce economic growth and investment lead dictatorships to tumble. Evaluating the capacity of disengagement - specifically, of economic sanctions - to induce political liberalization is a separate question. This Article follows the Congressional Research Service in defining "economic sanctions" as "...the deliberate, government-inspired withdrawal, or threat of withdrawal, of customary trade or financial relations,"76 via "measures such as trade embargoes; restrictions on particular exports or imports; denial of foreign assistance, loans, and investments; or control of foreign assets and economic transactions" involving citizens in the sanctioning country.77

There is now a rich and extensive literature on economic sanctions and their effectiveness. Much of it has been critical of sanctions, suggesting that these measures are often highly ineffective and frequently counterproductive. Summarizing recent literature on sanctions, Haas and O'Sullivan put it this way:

[s]anctions almost always result in some economic hardship, but this impact is often insufficient or unable to force the desired political change in the target country. Moreover, sanctions can be costly for innocent bystanders, particularly the poorest in the target country and American businesses and commercial interests. In addition, sanctions often evoke unintended consequences, such as the strengthening of obnoxious regimes.78

Accordingly, as an earlier study noted,

77. CONGRESSIONAL RESEARCH SERVICE, supra note 76, at 54.
78. HAAS & O'SULLIVAN, supra note 5, at 2.
sanctions can have the perverse effect of bolstering authoritarian, statist societies. By creating scarcity, they enable governments to better control distribution of goods. The danger is both moral, in that innocents are affected, as well as practical, in that sanctions that harm the population at large can bring about undesired effects that include bolstering the regime, triggering large scale emigration, and retarding the emergence of a middle class and civil society. 79

In a similar vein, in a study focusing on the utility of sanctions for middle powers, Nossal argued that "sanctions are, on balance, a normatively bad policy instrument: not only are they generally ineffective in producing political change in the target nation, but they also are a violent, blunt, and gendered tool of statecraft." 80 Nossal viewed sanctions introduced by middle powers like Canada and Australia as "rain dances," described as measures satisfying domestic constituencies without having appreciable impact on the political behavior of the sanctioned country. 81 More than ineffective, sanctions have a discernable negative impact on the most vulnerable populations, leaving the political elite untouched. These conclusions are affirmed by a now vast literature on the often-devastating humanitarian "side-effects" of sanctions. 82

Unilateral sanctions have been singled out for particular criticism. For example, the Cato Institute has urged there are "no examples of U.S. unilateral economic sanctions changing the basic character or significant policies of a foreign nation." 83 The Center for Strategic and International Studies is in substantial agreement, 84 though it notes some instances where narrowly targeted, non-comprehensive unilateral sanctions "have been

80. KIM RICHARD NOSAL, RAIN DANCING: SANCTIONS IN CANADIAN AND AUSTRALIAN FOREIGN POLICY 252 (1994).
81. Id.
83. CATO INSTITUTE, CATO HANDBOOK FOR CONGRESS ch. 53 http://www.cato.org/pubs/handbook/hb105-53.html; see ROBERT O'QUINN, A USER'S GUIDE TO ECONOMIC SANCTIONS (The Heritage Foundation, 1997) ("Although multilateral sanctions might succeed under the appropriate circumstances, unilateral sanctions will fail more often than not. By itself, a unilateral trade or investment embargo may not be enough to persuade a country's government to change its objectionable policies. In today's global economy, foreign rivals quickly and easily replace American companies to meet the needs of a target country's market."). at http://www.usaengage.org/studies/users.html.
successful in meeting their goal.” 85 For his part, Haas, in a Brookings Institution paper, concluded “unilateral sanctions tend to impose greater costs on American firms than on the target, which can usually find substitute sources of supply and financing.” 86

The literature is not, however, all bleak. Several studies point to instances where sanctions have achieved their objectives. The leading study by Hufbauer et al. reviews 116 sanctions regimes and concludes that sanctions contributed to their ultimate goal 34 percent of the time, 87 although other scholars contest this figure. 88 More recently, Haas observed “sanctions can on occasion achieve (or help to achieve) various foreign policy goals ranging from the modest to the fairly significant.” 89 In this regard, sanctions introduced after the Gulf War are said to have increased Iraqi compliance with resolutions on the destruction of weapons of mass destruction. Sanctions are also said to have contributed to Serbia’s acceptance of the Dayton agreement on Bosnia in August 1995. Similarly, a recent study by the International Peace Academy financed by the Canadian government and released with some fanfare at the United Nations in 2000 90 traces U.N. experience with sanctions in the 1990s. 91 Measuring “success” in terms of weakened power on the part of an abusive regime, the study concluded “sanctions appear to be more effective in gaining target compliance than is widely acknowledged.” 92

According to one study, sanctions are most likely to be successful where the goal is relatively modest, the target is much smaller than the country applying the sanctions, there is substantial trade between the two nations, the sanctions are imposed rapidly and decisively, and the cost to the sanctioning country is low. 93 Similarly, the Center for Strategic and International Studies views the prospects for effective economic sanctions being best where, inter alia, the target country

is small, weak, unstable, and/or highly dependent on the sanctioner(s); . . . the change demanded of the target state is a modest one; the sanctions are multilateral, not unilateral; the

85. Id.
86. HAAS, supra note 79.
87. HUFBAUER ET AL., supra note 76.
89. HAAS, supra note 79.
92. Id. at 204.
93. Kimberly Ann Elliot, Factors Affecting the Success of Sanctions, in CORTRIGHT & LOPEZ, supra note 91; see also HUFBAUER ET AL., supra note 76.
sanctions, where possible, are financial sanctions, not trade sanctions; the sanctions are roughly proportional to the offense; the sanctions, where appropriate, are targeted against specific people, activities, and policies in order to reduce suffering and to prevent damage to more important aspects of international relationships; the sanctions are imposed quickly and given time to work. . . .

These conclusions echo those of the International Peace Academy in its 2000 study. For the Academy, success is more likely with “comprehensive, rigorously enforced sanctions” and less likely with “limited, unenforced measures.” Yet, comprehensive sanctions represent the bluntest form of economic coercion, one with often unpredictable and devastating humanitarian and political side effects. Conversely, “[m]ore selective, targeted sanctions resulted in fewer humanitarian difficulties.” These findings lead the authors to favor narrowly tailored measures and to argue “not that targeted or selective sanctions are ineffective, but that policy steps necessary to enhance the impact of these more limited measures have not been taken.” Specifically, “whether sanctions are comprehensive or selective, general or targeted, their political impact depends on effective implementation.” According to the study, sanctions are most likely to be effective when they target the decision-makers responsible for wrongdoing and deny the assets and resources that are most valuable to these decision-making elites. At the same time, care must be taken to avoid measures that cause unintended humanitarian hardships or inadvertently enrich or empower decision-makers or criminal elements. The essence of smart sanctions strategy is tailoring sanctions to meet specific objectives and focusing coercive pressure on particular groups and resources.

The Academy establishes a sophisticated analytical framework for assessing the viability of sanctions. Rather than endorsing a “naïve theory” that envisages political change flowing directly from the economic pain caused by sanctions, the study suggests that the “political impact of sanctions ultimately depends on internal political dynamics within the targeted country.” Specifically,

95. CORTRIGHT & LOPEZ, supra note 91, at 208; see G. Hufbauer & E. Winston, Smarter Sanctions: Updating the Economic Weapon, 7 NAT’L STRATEGY REP. 1 (1997) (concluding smart sanctions are more difficult to enforce than comprehensive sanctions).
96. CORTRIGHT & LOPEZ, supra note 91, at 213.
97. Id. at 209.
98. Id.
99. Id. at 224.
100. Id. at 22.
Sanctions succeed when targeted decision-makers change their calculation of costs and benefits and determine that the advantages of cooperation with Security Council resolutions outweigh the costs of continued defiance of expressed global norms. One of the key considerations in a leadership’s calculation of costs is the degree of opposition from domestic political constituencies. To the strength that sanctions strengthen or encourage these opposition constituencies, they are more likely to achieve success.101

Put another way, sanctions might be most appropriate when directed against states exhibiting some domestic opposition.102

In terms of specific economic sanctions measures, the study calls financial sanctions “the centerpiece of a targeted sanctions strategy”.103 The effectiveness of these measures depends, in the study’s words, “on the ability to identify and target specific individuals and entities whose assets are to be frozen”.104 Similarly, arms embargoes are regarded as a “potentially effective form ... of targeted sanctions,” one “intended to deny wrongdoers the resources needed for repression and military aggression.”105 The effectiveness of arms embargoes depends, of course, on the wholesale co-operation of the international community, particularly “frontline” states likely to see the growth of arms smuggling.

The International Peace Academy report comes at a time of serious rethinking of sanctions policy at the United Nations. In April 2000, the Security Council created a sanctions working group, tasked with developing “recommendations on how to improve the effectiveness of United Nations sanctions,”106 launched at the same time as a U.N. symposium entitled “Toward Smarter, More Effective United Nations Sanctions.”107 In keeping with the conclusions of the International Peace Academy report and the title of the seminar, the focus of this renewal effort now appears to be on limited, elite-targeting sanctions measures.108

Notably, the International Peace Academy’s menu of economic measures might be supplemented by selective trade and investment

101. Id.
102. This conclusion is echoed by other scholars. See, e.g., van Bergeijk, supra note 88 (concluding that a statistically significant positive correlation exists between sanction success and the level of political liberalization in a state).
103. CORTRIGHT & LOPEZ, supra note 91, at 241. These conclusions are affirmed by other studies, pointing to the importance of financial sanctions in successful sanctioning efforts. See Dashti-Gibson, supra note 88; van Bergeijk, supra note 88.
104. CORTRIGHT & LOPEZ, supra note 91, at 241.
105. Id. at 242.
sanctions—specifically, measures affecting the offensive capacity of repressive regimes without producing significant hardships for innocent populations. In this regard, substantial recent effort at the United Nations has been directed at curtailing the export of “conflict diamonds” from Sierra Leone\textsuperscript{109} and Angola,\textsuperscript{110} the proceeds of which are used by rebel forces in their bloody insurgencies. Extrapolating from the diamond case, certain resource sectors have the potential to generate substantial resources for human rights abusers. Notably, these sectors may be rather isolated from the economy as a whole, generating limited positive economic spinoffs.\textsuperscript{111} Accordingly, there may be instances where limited trade and, potentially, investment measures reduce proceeds flowing to human rights abusers while having little negative impact on innocent populations. The U.N.’s experience with conflict diamonds suggests these measures are most likely to be successful where key economic actors in the relevant resource market are forced to desist trading with the targeted elite.

