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DEVELOPING A STANDARD FOR POLITICALLY RELATED STATE ECONOMIC ACTION

Clinton E. Cameron*

INTRODUCTION

Prior to the twentieth century, States solved disputes among themselves primarily through the use of force—by waging war against one another. There were specific rules about how the war was to be conducted, but few, if any, regulations governed what constituted a legal basis to go to war in the first place.¹ All of this has clearly changed as the U.N. Charter enshrines the prohibition on the use of force and customary law develops around the prohibition. Thus, States must utilize alternative methods of dispute resolution that do not explicitly entail the use of force in order to address conflicts between themselves. To comply with the terms of the Charter, States have sought out methods of action that would exert influence over—some would use the more value-laden terminology “coerce”—other States to accept their positions in the international arena. Many such methods exist, including the use of diplomatic persuasion and condemnation and appeals to individuals and private organizations. However, the method by far most frequently and most effectively utilized by States is the employment of economic measures to achieve foreign policy goals.

This form of State action, which I will describe as “economic diplomacy,” has often been controversial in the past, initially because of the schism between the East and West, and later because of the conflict between the North and South. Many developing and Second World States have asserted that several forms of what they typically described as “economic coercion” were contrary to international law in much the same way as is the exercise of the use of force.² Typically,


¹ Werner Meng, War, in 4 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 282, 282-83 (Rudolf Bernhard ed., 1982).

developing nations characterized the use of economic diplomacy (often by First World States against those of the Second or Third World)\(^3\) as a form of aggression or as a violation of the prohibition of intervention in the domestic affairs of other sovereign States. First World States accused of such action have generally either categorically denied the illegality of their exercise of economic diplomacy in international affairs or have sought exculpatory justification for their conduct. In at least one instance, however, this relationship was turned on its head, with the First World States arguing that the use of a particular type of economic diplomacy was illegal while Third World States argued that their actions were within the bounds of legality.\(^4\)

The dispute concerning the legality of the use of economic diplomacy has not been limited to the often self-serving claims of State actors. The community of international legal scholars has conducted a very active and wide-ranging debate on the legality of the exercise of economic diplomacy as well.\(^5\) Unfortunately, this debate has provided no clear answer to the question of legality of such action. Moreover, most of the scholarship that has appeared in this area was written between the mid-1960s and the late 1970s at the height of great turmoil

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\(^{4}\) This action was the 1973 Arab Oil Embargo placed by the Organization of Arab Petroleum Exporting Countries (OAPEC) against States that provided support to Israel. See discussion infra notes 109-112 and accompanying text.


Finally, for arguments that the use of such means are generally legal under international law, see, e.g., David A. Baldwin, Economic Statecraft 336-47 (1985); Richard B. Bilder, Comments on the Legality of the Arab Oil Boycott, 12 TEX. INT'L L.J. 41 (1977); Tom J. Farer, Political and Economic Coercion, 79 AM. J. INT'L L. 405 (1985) (editorial comment); J. Dapray Muir, The Boycott in International Law, 9 J. INT'L L. & ECON. 187 (1974).
in the international arena and of the ascendancy of the New International Economic Order (NIEO). The legal issue has been largely ignored during recent years while the use of such economic diplomacy has attained an even more important position in the toolbox of the diplomat.

Therefore, the international legal community must once again examine economic diplomacy to clarify the important question of its legality. This Note will give an analysis of the scholarship that has appeared in this field, as well as the actual practice of States, to determine if any fixed rules have been established in this area, and if so, what they are. It will do so by looking at the debates that have taken place concerning the application of the language and underlying principles of the U.N. Charter in order to see if these norms of State action prohibit economic diplomacy. The Note will then look to the actual practice of States to determine whether it provides adequate evidence of *opinio juris* to find regulation of the challenged conduct as a principle of general customary international law. Finally, the Note will seek to compare the rules that actually have been solidified in international law with those that ideally fit within the larger policy schema of the post-Charter international system in order to find how there may be improvement in the future law of this area.

One preliminary matter of terminology will be discussed for the purpose of clarity. In much of the literature in this field, authors use the names of various types of economic activity almost interchangeably though the activities are, in fact, quite different from one another in form and substance. Among the types of economic activity that are generally discussed as examples of economic diplomacy are embargo, boycott, economic sanction, "economic warfare," and blockade. For the purposes of this Note, the most important distinction between these terms is the difference between actions that are essentially supplemental to the exercise of the use of force and those that stand alone in the sense that they are not taken in support of, or in the contemplation of, the use of armed force. Among the types of economic activity

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10. Id.
that are supplemental to the use of such force are exercises of blockade and "economic warfare." These activities imply that the use of force is either involved in the execution of the economic action itself (i.e., blockade) or that the economic action is itself used in order to support the concurrent or planned execution of the use of force (e.g., war).