Part II takes up the question of whether international law, as presently constituted, cuts against “smart” sanctions meeting these criteria. At this point, however, it is instructive to canvass how the relationship between constructive engagement, on the one hand, and sanctions, on the other, has played out in past foreign policies. In this regard, the South Africa case served as an important proving ground for the contending positions of engagement and disengagement.

C. Case Study: South Africa

1. Constructive Engagement in South Africa

United States policy towards apartheid-era South Africa was initially guided by a strong constructive engagement philosophy. While constructive engagement was often invoked to describe a pattern of


\textsuperscript{111} Anecdotally, the Arabian Gulf experience suggests that economic development dependent on resource exports that pour royalties into government coffers does not produce a diffusion of economic power. Instead, the state itself is bolstered and insulated from calls for democratization. See HUNTINGTON, supra note 26, at 65.
diplomatic relations, its proponents clearly viewed the substantial U.S. corporate presence in South Africa as a potentially important agent of change. Specifically, defenders of economic engagement with the apartheid regime urged that economic growth would increase demand for black labor, creating black upward mobility and ultimately social and political reform.

In 1977, a code of ethics designed to guide U.S. business conduct in South Africa was proposed by the Reverend Leon Sullivan, a member of the General Motors board of directors. The Sullivan Principles were designed to "promote programs that could have a significant impact on improving the living conditions and quality of life for the non-white population [of South Africa], and to be a major contributing factor in the end of apartheid." The Sullivan code represented an intermediate position on U.S. business involvement with the apartheid state, one consistent with the doctrine of constructive engagement. It accepted the premise that foreign businesses could play a beneficial role, but only if they actively opposed apartheid in their own workplaces, and, as later versions of the Principles indicated, on the national stage. Indeed, the very existence of the Principles was used by opponents of comprehensive sanctions to defend continued involvement—or constructive engagement—in South Africa.

Many analysts urge that the Sullivan Principles resulted in the improvement of some labor conditions for apartheid's victims. U.S. firms took the lead in desegregating their workplaces. By 1986, all Sullivan firms were reportedly abiding by the total desegregation of their workplaces, had minimum wages 30 percent above the "minimum living level," had equal pay for equal work requirements, and in many case were providing assistance to local black communities. These improvements resulted in tangible benefits for black communities and workers. Further, the Sullivan Principles provided a model for domestic codes including those of the Urban Foundation and the Employers' Consultative Committee on Labour Affairs. Many South African firms

112. See Baker, supra note 5.
118. Id.
“felt challenged to catch up—or do even better”—than their U.S. counterparts and “initiated their own desegregation policies and social responsibility programs.”120 South African firms continued to lag behind U.S. companies in wages, but many “complained that they [had] to raise their wages to American levels to retain specialized workers.”121 Other observers argue that the “demonstration effect” associated with the Sullivan Principles and the adoption of similar codes by local business led to the recommendation by the Wiehahn and Riekert Commissions that blacks be included as “employees” under the Industrial Conciliation Act. This revision in turn “was the catalyst for the spectacular growth of a black trade union movement and consequential changes in South African industrial relations.”122

In addition, the presence of U.S. companies prompted significant economic growth. In 1980, foreign capital generally was responsible for one-third of the growth in the country’s GDP. At this time, 20 percent of foreign investment in South Africa was U.S., suggesting the U.S. businesses fuelled roughly 6.5 percent of the growth in GDP. At the same time, it has been argued that this economic activity contributed in only a minor way to the development of a black middle-class, first, because most of the benefits flowed to whites and, second, because U.S. businesses employed relatively few people.123 In this last regard, U.S. corporations adhering to the Sullivan Principles likely employed no more than 1 percent of the black workforce. In 1992, the Principles’ auditor, Arthur Little, conceded that the limited scope of U.S. operations in South Africa would reduce the impact of the Principles on apartheid policies.124

Taken together, this analysis suggests that the local level impacts of U.S. businesses operating in South Africa were generally constructive. Put another way, to the extent that U.S. companies could have a local-level impact, given the limited scale of their investments, the Sullivan Principles ensured that this impact was mostly positive. Some black South African leaders, including some union leaders and Chief Buthelezi, felt that these benefits justified the U.S. presence. These supporters “argued that foreign investment creates jobs, improves the economy, provides trickle-down benefits, and gives companies an opportunity to influence the situation in South Africa by following model employment practices and by improving working and living conditions for Black employees.”125

120. KOBACH, supra note 117, at 98.
121. Id.
122. Duncan C. Campbell, US Firms and Black Labor in South Africa: Creating a Structure for Change, 7 J. LAB. RES. 1, 3 (1986).
124. ARTHUR D. LITTLE, SIXTEENTH REPORT ON THE SIGNATORY COMPANIES TO THE STATEMENT OF PRINCIPLES FOR SOUTH AFRICA (1992) (“Employment by Signatory companies represents only a small fraction of one per cent of the economically employed labour force. It is not reasonable to expect this group of companies to have a large impact in South Africa based on their direct contributions of time and money.”).
125. RAZIS, supra note 123, at 104.
For their part, defenders of divestment from South Africa dismissed these developments. Political opponents to the apartheid regime, such as Bishop Tutu, urged that "[T]hose who invest in South Africa should not think they are doing us a favor; they are here for what they get out of our cheap and abundant labor." 126 Alfred Nzo, speaking on behalf of the African National Congress to the International NGO Action Conference for Sanctions against South Africa in 1980, declared that the Sullivan Principles and similar codes

must be reduced to the dustbins of history. They are nothing but attempts to counteract our demands for the complete severing of all economic links with the racist regime, and in particular the demand for comprehensive mandatory economic sanctions. It is no coincidence that such subterfuges are being introduced at a time when our people's mass resistance is reaching new heights and we are threatening the very nerve centre of the exploitative system in South Africa. 127

Other divestment proponents questioned the extent to which the Sullivan Principles mattered, arguing "these principles of desegregation, equal employment, training, promotion and community aid all failed to help dismantle apartheid in South Africa. Either they were not implemented fully by signatories or, even if they were, they were not structured to change social, economic, and political discrimination." 128 Further, critics note that the local level benefits promised by the Sullivan code were outweighed by the negative national level impacts associated with the U.S. business presence. Proponents of divestment argued that U.S. corporations in South Africa—particularly the many firms operating in key strategic sectors—served to bolster and perpetuate the apartheid system by propping up the South African economy. 129 Thus, while companies such as Control Data argued that "the little bit of repression that is added by the computer in South Africa is hardly significant" relative to the good the company was doing, critics concluded that "many corporations, just by being present in South Africa, give strategic assistance to South Africa in its fight to defend itself against those who want to abolish apartheid." 130 One critic addressing the impact of the Sullivan

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129. See Elizabeth Schmidt, One Step in the Wrong Direction—An Analysis of the Sullivan Principles as a Strategy for Opposing Apartheid (1985). For a more recent review, see Mangaliso, supra note 113, at 147-49.
130. U.N. Centre Against Apartheid, supra note 115. Support for the apartheid regime identified by this group included: Fluor's role in reducing South African dependence on imported oil; General Motors and Ford's role in supplying the South African security forces with vehicles;
Principles phrased this point as follows: "Workplace reforms [in the form of the Sullivan Principles] do not alter the strategic importance of American companies to the South African economy. They do not weaken the links of corporate collaboration or soften the blows of government repression."\textsuperscript{131} Corporations, it was urged, could not operate in South Africa without tacitly supporting a system whose economic purpose was the maintenance of cheap labor\textsuperscript{132} and without contributing moral support to the South African regime.\textsuperscript{133}

Indeed, there is also compelling evidence that in the absence of foreign investor loans, the apartheid regime would have faced a debilitating economic crisis after Sharpsville.\textsuperscript{134} Similar difficulties may have been encountered during the oil crisis and in the aftermath of the Soweto massacre.\textsuperscript{135} Further, U.S. firms were in fact concentrated in strategic sectors. They controlled 44 percent of foreign direct investments in oil, 33 percent in automobiles and 70 percent in computers,\textsuperscript{136} and provided key technological and infrastructural support in these areas. U.S. involvement in the oil industry "contributed a vital commodity to the South African economy" without which "its military and police could not function effectively."\textsuperscript{137} In the automobile industry, U.S. multinationals—Ford and GM—supplied "trucks and other vehicles to the police and military."\textsuperscript{138} In the electronics sector, "data-processing companies underpinned South Africa's industrializing economy by supplying crucial technology. Computers also enabled the minority government to automate apartheid."\textsuperscript{139}

Further, given the importance of foreign capital, the apartheid regime was willing to engage in repressive activity at least in part to reassure the investment community. As one study puts it, investor confidence in South Africa after the Sharpsville massacre was enhanced by changes to the exchange rate privileging inward capital inflows and "repression that

\begin{itemize}
\item Mobil and Caltex's sale of oil to the South African government; and Citibank's loans to South Africa. In 1977, months before his death in police custody, Steve Biko argued that "heavy investment in the South African economy, bilateral trade with South Africa... are amongst the sins of which the United States is accused. All these activities relate to whites and their interests and serve to entrench the position of the minority regime." \textit{Id.} at 6.
\item \textsuperscript{131} SCHMIDT, \textit{supra} note 129, at 82.
\item \textsuperscript{132} This point of view was echoed by many prominent anti-apartheid activists, including Desmond Tutu: "Those who invest in South Africa should not think they are doing us a favor; they are here for what they get out of our cheap and abundant labor." Karen Paul, \textit{The Inadequacy of Sullivan Reporting}, 57 BUS. & SOC'Y REV. 62, 65 (1986).
\item \textsuperscript{134} RICHARD HULL, \textit{AMERICAN ENTERPRISE IN SOUTH AFRICA} 245-47 (1990).
\item \textsuperscript{135} \textit{Id.} at 301.
\item \textsuperscript{136} \textit{Id.} at 334; see Mangaliso, \textit{supra} note 113, at 147-49.
\item \textsuperscript{137} Mangaliso, \textit{supra} note 113, at 148.
\item \textsuperscript{138} U.N. CENTRE AGAINST APARTHEID, \textit{supra} note 115, at 5; see Mangaliso, \textit{supra} note 113, at 149.
\item \textsuperscript{139} Mangaliso, \textit{supra} note 113, at 148.
\end{itemize}
quieted domestic unrest." As a result, according to proponents of divestment,

It there is no evidence that foreign investors protested or modified [the] harsh and inhuman [apartheid] measures [introduced by the South African government between 1960 and 1980]. The investors contributed greatly to the sustained economic growth enjoyed by white South Africans. In turn, to the degree that repression was successful, it provided a "stability" that was attractive to investors. 141

It sum, while the Sullivan Principles encouraged a large number of U.S. corporations not to participate actively in the apartheid system in their workplaces and had positive "micro" or workplace-level impacts, they did little to forestall U.S. corporate contributions to the repressive capacity of the apartheid state and failed to galvanize U.S. business into lobbying against apartheid. Critics contend that as a result of U.S. business support, the apartheid state was able to persist through successive economic crises engendered by its repressive activities. Realization of these shortcomings fueled the calls by anti-apartheid activists, including ultimately Sullivan himself, for comprehensive economic sanctions. 142

2. Economic Sanctions and South Africa

Over the course of its difficult post-war history, South Africa was subjected to a vast array of sanctions, including unilateral and multilateral arms, 143 trade, investment and financial embargoes. 144 By far the most

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141. Renate Pratt, Codes of Conduct: South Africa and the Corporate World, CANADIAN FORUM, Aug./Sept. 1983, at 34.
142. HULL, supra note 134, at 344; Mangaliso, supra note 113, at 154.
biting measure was the U.S. Comprehensive Anti-Apartheid Act\textsuperscript{145} passed by Congress in 1986. Amongst other things, the Act prohibited new loans and investments that were not directed at black-owned businesses. Firms with twenty-five South African employees or more already operating in South Africa were to meet the Sullivan Principles or submit an annual assessment of their activities to the Department of State.\textsuperscript{146} The Act also prohibited U.S. businesses from claiming foreign tax credits and deferral of United States tax on income earned in South Africa,\textsuperscript{147} ensuring that U.S. companies would be double taxed on South African income. Further, the Act barred the import of some South African commodities, including gold coins, uranium, coal, steel, iron, textiles and sugar.\textsuperscript{148} Exports of computers, nuclear material, certain arms and oil were also restricted.\textsuperscript{149} Finally, American banks were barred from making loans to—or receiving deposits from—the South African government.\textsuperscript{150}

Companies were generally unpersuaded that sanctions would have any impact on South Africa. Surveys of the attitudes of 167 U.S. multinationals still in South Africa in the late 1980s revealed that the vast majority (95.1 percent) did not believe that economic sanctions would prompt change in South Africa. Instead, fully 97.7 percent felt that ongoing pressure stemming from their presence in the country would prompt reform.\textsuperscript{151} Surveys of white South Africans, on the other hand, reflected a strong belief that sanctions hurt the South African economy.\textsuperscript{152}

In fact, it now seems clear that sanctions began to affect the South African economy in the late 1980s. Between 1985 and 1989, sanctions resulted in $11 billion in net capital outflows and $4 billion in lost export earnings. The total cost to South Africa during this period was placed at $32 to $40 billion.\textsuperscript{153} As one observer put it, "[i]t is indisputable that the myriad pressures generated by the many forms of sanctions imposed on South Africa forced the previously immovable and inflexible system of
apartheid to recognize the necessity of change." \textsuperscript{154} This is a view seemingly shared by those generally opposed to sanctions. \textsuperscript{155} In October, 1989, then South African President F.W. de Klerk told a business conference that "[w]e recognize that credible constitutional reform has a very important role to play...in the normalization of South Africa’s international economic relations and the development of a strong economy." \textsuperscript{156}

Arms, trade and investment and financial embargoes all had impacts. Weapons sanctions, which began in the early 1960s and became more stringent as time progressed, obliged South Africa to expend human and financial capital in developing its own arms industries and purchasing weapons on the black market, reducing resources “available to be used directly in South Africa’s wars in Angola and South West Africa.” \textsuperscript{157} Further, “South African weapons gradually became obsolete,” particularly in the area of combat aircraft. \textsuperscript{158} This fact, coupled with difficulties in obtaining spare parts and upgrades in Angolan aircraft, ultimately reduced South Africa’s air superiority in southern Africa. \textsuperscript{159}

Economic isolation in the form of restrictions on loans, partial trade constraints and divestment reduced economic growth, “making the government increasingly vulnerable to domestic political pressures and escalating sanctions.” \textsuperscript{160} Sanctions measures imposed on banks and the IMF’s denial of “bridging loans” beginning in 1983 “contributed substantially to the country’s economic and political crisis in the 1980s.” \textsuperscript{161} Goods such as oil acquired by South Africa through sanctions-busting were purchased at a premium, augmenting inflation and “recessionary conditions.” \textsuperscript{162} In the words of one observer, “[e]ven leaky oil sanctions made the maintenance of apartheid more expensive—and that expense probably helped to slow South Africa’s economic growth in the 1970s and 1980s, which in turn decreased the ability of the state to maintain apartheid.” \textsuperscript{163} Corporate divestment “as a signal of harsher measures to come, weighed more heavily than its actual financial costs on South African business and political leaders.” \textsuperscript{164} Specifically, after 1985, “the

\textsuperscript{154} Jennifer Davis, Sanctions and Apartheid: The Economic Challenge to Discrimination, in ECONOMIC SANCTIONS: PANACEA OR PEACEBUILDING IN A POST-COLD WAR WORLD? 181 (David Cortright & George Lopez eds., 1995).

\textsuperscript{155} See id.

\textsuperscript{156} Christopher Wilson, De Klerk Says Apartheid Reform is Vital for Stronger Economy, REUTERS, Oct. 26, 1989.

\textsuperscript{157} Neta Crawford, How Arms Embargoes Work, in CRAWFORD & KLOTZ, supra note 113, at 63.

\textsuperscript{158} Id. at 63-64.

\textsuperscript{159} Id. at 64.

\textsuperscript{160} Audie Klotz, Making Sanctions Work, in CRAWFORD & KLOTZ, supra note 113, at 268.

\textsuperscript{161} Carim, Klotz & Lebleu, supra note 140, at 170.

\textsuperscript{162} Id. at 269.

\textsuperscript{163} Neta Crawford, Oil Sanctions Against Apartheid, in CRAWFORD & KLOTZ, supra note 113, at 122.

\textsuperscript{164} Meg Voorhes, The US Divestment Movement, in CRAWFORD & KLOTZ, supra note 113, at 142.
exodus of U.S. companies increased the psychological pressures on South African officials and increased the perceived costs of repressive measures.” Further, as one set of scholars put it, “the financial pressures resulting from the successful divestment campaigns...undermined banking confidence in the Pretoria regime, while empowering regime opponents.” In sum,

the barrage of economic sanctions exacerbated increasing divisions among whites, including Afrikaners. Conservatives, especially in the rural areas, remained defiant in the face of international criticism, but many business leaders...joined the 'trek on Lusaka' to meet with the exiled ANC. The [National Party] proved belatedly attuned to its core constituency, instituting substantive reforms throughout the 1980s, culminating in de Klerk's dramatic measures in the early 1990s.

On the other hand, sanctions also had less positive side-effects. The benefits of arms sanctions were slow to materialize and while “strategic sanctions weakened South Africa directly by undermining its military capabilities and straining its key alliances,” the country retained sufficient power to “respond to perceived regional security threats” and prove a destabilizing influence in the southern Africa. Further, the weapons embargo “tended to reinforce aggressive and isolationist tendencies rather than encouraging elites to solve the country’s security problems through negotiations,” in part because import substitution strategies created a domestic economic constituency bolstered by sanctions. With regard to investment sanctions,

[the conclusion can...be drawn that South African interests benefited most from the disinvestment of U.S. multinationals since [they] acquired 83 (51.3 per cent) of [previously U.S. owned] companies. On balance, it would consequentially seem that South African businesses were the major beneficiaries of U.S. disinvestment and there seems to be no reason to believe that the South African economy was more than marginally disadvantaged by the disinvestment campaign.

This position was reiterated by witnesses at the second United Nations Public Hearings on multinational corporations in South Africa held in 1989.

165. Id. at 141.
168. Id. at 267.
169. Id.
170. VENTER, supra note 151, at 147.
Divestment, these experts felt, had served to “concentrate economic power even more tightly in the hands of a [South African] white business oligarchy” that remained “less responsive to worker demands than the TNCs they replaced.” The U.N. panel of experts overseeing the hearing went on to find that “black ownership [of former U.S.-owned assets] is still quite clearly the exception rather than the rule.” Further, the newly South Africanized firms cut back on funding of community development programs and organizations that challenged apartheid policies. Where U.S. assets had been purchased by South African companies, divestment often led to reduced wages and wage benefits to black workers. Friction between management and unions also sometimes increased in the wake of South African corporate takeovers.

D. Conclusion

As one set of researchers have noted, engagement is particularly vulnerable to the charge of appeasement. Concerned that constructive engagement is nothing more than a moral spin sanitizing exclusively mercantilist ambitions, one Canadian critic has called constructive engagement “two weasel words used in succession.” In fact, the evidence marshaled in this section suggests that, to the extent it depends on simple-minded economic determinism, “constructive engagement” lacks empirical support. Indeed, as this part has demonstrated, there are clear instances in which economic engagement can provoke human rights abuses or enhance the capacity of repressive regimes resisting political liberalization.

Yet, highlighting the flaws of constructive engagement does not make the case for punitive economic measures. Though perhaps motivated by the right concerns, sanctions can be both ineffectual and counterproductive in driving recalcitrant repressive regimes along the path of reform. On the other hand, sanctions measures meeting certain key pre-requisites may well prove effective in some instances.

The South African experience supports these conclusions. American companies operating in South Africa were able, in a limited way, to insulate their workplaces from the pernicious dictates of apartheid. Yet, multinational companies lacked the capacity, and in most instances the will, to serve as true catalysts of social change. On the other hand,

172. Id. at 96.
173. Id. at 98; see also HULL, supra note 134, at 344.
175. HAAS & O’SULLIVAN, supra note 5, at 2, 5.
176. Bruce Ceadle, Busy Year in Foreign Policy Ends to Mixed Reviews, CAN. PRESS, Dec. 16, 1997 (quoting Roy Culpepper, President of the North-South Institute).
unconditional economic engagement by the international community played a clear role in preserving the apartheid regime from the economic crises engendered by its repressive policies and in equipping the government and the South African economy with key strategic assets. Eventual economic sanctions in the form of financial, limited trade, arms and, to a lesser extent, investment embargoes, while not disastrous, did debilitating the economy, jeopardizing the ability of the government to maintain its programs and creating a powerful domestic business constituency supportive of reform. At the same time, these measures had unintended side-effects, in some cases bolstering conservative elements and, in others, rolling back some of the gains made by U.S. companies in managing apartheid at the micro-level.