Yet, no use of armed force is either explicit or implicit in the exercise of the policies of boycott, embargo, or economic sanction, nor are these actions typically a prelude to the use of this type of force. These activities are, in terms of their execution, of a purely nonforceful character and nothing about them implies the imminent application of the use of force. The boycott is often associated with the actions of private parties, especially within the domestic context; however, only those boycotts that are mandated by State action are relevant for the purposes of this Note. A boycott is a State-mandated refusal to allow the purchase of goods and services originating from a certain target State. The term "embargo" is the exact opposite of the concept of the boycott. During an embargo, the State forbids goods or services to be exported for the use of the target State or its nationals. Finally, the term "economic sanction" refers to a broader category of State action, of which the other two — embargo and boycott — are subcategories, affecting the economic interests of another State. In the exercise of a general economic sanction, the State may be doing more than simply controlling the economic actions of those persons under its jurisdiction — it may also take actions within the international community that are directed toward the target State's economic interests. Examples include a country seizing the assets of another, discontinuing foreign aid that it had promised, or blocking another's access to international credit institutions.

This Note does not consider the issue of collective sanctions as provided for in the U.N. Charter at the call of the Security Council under Article 41. Instead, it discusses the actions of States, individually or collectively, that are not sanctioned by such international bodies. Moreover, this Note will not specifically address State actions that are taken to gain an advantage in the terms of trade. On this issue, it is very difficult to distinguish the actions of States that are directed toward advancing its economic goals but not its political agenda. An inherent overlap exists in these areas of State action that cannot be avoided because there is no clear distinction between economic and

11. See id.; Lauterpacht, supra note 8, at 126-27. Moreover, since these types of actions, if taken by private parties without State encouragement, are performed by actors beyond the reach of the subjects of international law, their conduct may not be prohibited by such a norm. Derek W. Bowett, Economic Coercion and Reprisals by States, 13 VA. J. INT’L L. 1, 10 (1972).
political spheres in the reality of international relations. Despite these obvious difficulties, this Note will attempt to focus on those actions that would traditionally be seen as advancing primarily the "foreign policy" of the State rather than its relative economic prosperity.

I. CURRENT INTERNATIONAL LEGAL REGULATION ON THE EXERCISE OF ECONOMIC DIPLOMACY

A. The View of the Classical Positivist Publicists of International Law

Given that the U.N. Charter reflects a true break with the history of the regulation of States' interaction with each other in the international arena, most of the discussion in this Note will focus on post-Charter international law. However, it is important to understand the origins of the current law in this area in order to understand the true nature of the present situation. The classical positivist commentators of international law saw very few restrictions on State action, and those that they did find were built upon the notion of consent of the States themselves. The area of international economic action was, in particular, virtually beyond the realm of international legal regulation according to classical international law publicists. As an example, de Vattel stated rather categorically that

\[\text{[i]t depends on the will of any nation to carry on commerce with another, or let it alone. If she be willing to allow this to one, it depends on the nation to permit it under such conditions as she shall think proper. For in permitting another nation to trade with her, she grants that other a right; and every one is at liberty to affix what conditions he pleases to a right which he grants of his own accord.}\]

Thus, it is quite clear that no State was under an affirmative legal obligation to allow trade between itself and any other State under the classical law of nations as seen by these positivist thinkers.

De Vattel stated further that the trade between nations was not susceptible to the formation of binding international legal norms based upon custom because,

\[\text{it depends on the will of each nation to carry on commerce with another, or not to carry it on . . . , the right of commerce is evidently a right of mere ability (jus merae facultatis), a simple power, and consequently is imprescriptible. Thus, although two nations have treated together, with-}\]

12. See Martti Koskenniemi, From Apology to Utopia: The Structure of International Legal Arguments 106-17 (1989) for a general discussion of the positivist movement in international law.
out interruption, during a century, this long usage does not give any right to either of them; nor is the one obliged on this account to suffer the other to come and sell its merchandises, or to buy others: — they both preserve the double right of prohibiting the entrance of foreign merchandise, and of selling their own wherever people are willing to buy them.¹⁵

This scholarship reveals that virtually no customary law constraint on the exercise of economic diplomacy existed under the classical law of nations. However, it was quite clear that States could contract with one another by entering into treaties in order to protect themselves from the exercise of economic diplomacy that was adverse to their interests. Many States availed themselves of the opportunity in the eighteenth and nineteenth centuries by entering into Treaties of Friendship, Commerce, and Navigation (FCN) with their important trading partners.¹⁶ Yet, treaty enactment was basically the only protection that States had against the exercise of adverse forms of economic diplomacy—except, of course, the ultimate threat of the use of force which always remained open to them.

This classical system of regulating State action began to erode at the end of World War I and was thoroughly dismantled by the end of World War II when the international community sought to change fundamentally the way States interacted with one another.