Accordingly, this section suggests that neither constructive economic engagement nor sanctions are, alone, effective means of prompting political liberalization and human rights-sensitive development. Constructive engagement and sanctions are two tools in the foreign policy toolbox whose propriety depends on the circumstances of each case.

III. RESPONSIBLE ENGAGEMENT AND INTERNATIONAL LAW

Conclusions similar to the one set out above have prompted some observers to endorse nuanced policies of engagement. Thus, Haas and O'Sullivan favor a form of engagement “employing a strong incentives component to shape the behavior of problem countries.”177 In another forum, Haas has invoked “conditional engagement”, defined as “a mix of narrow sanctions and political and economic interactions that are limited and made conditional on specified behavioral changes.”178 In describing the constrained selection of primarily economic policy prescriptions addressed in this Article and in distinguishing these from the broad meaning attributed to “conditional engagement” by other scholars, I shall rely on the phrase “responsible engagement.” The section that follows defines “responsible engagement” and proposes in very general terms a methodology for approaching questions of constructive engagement versus sanctions. Subsequently, the section shifts focus, examining the legal environment in which a policy of “responsible engagement” must operate.

A. Towards a Doctrine of Responsible Engagement

Put simply, the proposed notion of “responsible engagement” holds that the objective of foreign policy should be not only to increase wealth,

177. HAAS & O'SULLIVAN, supra note 5, at 160.
178. HAAS, supra note 79; see also Meghan L. O'Sullivan, Sanctioning 'Rogue' States: A Strategy in Decline?, HARV. INT'L. REV. (Summer 2000) (“'Conditional' engagement refers to a negotiated series of exchanges between governments, as when the United States extends positive inducements for changes undertaken by the target country.”), at http://www.brookings.edu/views/articles/OSullivan/2000summerHIR.htm.
but also to enhance human rights observance and political liberalization. In this respect, the doctrine is consistent with the express foreign policy positions of many Western democracies. 179 Further, responsible engagement follows conventional economic wisdom and posits that economic integration through trade and investment generally facilitates economic growth and the alleviation of poverty. 180 It is, as a consequence, typically hostile to protectionism or isolationism. On the other hand, in keeping with the empirical data and the foreign policy assertions of the United States, United Kingdom, Australia and Canada cited above, the model does not presume that economic development leads inexorably to political liberalization and greater observance of human rights. Further, responsible engagement does not suppose that the benefits of economic integration always outweigh costs that might stem from exacerbated human rights abuses or entrenched repressive regimes.

The policy prescriptions flowing from these premises are constrained by a series of moral and legal limitations. First, on the moral side, in assessing whether the costs of economic integration outweigh benefits, responsible engagement is infused with a human rights ethos. "Responsible engagement" presumes that policy should avoid the infliction of pain. Thus, where human rights objectives and the dictates of wealth generation conflict irreconcilably, responsible engagement favors the former over the latter. Responsible engagement recognizes that trade-offs are inevitable and that foreign policy strategies will affect different actors differently. Assessing whether, in net, foreign policies focusing on wealth


180. This position is affirmed by three recent studies: DAN BEN-DAVID ET AL., WORLD TRADE ORGANIZATION, TRADE, INCOME DISPARITY AND POVERTY 6 (2000) (noting that “evidence seems to indicate that trade liberalization is generally a positive contributor to poverty alleviation—it allows people to exploit their productive potential, assists economic growth, curtails arbitrary policy interventions and helps to insulate against shocks"); at http://www.wto.org/english/ news_e/pres00_e/pr181_e.htm; DAVID DOLLAR & AART KRAY, GROWTH IS GOOD FOR THE POOR WORLD BANK (2000) (finding that “openness to foreign trade benefits the poor to the same extent that it benefits the whole economy."); at http://www.worldbank.org/research/ growth/pdfiles/growthgoodforpoor.pdf; OECD, OPEN MARKETS MATTER (1998) (finding that “liberalisation can benefit developed and developing countries alike. As is the case for OECD countries, foreign investment brings higher wages, and is a major source of technology transfer and managerial skills in host developing countries. This contributes to rising prosperity in the developing countries concerned, as well as enhancing demand for higher value-added exports from OECD economies”).
generation or human rights conflict will remain a difficult chore. However, as a general rule, the model resists appeasing or overlooking present-day human rights violations in the hope that short-term suffering borne by a contemporary class of victims will lead to long-term gains for some future generation.

Second, responsible engagement holds that international human rights law cuts both ways. Responsible engagement takes the view that action directed at improving human rights adherence is endorsed and perhaps required by international law. In this regard, the influential American Law Institute's Restatement (Third) of The Foreign Relations Law of the United States urges that "a consistent pattern of gross violations of internationally recognized human rights" amounts to a violation of customary international law. Further, human rights principles barring the most serious human rights violations have jus cogens status and an international agreement that violates this norm is void. The Restatement also concludes that these customary international human rights principles are obligations erga omnes, in that all states have a legal interest in their protection. Thus, transgressions of any of these norms, it is said, "are violations of obligations to all other states and any state may invoke the ordinary remedies available to a state when its rights under customary law are violated". This is a view largely consistent with that of the International Court of Justice (I.C.J.) in the Barcelona Traction, Light and Power, Ltd. case. The Institute of International Law, in 1989, went even further than the Restatement or the I.C.J. in declaring that the very obligation of states to guarantee the protection of human rights is an obligation erga omnes. For the Institute, this obligation "implies a duty of solidarity among all States to ensure as rapidly as possible the effective protection of human rights throughout the world." Notably, the

181. RESTATeMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE U.S. § 702 cmt. g (1986).
182. The rights in question said to be jus cogens are genocide, slavery or slave trade, the murder or causing the disappearance of individuals, torture or other cruel, inhuman, or degrading treatment or punishment, prolonged arbitrary detention and systematic racial discrimination [hereinafter RESTATeMENT]. See RESTATeMENT § 331 cmt. e.; see also RESTATeMENT § 702.
183. RESTATeMENT § 702 cmt. o.
184. (Belg. v. Spain), 1970 I.C.J. 3, 32 paras. 33-34 (Feb. 5). The Court stated:

[A]n essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations erga omnes. . . Such obligations derive. . . from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law. . . ; others are conferred by international instruments of a universal or quasi-universal character.

Id.

185. MAURIZIO RAGAZZI, THE CONCEPT OF INTERNATIONAL OBLIGATIONS ERGA OMNES 142
remedies typically available where international obligations owed to a state are violated include self-help in the form of retortion or reprisals186 and economic sanctions.187 Thus, the Restatement notes “[a] state may criticize another state for failure to abide by recognized international human rights standards, and may shape its trade, aid or other national policies so as to dissociate itself from the violating state or to influence that state to discontinue the violations.”188 Taken together, these principles suggest that any foreign economic policy should—and perhaps must—be closely scrutinized according to whether it reacts to the erga omnes implications of serious human rights abuses. Amongst the tools legitimately available to states in response to human rights abuses are economic sanctions.

Yet, responsible engagement also recognizes that the means selected to achieve this human-rights sensitive objective must themselves comport with principles of international law. Thus, responsible engagement acknowledges that “principles governing unilateral countermeasures apply... when a state responds to a violation of an obligation to all states,”189 such as human rights abuses, and concurs with the view that even U.N.-authorized measures with significant impacts should be scrutinized with an eye to these principles.190 Specifically, sanctions should be employed only where necessary, by reason of recalcitrance on the part of the human-rights abusing state. Further, the measures selected should be proportionate—not excessive in light of the violation being sanctioned.

A policy of responsible engagement also responds to provisions in the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights guaranteeing everyone a “standard of living adequate for the health and well-being of himself and his family,”191 and invoking rights to be free from hunger192 and to enjoy “the

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188. RESTATEMENT § 703 cmt. f (1986). Some scholars would go even further and urge that human rights violations “oblige” international sanctions. Jennifer E. Morris, Note, Human Rights Violations During the Tiananmen Square Massacre and the Precedents Obliging United States Response, 13 CARDozo L. REV. 1375, 1399 (1991) (“As a member of the United Nations, the United States assumes an obligation under article 55 of the United Nations Charter to ‘promote universal respect for... human rights.... The United States also assumes an obligation under article 56 of the United Nations Charter ‘to take joint and separate action... for the achievement of the purposes set forth in article 55.’ Assumption of these obligations suggests a corresponding duty not to support another state engaged in serious violations of internationally recognized human rights. So long as China continues its flagrant violation of internationally recognized human rights, the United States has a duty under international law to deny China economic, military, and diplomatic support.”)
189. RESTATEMENT § 905 cmt. a (1986).
highest attainable standard of physical and mental health." Article 55 of the U.N. Charter, meanwhile, pledges the U.N. to respect human rights, but also to promote "higher standards of living, full employment, and conditions of economic and social progress and development." Responsible engagement concurs with the view that Article 55 and related human rights norms delineate "elementary standards" to be taken into account before sanctions are leveled. For instance, as other observers have put it, "[a]ssuming that the target is a developing country trying to achieve the objectives set out in Article 55, the United Nations would be less likely to impose a haphazard embargo. . . . The organization would have to first assess the socio-economic status of the target and determine what type of sanctions would cause the least damage to the target's development." The U.N. Sub-Commission on Human Rights, for its part, has expressed strong concern about the humanitarian impacts of sanctions, and has recently urged "all competent organs, bodies and agencies of the United Nations system. . . . [to] observe and implement all relevant provisions of human rights and international humanitarian law" in their sanctioning activities. Similarly, the Committee on Economic, Social and Cultural Rights concluded in 1997 that sanctioning parties are obliged by virtue of the Covenant on Economic, Social and Cultural Rights "to take steps, individually and through international assistance and cooperation, especially economic and technical" to mitigate humanitarian suffering prompted by sanctions. The five permanent members of the Security Council themselves have reflected on the detrimental impacts of sanctions, concluding in 1995 that "further collective actions in the Security Council within the context of any future sanctions regime should be directed to minimize unintended adverse side-effects of sanctions on the most vulnerable segments of targeted countries.