B. The United Nations Charter

The most important international source of law that is relevant to a discussion of the use of economic diplomacy in the postwar order is the U.N. Charter. The Charter contains many provisions that are relevant to this inquiry, but the one that has been discussed most frequently in this debate has been Article 2. Article 2 provides in pertinent part:

The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles. . . .

3. All Members shall settle their international disputes by peaceful means in such manner that international peace and security, and justice, are not endangered.

4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any manner inconsistent with the Purposes of the United Nations. . . .¹⁷

It is this language of the Charter that many advocates of the illegality

¹⁵. Id. at 41.


of the exercise of economic diplomacy have seized upon in order to support their position. The argument is essentially that certain forms of economic diplomacy are inherently "coercive" in character and are thus proscribed by the purposes of the United Nations as set forth in Article 2 of the Charter.

Most of the discussion concerning the use of economic diplomacy has focused on whether such activity constitutes "aggression," under the U.N. Charter. This seems like a peculiar focus given the fact that the portions of the Charter that directly proscribe certain types of activities by Member States (i.e., Article 2) make no textual mention of the prohibitions of actions that would amount to "aggression," but rather refer to the use of force. However, the term "aggression" does prominently appear in Article 39 of the Charter, which delineates the Security Council's responsibilities and requires the Council to take certain types of measures in opposition to actions it deems to constitute aggression. Therefore, it is better to think of the issue in terms of whether the use of economic diplomacy amounts to the "use of force" acting against the sovereignty of another State than whether it amounts to "aggression."

Scholars have tended over time to use the language in the Charter relating to aggression as a basis to argue that economic diplomacy has been abolished through the formation of a principle of international law which, while not clearly covered by the language of the Charter, has been prohibited by the general scheme and purpose of the instrument. This line of argument has frequently resulted in a collapsing of the notions of "aggression" and "use of force" as used in the various Charter provisions so that they are treated nearly interchangeably. While the present author does not advance this position, a sufficiently large group of highly respected authorities have adopted it that the

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19. Comment, supra note 5, at 1000-02.

20. Article 39 provides,

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

U.N. CHARTER art. 39.

See infra notes 46-58 for a more detailed discussion of the distinction between "use of force" and "aggression" and the attempts by the United Nations to define "aggression" as used in the Charter.

21. Paust & Blaustein, supra note 5, at 413.

22. See, e.g., Brosche, supra note 2, at 22.
view cannot be ignored. Moreover, while there may not be a unity of meaning of the two terms as used within the Charter, there is some utility to examining the various understandings of the meaning of the term "aggression" to understand the legality of the exercise of certain forms of economic diplomacy.

In analyzing the meaning of a particular international treaty provision, one must consider whether its language is ambiguous in any way.\footnote{23. Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, art. 32, 1155 U.N.T.S. 331, 340 (entered into force Jan. 27, 1980) [hereinafter Vienna Convention].} The vast majority of treaty provisions could be described as vague, and Article 2 is especially ambiguous because the Charter does not define the term "force" and no clear and consistently held meaning exists for the term within the international community. Therefore, the analysis must make reference to the travaux préparatoires of the Charter in order to understand the commonly accepted meanings for the terms used within the document.

At the time of the drafting of the Charter, the Brazilian delegate to the drafting committee attempted to proscribe explicitly the use of certain economic measures in Article 2 of the Charter. This amendment proposed that the Article read:

All Members of the Organization shall refrain in their international relations from the threat or the use of force and from the threat or use of economic measures in any manner inconsistent with the purposes of the Organization.\footnote{24. Amendments of the Brazilian Delegation to the Dumbarton Oaks Proposals, Doc. 2, G/7(e)(4), 3 U.N.C.I.O. Docs. 251, 253-54 (1945) (emphasis added).}

The provision was, however, not included within the final text of the instrument at the overwhelming vote of twenty-six to two of the delegates to the meeting.\footnote{25. Summary of the Eleventh Meeting of Committee 1/1, Doc. 784, 1/1/27, 6 U.N.C.I.O. Docs. 331, 334-35 (1945).} Rejection of the proposed amendment implies, on its face, that the drafters of this provision of the Charter did not intend to proscribe the use of economic diplomacy within the coverage of Article 2(4) of the Charter. The actual situation, however, is not so clear. In the first place, one of the arguments made in opposition to the amendment was that the text of Article 2(4) was broad enough to prohibit many economic measures without the proposed change. The delegates supporting this position claimed that the existence of the language "or in any manner inconsistent with the purposes of the United Nations" within the final text of Article 2(4) implied that the coverage of the article was beyond the traditional meaning of armed force.\footnote{26. Id. at 334.} Thus, the confusion that presently surrounds the meaning of the
phrase "use of force" has existed from the very drafting sessions of the Charter and is the product of a drafting mechanism that intentionally sought to include a certain amount of ambiguity and flexibility in the terminology of the Charter.