Put in more mechanical terms, a policy of responsible engagement


192. ICESCR, supra note 191, art. 11(2).
193. ICESCR, supra note 191, art. 12(1).
194. U.N. CHARTER art. 55.
196. Id.
starts from the assumption that economic integration and economic growth are consistent with a human rights-maximizing foreign policy. Yet, because there is no automatic causal link between economic growth and improvements in human rights, responsible engagement obliges a cost-benefit analysis or "human rights impact assessment" of any economic integration strategy. Such an analysis would identify instances such as those cited above where economic integration augments the staying power of repressive governments or induces human rights abuses. Subsequently, responsible engagement takes steps to mitigate these negative impacts. Thus, a government may insist that its corporate nationals meet standards of conduct minimizing the human rights-retarding aspects of their overseas presence. For example, as with South Africa, many Western nations now actively endorse and promote so-called voluntary codes of business conduct pledging companies with operations in repressive countries to meet human rights standards.200

In some instances, state or economic actors may prove unresponsive to these modest means of curbing human rights abuses. Here, sanctions mechanisms targeting recalcitrant regimes may be the most viable means of effecting change. In keeping with the discussion above and the moral and legal premises of responsible engagement, sanctions measures should be carefully tailored, targeting elite decision-makers, enhancing domestic oppositions and preserving innocent populations. Accordingly, each sanctions measure, prior to being implemented, must undergo its own cost-benefit and human rights impact assessment, measuring its likely impact as against these criteria.201 As the discussion in Part I suggests, as a general rule, this analysis will likely favor "smart sanctions" comprising financial measures targeting elites, arms embargoes and selective trade and investment sanctions that affect the offensive capacity of repressive regimes without producing significant hardships for innocent populations.

200. For instance, the Clinton Administration sought to diffuse criticism of its failure to push human rights concerns during its renewal of China’s most favored nation trading status by promoting a model voluntary code of conduct for U.S. business overseas and played an active role in the development of the Apparel Industry Partnership, a code on overseas sweatshop labor. The European Parliament adopted a resolution in 1999 urging European companies operating in developing countries to develop a European code of conduct. In Canada, the federal government endorsed a Canadian code for international business that included reference to human rights. See Craig Forcese, Human Rights Means Business: Broadening the Canadian Approach to Business and Human Rights, in GIVING MEANING TO ECONOMIC, SOCIAL AND CULTURAL RIGHTS 71 (Isfahan Merali & Valerie Oosterveld eds., 2001).

201. In fact, the U.N. Office of the Coordinator for Humanitarian Affairs (OCHA) has been working on a methodology by which to evaluate the humanitarian impacts of sanctions. See Sergio Vieira de Mello, Assessing the Humanitarian Impact of Sanctions: Toward Smarter and Better Managed Sanctions Regime, Informal briefing of the U.N. Security Council (Apr. 21, 1998), available at http://www.reliefweb.int/ocha_01/USG: 205speeches/Index.html); see also Eric Hoskins, THE IMPACT OF SANCTIONS: A STUDY OF UNICEF'S PERSPECTIVE (UNICEF Office of Emergency Programs 1998) (proposing a methodology for assessing the humanitarian impacts of sanctions), available at http://www.unicef.org/emerg/sanctions.htm; Reisman & Stevick, supra note 190 (proposing their own assessment process and urging, inter alia, that sanctions be necessary and proportionate, that they discriminate between combatants and non-combatants, that they be reviewed periodically, and that relief be extended to injured third parties).
In sum, "responsible engagement" appreciates that economic relations are neither the absolute cause nor absolute solution to human rights abuses. At the same time, it resorts to a rational analysis of the role of economic relations in exacerbating or preventing repression and, deferring to a series of moral and legal constraints, deploys levers of economic influence to mitigate harmful impacts and promote positive spin-offs. Put another way, responsible engagement strives for an analytically coherent approach to foreign policies predicated on the twin goals of economic growth and human rights promotion. Clearly, fleshing out the precise methodology that would be employed to implement this responsible engagement doctrine goes beyond the scope of this paper. However, it is instructive to consider, in the remaining pages of this Article, whether the prescriptions set out here are likely to be helped or hindered by the international legal context in which they would be expected to operate.

B. The Legal Environment for Responsible Engagement

Responsible engagement, as articulated above, has three prongs. First, it depends on economic integration and growth, said to be generally consistent with human rights-responsible development. Second, it anticipates circumstances where the potentially negative impacts of economic integration are tempered by recourse to special standards of behavior—for instance, voluntary business codes of conduct. Last, it permits recourse to economic sanctions, almost inevitably of the "smart" persuasion. As the section that follows suggests, each of these aspects of responsible engagement is embedded in an international legal context.

1. Legal Environment for Economic Engagement

There is no principle in customary international law obliging states to trade with, or invest in, one another. Nevertheless, there is now a comprehensive legal regime facilitating economic integration. In the area of trade in goods and, to a lesser degree, services, the various agreements comprising the World Trade Organization (WTO), and most particularly the General Agreement on Tariffs and Trade (GATT), impose an array of constraints obliging market access. While the international legal regime for foreign direct investment is considerably less advanced, the world is webbed together by a range of bilateral investment treaties, a multilateral investment dispute regime, and international law favoring a robust system of private commercial arbitration, all greatly conducive to

202. For a list of the treaties maintained by the World Bank, see http://www.worldbank.org/icsid/treaties/1-1.htm.
204. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June
economic integration. In sum, it is perhaps fair to conclude that the area of international economic law is amongst the most developed of international legal regimes. Accordingly, and probably not coincidentally, a strong legal foundation exists for the prong of responsible engagement favoring economic integration and economic growth.

2. Legal Environment for Mitigating Negative Impacts

Responsible engagement obliges efforts to mitigate human rights-abasing effects that might flow from economic integration by, inter alia, encouraging economic actors to guard against contributing to abuses. The Sullivan Principles outlined above and their contemporary equivalents represent one form of mitigation. These “voluntary” business codes of conduct have proliferated at an enormous rate, springing up at the level of individual corporations, private international bodies and between and within states. At present, there is an enormous debate concerning the effectiveness of these codes, with strong suggestions being made that codes are unlikely to prove effective unless companies are given a distinctive business incentive to abide by their terms.\(^{205}\)

Most notable among these incentive efforts are proposals linking code compliance with various home country benefits, such as trade and investment assistance or insurance, ethical investment by public pension funds and government procurement. Selective government procurement, in particular, has had a vigorous history. For instance, a number of U.S. municipal and state governments, including the State of New York,\(^ {206}\) have introduced selective purchasing laws that restrict government procurement from companies operating in Northern Ireland to corporations abiding by the MacBride Principles, a code barring discrimination against Catholics.\(^ {207}\) In other instances, selective procurement has been used in the past, not so much as a code compliance incentive, but as a form of economic sanction. Thus, during the South African-apartheid era, a large number of U.S. municipalities and states passed laws and ordinances prohibiting government procurement from firms that operated in South Africa.\(^ {208}\) More recently, some U.S. states, as well as a growing number of U.S. and Australian cities, have introduced what are known as “selective purchasing” procurement policies prohibiting government procurement from companies operating in

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205. For a discussion on this issue by this author, see Craig Forcese, supra note 200; CRAIG FORCENSE, PUTTING CONSCIENCE INTO COMMERCE (1997).

206. N.Y. STATE FIN. § 165 (Consol. 1999).


Burma. The best known of these laws, that of the State of Massachusetts, has been a source of some controversy and was recently held unconstitutional by the U.S. Supreme Court. Selective purchasing of the sort set out the Massachusetts law may also raise significant international trade law issues.

In this last regard, in 1997, Japan and European Union brought a complaint against the United States under the Government Procurement Agreement (GPA) of the WTO. According to a summary prepared by the WTO, the EC and Japan contended “that, as Massachusetts is covered under the U.S. schedule to the GPA, this violates Articles VIII(B), X and XIII of the GPA Agreement. The EC [and Japan] also contend... that the measure also nullifies benefits accruing to it under the GPA, as well as impeding the attainment of the objectives of the GPA, including that of maintaining balance of rights and obligations.” More specifically, in its request for consultations, the EC expressed the “view that the Massachusetts legislation contravenes, though not necessarily exclusively, the following provisions of the GPA: Article VIII(b), given that it imposes conditions on a tendering company which are not essential to ensure the firm’s capability to fulfill the contract; Article X as it imposes qualification criteria on political rather than economic considerations, and Article XIII to the extent that the statute allows the award of contracts to be based on political instead of economic considerations. This measure also appears to nullify or impair the benefits accruing to the European Communities under this Agreement.”

While a dispute panel was requested in 1998, panel proceedings were suspended in 1999, pending the ultimately successful domestic constitutional challenge to the regulation. Yet, though the matter has not been adjudicated by a WTO panel, and in fact authority for the establishment of the panel lapsed as of February 2000, it remains an open question as to whether a selective purchasing law motivated, not by the traditional protectionist sentiments policed by trade law, but a real, discernable human rights motivation, is compliant with the WTO GPA.

Further, some uncertainty exists as to the WTO-legality of government efforts to promote codes at all, in any fashion. Several human rights


213. Request for Consultations, supra note 211.
groups have suggested that voluntary codes of conduct induced or encouraged by governments might constitute measures controlled by the WTO's Technical Barriers to Trade (TBT) agreement.\textsuperscript{214} The TBT\textsuperscript{215} seeks to regulate "standards", defined as a "document approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory".\textsuperscript{216} The Agreement requires that governments ensure that their "standardizing bodies" meet a "Code of Good Practice." In addition, governments "shall take such reasonable measures as may be available to them to ensure that...non-governmental standardizing bodies with their territories...accept and comply with [the] Code of Good Practice." The Code sets out a number of requirements concerning transparency, but also provides that standards are not to constitute "unnecessary obstacles to international trade".\textsuperscript{217} The meaning of this phrase is not defined in the TBT.

Reviewing the TBT with an eye to the promotion of corporate codes of conduct, the United Kingdom government has echoed some of the concerns raised by human rights groups. It notes, "[a] key issue in determining government obligations to promote compliance with the TBT Agreement (and therefore the risk of challenge under WTO rules) concerns the extent to which voluntary initiatives may amount to 'standards'."

Unfortunately,

\[the TBT Agreement states that standards are documents "approved by a recognised body" but does not elaborate on what constitutes a "recognised body". But when WTO member governments become involved in promoting voluntary initiatives, they may in effect be establishing the home of those initiatives as "recognised bodies". However, there is uncertainty over the degree of government involvement necessary for this to occur and thereby to trigger a requirement to promote compliance with TBT. There is also uncertainty about the substantive implications of the Code of


\textsuperscript{216} \textit{Id.} at annex 1.

\textsuperscript{217} \textit{Id.} at annex 3.

Good Practice.219

The U.K. government takes the position that "internal or private codes of conduct which are company specific are not covered by WTO rules" and that government initiatives in the area of human rights codes are "unlikely to be challenged". 220 It acknowledges, however, that continued government support in this area enhances the chances of such a dispute.

In sum, the effect of the international trade law regime established to promote economic integration on the second prong of a "responsible engagement" strategy is ambiguous. There is some reason to conclude that, interpreted strictly, provisions of the WTO cut against efforts to induce company compliance with standards designed to mitigate the harmful aspects of economic integration.

3. Legal Environment for Smart Sanctions

At the margins, "conditionalities" inducing adherence to codes of conduct and sanctions blur together. For instance, while selective purchasing need not constitute a boycott, the Burma and South Africa procurement regimes discussed above are clearly designed to curtail economic engagement with unpalatable regimes. Measures insisting on divestment cross a subtle boundary, going beyond the "mitigation" goal of the second prong of responsible engagement. They clearly constitute sanctions, the propriety of which must be scrutinized with an eye to the various concerns about sanctions, their effectiveness and secondary effects.

Whether the sanctions regime comprises boycotts or some other measure, the materials marshaled in Part I suggest that these measures should be "smart", applying leverage against political elites and empowering opposition groups. Emerging popular wisdom identifies arms, financial and strategic resource sanctions as the most likely candidates for "smart" status. Further, the discussion in Part I suggests that only in the rarest of instances will unilateral "smart" sanctions prove effective. Arms and strategic resource embargoes require the active participation of all states, particularly "front-line" neighboring countries. Investment sanctions oblige observance by a slightly smaller group of capital exporting nations. Financial sanctions require the cooperation of a more exclusive set of key lending or banking nations. On this basis, only when the target country is very small and the sanctioning nations are very large or particularly influential in the sector being targeted are unilateral measures likely to be successful. Accordingly, a viable strategy of responsible engagement relying on "smart sanctions" depends on international coordination, something that raises international legal

219. Id.
questions.

\[i. \text{Venue for Sanctions Measures}\]

In recent years, the United Nations has served as the most important venue for imposing economic sanctions. While sanctions resolutions of the General Assembly are merely hortatory in their legal effect, the Security Council, acting with reference to Chapter VII of the U.N. Charter, has enormous discretion to determine instances where economic sanctions are appropriate. Further, Security Council measures authorized under Chapter VII have resounding legal impact. No doubt, for these reasons, Security Council resolutions became a vehicle of choice for sanctions in the 1990s.\textsuperscript{221} However, it is trite to say that the Security Council suffers from significant political and legal deficiencies. The five permanent members, wielding their veto, are in a position to derail Security Council action. As a consequence, the Security Council imposed only two mandatory sanctions regimes prior to the collapse of the eastern bloc and the Gulf War in 1990.\textsuperscript{222} The unprecedented level of cooperation during the 1990s notwithstanding, the Council remains vulnerable to changing political fortunes. In fact, co-operation amongst the permanent five may have passed its highpoint.\textsuperscript{223} Further, as one scholar has put forth, “[t]he veto means that permanent members and their clients are permanently exempt from formal censure.”\textsuperscript{224} For example, it is unlikely serious economic sanctions – whether smart or comprehensive – would be imposed on Sudan. Evidence marshaled above demonstrates that investments in the country’s oilfields are exacerbating Sudan’s brutal civil war, suggesting that oil investment is ripe for “smart sanctions” in much the same way conflict diamonds have sparked U.N. scrutiny. Yet, the Sudanese government has a particularly close relationship with China, a country intent on tapping Sudan as a source of oil.\textsuperscript{225} China has reportedly publicly


\textsuperscript{223} Id. at 211.

\textsuperscript{224} Id. at 210.

\textsuperscript{225} Jane’s Information Group, \textit{China Targets Africa}, JANE’S FOREIGN REPORT, Oct. 24, 2000 (“Over the past three years significant numbers of Chinese have been shipped in to live and work in Sudan. The majority of these are believed to be oil and construction workers. However, some are security personnel brought in to protect the country’s oilfields from attack by rebel forces. A number of Chinese military advisers are also believed to be resident in the country.”), \textit{available at} http://www.janes.com.
opposed sanctions on Sudan.226

A moribund Security Council raises the specter of plurilateralism as the sole remaining means of approaching some form of loosely multilateral responsible engagement. Institutionally, other bodies exist able to coordinate modest sanctioning activity. Indeed, several alternate international venues once played a dominant part in the sanctions area during the period of Security Council paralysis.227 For example, the Commonwealth of Nations had a key role in sanctions against Nigeria under the military and apartheid-era South Africa. The Organization of American States (OAS) was instrumental in authorizing early sanctions against the dictatorship in Haiti in the early 1990s. Yet, these likely suspects among the plurilateral international organizations suffer from their own shortcomings. The Commonwealth, comprising the United Kingdom, middle powers such as Canada and Australia, and a large number of developing nations, likely lacks the gravitas or influence exercised via smart sanctions to affect the larger members of even its own fraternity. The OAS, for its part, suffers from a constrained geographic focus.

As a consequence, another plurilateral body—the Group of Eight—may well be an institution whose sanctioning role will become more important. The G-8 has in fact placed sanctions on its agenda, most particularly with respect to Yugoslavia.228 The countries grouped together under the rubric of the G8 together wield enormous economic influence. Particularly in the area of financial sanctions, consensus by G8 members freezing assets, limiting market access or foreign direct investment and other capital flows may have a substantial impact on target elites.229


227. See Doxey, supra note 222, at 208.


229. In fact, in 1997, the Sanctions Working Group (SWG) of the Department of State’s Advisory Committee on International Economic Policy proposed an enhanced role for the then-G7 in sanctions policy. See ADVISORY COMMITTEE ON INTERNATIONAL ECONOMIC POLICY, U.S. UNILATERAL ECONOMIC SANCTIONS: A STRATEGIC FRAMEWORK (Sept. 1997) (observing that “[o]nly in the most unique circumstances is a target country sufficiently vulnerable to the United States that we can force a change by relying only on unilateral economic sanctions,” the SWG recommended the creation of a new Sanctions Task Force within the G-7, one that would allow consensus building and co-ordination of sanctions), at http://www.usaengage.org/studies/swg.html; see also G8 Miyazaki Initiatives for Conflict Prevention, July 13, 2000 (underscoring the G8’s strong support for national legislation that establishes legal enforcement embargoes, observing that G8 economies represent a substantial portion of the global diamond market and suggesting that members consider actions bar diamonds from illicit transactions out their markets), at http://www.library.utoronto.ca/g7/foreign/fm000713-in.htm.
ii. International Legal Constraints on Smart Trade Sanctions

The co-ordinating potential of the G8 or any other plurilateral body notwithstanding, recourse to plurilateral sanctions plainly reduces the range of sanctions measures able to be pursued, for both technical and legal reasons. Technically, arms embargoes and strategic resource sanctions are bound to be ineffective unless frontline border states and key arms-producing or resource-consuming nations participate actively. No intergovernmental organization other than the U.N. is likely to have all of these countries numbered among its members. Legally, plurilateral organizations are generally unable to require observance of sanctions regimes by unwilling non-member third-party states, something the United States has learned in its usually futile efforts to force its allies into compliance with its unilateral sanctions laws.230

Further, in the absence of a Security Council resolution, World Trade Organization-member states imposing export or import restrictions, however modest, on another WTO member risk running afoul of the General Agreement on Tariffs and Trade. Canada, for example, has placed Burma on the Area Control List under the Export and Imports Permits Act. The Act allows Cabinet to “establish a list of countries” for which it deems “it necessary to control the export of any goods.”231 This is a discretionary power, unfettered by any conditions. According to the regulatory impact statement accompanying the relevant regulation in the Canada Gazette, the measure was prompted by the “deteriorating human rights situation” in Burma.232 Under the Act, “[a]ll export permit applications will be reviewed on a case-by-case basis.”233 While humanitarian and personal effects will generally be approved for export, “[p]ermits for other goods will generally be denied”.234

As Burma is a WTO member, trade constraints associated with the permitting system under the Export and Import Permits Act might conceivably fall afoul of Article XI of the GATT. Amongst other things, Article XI of the GATT, 1947 provides that

No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas . . . export licenses or other measures, shall be instituted or maintained by any

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233. Id.
234. Id.
contracting party . . . on the exportation or sale for export of any product destined for the territory of any other contracting party.\textsuperscript{235}

It is plain that panels constituted under both the GATT and the WTO have given Article XI a broad and potent reading.\textsuperscript{236} Further, the exceptions to this rule, set out in Article XI(2), do not include reference to any consideration of relevance in the application of political sanctions, including those motivated by human rights. Accordingly, if Burma were to challenge Canada’s export permit provisions, Canada would likely be obliged to defend with reference to the general GATT exemption provisions: Articles XX or XXI. It is worth reviewing each of these provisions in turn.

Article XXI contains two exemptions of relevance here. First, it contains a U.N. escape clause, indicating that nothing in the GATT is to be construed “to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security”.\textsuperscript{237} Second, it includes general exemptions on national security grounds, indicating “[n]othing in this Agreement shall be construed . . . to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests” relating to, \textit{inter alia}, “the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment” or to any “other emergency in international relations”.\textsuperscript{238}

In the absence of a U.N. Security Council resolution, it is unclear what, if any, utility the U.N. escape clause provision might have. Without a binding Security Council declaration regarding a threat or breach of international peace and security and calling for state action, states likely are not obliged to take any “action in pursuance” of “obligations” to maintain “international peace and security.”\textsuperscript{239}


\textsuperscript{236} In \textit{Japan – Trade in Semi-Conductors}, B.I.S.D. 355/116 (1988), a GATT panel scrutinizing export constraints imposed by Japan on semi-conductors described the wording of Article XI:1 as “comprehensive” and broadly construed the provision as applicable to all measures inhibiting trade, not just laws or regulations. In fact, the mere monitoring of exports, resulting in excessive delays, was a violation of Article XI:1. In \textit{Canada – Measures Affecting Exports of Unprocessed Herring and Salmon}, B.I.S.D. 355/98 (1987), a GATT panel concluded that export restrictions maintained by Canada on unprocessed sockeye salmon, pink salmon and herring were inconsistent with the obligations of Canada under Article XI. More recently, in \textit{United States – Import Prohibition of Certain Shrimp and Shrimp Products}, WT/DS58/R (1988), a WTO panel concluded that Article XI:1 bars quantitative restrictions made effective through export licences. This observation was not disturbed on appeal to the Appellate Body.

\textsuperscript{237} GATT Agreement, \textit{supra} note 235, at art 21.

\textsuperscript{238} \textit{Id.} art 21.

The national security exemption does not depend on U.N. action. However, the term “essential security interests” is not a legal term of art and is therefore fraught with ambiguity. Indeed, this exception has proven fairly elastic in the past. Countries have regularly argued that determining security interests is a matter for their sole discretion. These interpretations have been justly criticized as contorting the plain meaning of the exemption, resulting in its invocation to defend protectionist policies or in instances where no reasonable connection exists between the behavior being sanctioned and the national security of the sanctioning state. In this last regard, the United States relied on Article XXI to defend a ban on exports to and imports from Sandinista Nicaragua, urging that Nicaragua presented an “unusual and extraordinary threat to the national security and foreign policy of the United States.” Other countries vigorously objected to this action. India, for example, insisted “under [Article XXI] only actions in time of war or other emergency in international relations could be given the benefit of this exception . . . [A] Contracting Party having recourse to Article XXI . . . should be able to demonstrate a genuine nexus between its security interests and the trade action taken.”

International Law: The Interrelationship Between United Nations Law and the Law of Other International Organizations, 82 MiCH. L. REV. 1604, 1612 (“The question whether recommendations of the General Assembly are also covered by this provision . . . has never been answered.”). The Dutch government has apparently taken the view that “that the word ‘obligations’ in that Article did not exclusively refer to formally binding obligations.” Bijl, Hand. II, Zitting 1977, 14 006, No. 8, at 2, as cited in Lauwaars, supra, at 1616.


241. For example, the Swedish government defended an import quota of certain shoes, arguing “the decrease in domestic production had become a threat to the planning of Sweden’s economic defence in situations of emergency as an integral part of its security policy . . . [which] required the maintenance of a minimum domestic production capacity in vital industries.” GATT Council, Minutes of Meeting held October 31, 1975, Nov. 10, 1975, GATT/C/M/109, at 8, as cited in Shapiro, supra note 240, at 102.


243. GATT Council, Minutes of Meeting held May 29, 1985, June 28, 1985, GATT/C/M/188, at 11, as cited in Shapiro, supra note 240, at 103. In the Nicaragua case, the United States was able to constrain the terms of reference of the GATT dispute resolution panel, restricting the extent to which it inquired into the Article XXI justification. See GATT Secretariat, United States Trade Measures Affecting Nicaragua, L/6053, 46 (1986). Under the new WTO’s more robust dispute settlement process, the precise scope of Article XXI may be decided at some point, perhaps with reference to the deeply controversial U.S. Helms-Burton Act, 22 U.S.C. §§ 6021-6091 (1996). That said, the United States is likely to continue objecting to any WTO scrutiny of its Article XXI national security claims. The Helms-Burton matter was referred to the WTO by the European Union. The United States expressed an intent to defend with reference to Article XXI but then indicated it would resist WTO jurisdiction to determine whether a matter fell within its national security interest. WTO proceedings now seem to have ceased, as the objectionable provisions of the act are not in force. See generally Rene E. Browne, Revisiting “National Security” in an Interdependent World: The GATT Article XXI Defense After Helms-Burton, 86 GEO. L.J. 405 (1997); C. Todd Piczak, The Helms-Burton Act: U.S. Foreign Policy Toward Cuba, The National Security Exception to the GATT and the Political Question Doctrine, 61 U. PITTS. L. REV. 287 (1999).
In sum, Article XXI’s relevance in defending plurilateral trade-restraining sanctions directed at human rights abusers is most uncertain. While some countries—most notably the United States—are comfortable invoking national security considerations in dubious circumstances, smaller nations without economic muscle, and thus dependent on a rule-based system of trade law, are likely to be more wary. As one scholar has noted, “GATT Contracting Parties exercised restraint in interpreting these terms, and most WTO Members have also been cautious.”

For instance, in the 1980s, the Netherlands took the position that an oil export embargo and coal import sanctions against South Africa not authorized by the U.N. violated the GATT and were not exempted by Article XXI. For this and other reasons, the Dutch declined to impose such measures. At present, some developing nations reportedly insist export control measures in the weapons and dual use area “conflict with commitments to free trade, especially those made under the auspices of the GATT and World Trade Organisation.”

Even developed countries, often on the receiving end of expansive U.S. “national security” measures, are likely to resist contorting the language of article XXI to justify even “smart” sanctions measures for fear that damaging precedents will be established.

Article XX, for its part, is a complex series of exemptions to the WTO/GATT rules, each with its own ambiguities. Essentially, for article XX to apply, one of the enumerated justifications set out in article XX must exist and the constraints on these justifications imposed by the so-called “chapeau” — or preamble — to the article must not bar the application of the justification to the measure in question. With respect to the enumerated justifications, there is no “human rights” exemption. At best, a general human rights motivation might fall within paragraph (a), measures necessary to protect public morals, or (b), measures necessary to protect human life and health. Neither is a particularly intuitive fit. Human rights are not, at least exclusively, about public morals, nor are they inevitably about human health or life.

Notably, there are few GATT or WTO panel decisions interpreting these paragraphs. In fact, to date, the public morals exemption remains uninterpreted. The human health exception was at issue in Thailand — Restrictions on Importation of and Internal Taxes on Cigarettes. Here, a GATT panel concluded that a measure protecting health is not “necessary” “if an alternative measure which it could reasonably be expected to employ and which is not inconsistent with other GATT provisions is available to it.” Further, “a contracting party is bound to use, among the measures reasonably available to it, that which entails the least degree of inconsistency

244. Bhala, supra note 239, at 272.
with other GATT provisions." 248

This "least trade inconsistent" approach was applied subsequently by the Appellate Body in European Communities - Measures Affecting Asbestos And Asbestos-Containing Products.249 Here, the Appellate Body considered whether a French ban on asbestos imports could be justified under Article XX(b). Upholding the panel determination that asbestos posed health hazards, the Appellate Body focused on the question of whether the French measure was "necessary" to protect human health. On this issue, the Appellate Body held that a key question in determining whether a WTO-consistent alternative measure is reasonably available is the extent to which the alternative measure "contributes to the realization of the end pursued."250 The Appellate Body concluded that absent adequate proof that steps other than a ban would be effective in absolving health concerns, "France could not reasonably be expected to employ any alternative measure if that measure would involve a continuation of the very risk that the [French] Decree seeks to 'halt'. Such an alternative measure would, in effect, prevent France from achieving its chosen level of health protection."251

In brief, this discussion suggests that there are multiple uncertainties concerning the utility of Article XX in justifying human rights trade sanctions. Specifically, given the absence of express "human rights" language, does the language of "public morals" and "human life and health" extend to an export ban motivated by human rights concerns?252 A second open question surrounding article XX(a) and (b) is the meaning of the term "necessary". The cases cited above suggest that to satisfy article XX(b), a WTO member must select a solution that both achieves the desired end and is least trade restrictive. In principle, this is a reasonable test. However, in practice, it obliges a trade-restraining nation to defend its measure as more effective in achieving its ends than any conceivable non-trade restraining measure. This may be possible where questions of human health are at issue, and scientific evidence demonstrating the exact consequences of different measures may be adduced. On the other hand, where the goal is the rather inchoate objective of protecting and promoting human rights, measuring and quantifying the relative effectiveness of measures in achieving that end may prove a laborious undertaking.

The "chapeau"—or language preceding the list of exceptions in article

248. Id.
249. GATT Secretariat, European Communities Measures Affecting Asbestos And Asbestos-Containing Products, WT/DS135/AB/R (2001).
250. Id. para. 172.
251. Id. para. 174.
252. With respect to "human life and health", there is the subsidiary question of whether the health being protected need be that of people in the state introducing the measure. The question of Article XX(b)'s extraterritorial reach appears to remain open in the wake of the unadopted GATT panel decision in United States - Restrictions on Imports of Tuna, 33 I.L.M. 839, 889-90 paras. 5.8, 5.9 (1994), the so-called Tuna II case. Unlike the first Tuna/Dolphin case, United States - Restrictions on Imports of Tuna, 30 I.L.M. 1598 paras. 2.1, 2.2 (1991), the panel in this matter concluded that Article XX(b) could have extraterritorial reach, at least in some limited instances.
XX—prohibits the application of an enumerated measure in a fashion "which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail" or "a disguised restriction on international trade." In United States - Import prohibition of certain shrimp and shrimp products, the Appellate Body noted that the meaning of these terms is very context-specific. In this regard, it urged that

[w]hat is appropriately characterizable as "arbitrary discrimination" or "unjustifiable discrimination", or as a "disguised restriction on international trade" in respect of one category of measures, need not be so with respect to another group or type of measures. The standard of "arbitrary discrimination", for example, under the chapeau may be different for a measure that purports to be necessary to protect public morals than for one relating to the products of prison labour.

However, the Appellate Body also concluded that "[t]he policy goal of a measure at issue cannot provide its rationale or justification under the standards of the chapeau of Article XX." Rather, for the Appellate Body,

The task of interpreting and applying the chapeau is, hence, essentially the delicate one of locating and marking out a line of equilibrium between the right of a Member to invoke an exception under Article XX and the rights of the other Members under varying substantive provisions (e.g., Article XI) of the GATT 1994, so that neither of the competing rights will cancel out the other and thereby distort and nullify or impair the balance of rights and obligations constructed by the Members themselves in that Agreement. The location of the line of equilibrium, as expressed in the chapeau, is not fixed and unchanging; the line moves as the kind and the shape of the measures at stake vary and as the facts making up specific cases differ.

This position has not been revisited in subsequent Appellate Body discussions of the chapeau. Obviously, this is an extremely amorphous standard by which to measure whether a sanctions regime will be upheld as WTO-compliant under article XX.

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253. GATT Agreement, supra note 235, at art. 20.
255. Id. para. 120.
256. Id. para. 149.
257. Id. para. 159.
258. Recent cases discussing the chapeau of Article XX in very specific contexts include the two settlements in United States - Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 of the DSU, WT/DSS8?AB/RW (01-5166) (Oct. 22, 2001).
In sum, taken together, article XI's specific censures, coupled with uncertainty surrounding the article XX and XXI exemptions, add legal doubt to the sanctions equation. This indefiniteness potentially cuts against the rapid and concerted application of plurilateral sanctions, even in reasonably non-contentious areas such as arms embargoes. Countries who might agree that smart sanctions are warranted may resist bending the meaning of Articles XX and XXI to accommodate trade-restraining measures.

While the GATT potentially discourages "smart" plurilateral trade sanctions focused on weapons and strategic resources, it accommodates import-restraining measures that, as applied by the United States, are blunt instruments. Since the early 1980s, developed countries have relied on articles XXXVI and XXXVII of the GATT to lever human rights considerations onto the agenda of their less developed trading partners. These provisions—situated under the heading of trade and development—permit developed country contracting parties to grant non-reciprocal tariff benefits to developing nations. Non-reciprocal benefits under the GATT are considered non-binding on the importing country and thus can be raised again should the importing country so desire. Further, "these benefits may...be denied on a discriminatory basis without violating the international rules governing trade among nations." 259

The United States has been particularly active in tying these non-reciprocal benefits to mixed economic and geo-political concerns. For example, the U.S. "General System of Preferences" (GSP) program was created in 1974, ostensibly as a development program favoring trade over aid. 260 To qualify for tariff-free access to the U.S. market for a narrow range of goods, a nation could not possess a communist government or be a member of OPEC, or have expropriated U.S. property, harbored terrorists, afforded preferential treatment to developed nations other than the U.S. in a fashion harming U.S. commerce, or have ignored any arbitral award in favor of the U.S. 261 In 1984, Congress revised the GSP program to add a larger human rights dimension, tying the extension and renewal of GSP preferences to labor rights. Thus, an infringement of "internationally recognized worker rights" would remove a nation from eligibility as "a beneficiary developing country" under the system. 262

In the mid-1990s, the European Union followed the U.S. lead, introducing its own GSP labor-rights conditionalities. The present EU regulation provides extra special "incentive" benefits to countries meeting labor standards 263 and anticipates the withdrawal of benefits where certain

rights are violated, something that has been done in the case of Burma. While the U.S. workers rights system removes countries in their entirety from the GSP, the EU system allows removal of benefits in whole or in part, suggesting it can be tailored to specific products rather than directed at entire economies. Similarly, the Canadian GSP system appears to permit exclusion of specific goods from the program. While the Canadian law includes no reference to human or labor rights, it has been used as part of Canadian sanctions against Burma.

Clearly, the GSP program can be viewed as a variant on traditional sanctions laws, one impeding, without banning, market access by sanctioned nations. Resort—or threatened resort—to the GSP has, in fact, been employed by the U.S. to achieve human rights-related political objectives. Thus, the removal of U.S. GSP benefits for Chile, for example, is said to have served “as an important element putting pressure on Chile at the time of the ending of the Pinochet government” to continue the democratization process. Similar pressures were placed on Paraguay at the end of the Stroessner dictatorship. In both instances, “business interests formerly comfortable with military rule and suppressed labor movements, now facing economic sanctions under the labor rights provisions of the Generalized System of Preferences just when they hoped to expand their exports to the United States, joined calls by labor, human rights, and other democratic forces for the generals to step down.” In Guatemala, “the application of a ‘continuing review’ status under the labor rights clause, with the potential cutoff of GSP benefits surfaced as the chief U.S. policy instrument in reversing a military-backed [coup] by then-president Joerge Serrano in 1992.”

264. Id. art. 22.
The U.S. GSP has also been directed at specific "sweatshop" style labor abuses. Thus, the United States Trade Representative reportedly threatened to remove Nicaragua's tariff benefits unless that country moved to ensure that a factory from which the Pentagon and major U.S. retailers source products "complied with labor laws." The threat of removal of Guatemala's GSP status in 1992, more than encouraging democracy, is said to have "prompted the Guatemalan government to pass revisions to update its Labor Code and authorize the only existing union in a maquila plant." Further, a petition filed against Sri Lanka in 1991 is said to have induced the Sri Lankan government to open its export processing zones to labor organizers. A 1992 petition against Peru reportedly "led the government of President Fujimori to open a dialogue with trade unions for the first time in his administration's history." In the Dominican Republic, threatened removal of GSP benefits for sugar reportedly forced the government "to crack down on the plantations with the worst abuses and to reform its labor laws to make it illegal to capture illegal workers by debt bondage." Indeed, overall, some observers regard the GSP program as being very influential in improving labor conditions in many U.S. trading partners. Trade unionists from developing countries have reported that their governments have "responded to the criticism in the GSP petition more seriously than they [have] ever reacted to a negative judgment by the ILO's Committee on Freedom of Association or Committee of Experts."  

In sum, U.S. GSP sanctions seem to have a reasonable rate of success, no doubt tied to the importance of the American market. That said, U.S. GSP sanctions run the risk of being a very indiscriminate instrument. As noted above, unlike the Canadian or European system, the U.S. withdrawal process is country, not product specific. In other words, while the Paraguayan and Chilean experiences cited above suggest that the "nuclear" option of country GSP withdrawal can generate elite opposition to the sanctioned behavior, GSP removal plainly runs the risk of affecting economies as a whole, not simply the interests of specific elites. While this countrywide focus may make the instrument less vulnerable to capture by U.S. domestic protectionist interests, it may also seriously harm innocent parties and simply stall economic growth, thereby running afool of the pre-requisites of responsible engagement set out above.

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274. Harvey, Labor Rights, supra note 269, at 20.
275. Id. at 6.
276. Id.
277. Id.
278. Id. at 8 ("It does not matter which goods are related to labor violations, or whether any trade goods-production is implicated at all. Labor rights violations in any sector can lead to a challenge. [This] generic approach of the GSP law has probably been instrumental in [explaining] its not being "hijacked" for competitive reasons.") (emphasis added).
IV. CONCLUSION

This Article suggests that, at the end of the day, there may be sufficient room on the bridge for Moral Principle and Material Interest to cross together. Economic engagement and the promotion of human rights-sensitive development are generally compatible objectives. However, concluding that such a synergy of interest is possible does not render such harmony certain or even likely. This paper has pointed to clear instances where goals of unalloyed economic integration and human rights diverge. Accordingly, assuring sufficient room on the bridge obliges concrete policy steps taken to side-step and mitigate circumstances where economic and human rights objectives conflict. To this end, this paper draws on an analysis of the costs and benefits of both constructive economic engagement and economic sanctions to propose a strategy of “responsible engagement”, one premised on a series of moral and legal constraints and directed at capitalizing on the promise both of economic expansion and of human rights-sensitive development. More specifically, responsible engagement supports enhanced economic integration while at the same time seeking to mitigate some of the negative human rights impacts of this integration and, in the worst cases, prescribes a series of “smart sanctions” directed at recalcitrant, human rights abusing elites.

Yet, while the first essential aspect of responsible engagement - the need for continued economic integration - is strongly supported by the contemporary international legal apparatus, those facets of the strategy seeking to condition engagement on human rights standards and sanction inappropriate behavior rest on more uncertain legal ground. To be sure, the WTO/GATT says nothing, as of yet, about some “smart” sanctions measures, such as financial and investment sanctions. Accordingly, financial sanctions, in particular, represent an important area for future development. However, the Government Procurement Agreement and the Technical Barrier to Trade Agreement of the WTO create some legal uncertainty as to whether and how governments can promote voluntary codes of conduct for businesses operating overseas and direct their procurement regimes to encourage adherence to these codes. Similarly, trade-restraining sanctions unauthorized by the typically moribund U.N. Security Council raise serious issues under the General Agreement on Tariffs and Trade. While exemptions allowing trade-restricting measures exist in the GATT, these provisions are, at best, ambiguous. Ironically, the only clear human rights-related, trade constraining sanction permitted under the WTO/GATT framework relates to General System of Preferences non-reciprocal tariffs. Yet, at least as implemented by the United States, these measures are potentially much broader in their impact than the narrowly tailored “smart” sanctions prescribed by responsible engagement.

In sum, the legal strictures that govern international economic relations and within which a strategy of responsible engagement must be articulated are focused, myopically, on unconditional economic integration. In the
construction of such instruments as the WTO, much emphasis has been placed on locking countries into economic integration, with little thought being directed at how the WTO’s success in this area might affect more nuanced approaches to human rights sensitive development. While no provision of the WTO clearly bars any of the measures endorsed by a strategy of responsible engagement, ambiguity and uncertainty in WTO/GATT provisions diminish the prospects that nervous countries will interpret these ambiguous provisions to serve moral rather than material objectives. The net result may well be responsible engagement strategies pursued by a limited number of states whose governments turn a deaf ear to the trade law uncertainty, resistance on the part of more cautious states to sensible plurilateral, trade-restraining “smart” sanctions, and haphazard recourse to those potentially less appropriate trade-restraining measures, such as the GSP, actually permissible under the WTO/GATT.

Some might argue that hindering responsible engagement is a small price to be paid for assuring economic integration, ultimately the single best guarantee of human rights sensitive development over the long term. Trying to accommodate responsible engagement strategies in the fabric of the WTO might create new uncertainties, vulnerable to exploitation for protectionist rather than genuine human rights reasons. Certainly these are real concerns. They are, however, matters of drafting and construction and not of policy. Dismissing the policy concerns driving responsible engagement ignores the serious prospect that a trade law system incapable of accommodating human rights concerns will lose credibility, political salience and ultimately legal sway. Put more dramatically, if governments do not address what Sir Leon Brittain has called the “moral implications of globalization”,

279 globalization risks fuelling an anti-liberalization backlash and social anomie. While the matters dealt with in this paper do not purport to cover all the “moral implications of globalization”, clarifying terms in the GATT/WTO to accommodate the modest dictates of responsible engagement might step towards addressing these concerns. At worst, such a rethinking would ensure that when Material Interest and Moral Principle next meet on the bridge, Moral Principle is not swept too far downstream.