Another argument that some commentators have made is that, while it may be true that the original intention of the drafters of this language may not have been to include the concept of "economic coercion" within the ambit of Article 2, the Charter has subsequently developed in such a way that this concept's inclusion is necessary to the proper functioning of the international system and has been accepted by the Member States through their subsequent practice. The basic idea put forward by these writers is that the meaning of the various provisions of the Charter may be changed through the practice of the Member States of the United Nations in a way that may be at variance with the understandings of the initial drafters of the instrument. As one commentator explained it:

[T]he United Nations Charter is no historical monument, but a living instrument which continues to expand due to the dynamic and progressive nature of our international society whose prime objectives is still the maintenance of peace and security.

This position is supported by some of the most basic principles of treaty interpretation and is well known in municipal constitutional interpretation. The full implications of an evolutionary approach to the interpretation of the Charter are beyond the scope of this Note. However, the Note will explore this concept through the analysis of some of the many resolutions passed by the U.N. General Assembly in this area. While a treaty (in this case the Charter) may be subject to change through the customary use of its members, the kind of "evolution" that the meaning of the document's terms undergoes through such mechanisms must have some limits. Though the principle that treaties may evolve to some extent over time seems unobjectionable in itself, some point exists where the mutation of the meaning of the instrument has created something which is so different from the original understanding and text that it is difficult to argue that it is the same document to which all of the signatories agreed.

27. Brosche, supra note 2, at 23.
28. Id. at 23.
29. Vienna Convention, supra note 23, arts. 31(3)(a)-31(3)(b); Rudolf Bernhardt, Interpretation in International Law, in 7 Encyclopedia of Public International Law 318, 322 (Rudolf Bernhard ed., 1984).
31. See Vienna Convention, supra note 23, art. 31(3).
As the foregoing discussion illustrates, the applicability of Article 2(4) of the Charter is quite unclear and subject to widely divergent interpretations. Some commentators have concluded that Article 2(4) prohibits the use of economic diplomacy in a rather broad fashion, while others have concluded that it only prohibits the most extreme forms of politically motivated state action, while still others have concluded that Article 2(4) itself places no restrictions on the use of such actions.

Another interpretive problem exists with regard to Article 2(4)'s coverage of the concept of economic coercion as a use of force, relating to its interaction with Article 51 of the Charter. As has been stated, Article 2(4) bans the use of force, while Article 51 provides the aggrieved party the right to exercise self-defense only in the face of an "armed attack." Assuming that Article 2(4) of the Charter proscribes the use of certain forms of economic coercion, then the question must be answered whether such action would provide the "attacked" State with the right of self-defense under Article 51. While Kelsen and some other commentators suggest that Article 51 of the Charter does not limit the exercise of self-defense to cases where the State is under an armed attack against its borders, the better position, both in terms of the weight of opinion among commentators and the actual language and purpose of the Charter, is that an economic "attack" is not sufficient to justify a State in taking action in self-defense under Article 51 of the Charter.

32. See Brosche, supra note 2, at 19, 34; Paust & Blaustein, supra note 5, at 415-19. While Neff does not specify to what extent Article 2(4) places restrictions on this sort of activity, he finds that it continues to have some relevance in the general regulation of the use of economic diplomacy. Neff, supra note 2, at 140.

33. Farer, for instance, believes that Article 2(4) may come into play only when "the objective of the coercion is to liquidate an existing state or to reduce that state to the position of a satellite." Farer, supra note 5, at 413.

34. A whole host of commentators on the subject have found that Article 2(4) is not truly applicable to the regulation of the use of economic state action. See, e.g., Baldwin, supra note 5, at 340; Bowett, supra note 5, at 245 (citing the debates of the U.N. Special Committee on Friendly Relations Between States); Kausch, supra note 5, at 31. "[C]onventional wisdom" is that the applicability of Article 2(4) to economic diplomacy is "doubtful." Lillich, supra note 6, at 236.

35. Article 51 states in pertinent part:
Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. . . .
U.N. CHARTER art. 51.


37. See Leland M. Goodrich & Edvard Hambro, Charter of the United Nations: Commentary and Documents 70 (1946) for a discussion of Article 51's legislative history that supports this view.
This analysis indicates that a gap would exist between the use of force banned under Article 2(4) of the Charter and the position where States might exercise the use of force in their own self-defense, if the Charter prohibits certain types of economic diplomacy. Such a gap would severely detract from the consistency of the international system under the U.N. Charter and strongly implies that the meaning of the term "force" in Article 2(4) refers only to the sort of activity that would constitute an armed attack.  

One of the approaches to the argument that Article 2(4) prohibits the use of economic diplomacy has been strongly influenced by the "policy science" school of thought finding its roots in the work of Myres McDougal, among others. The idea of the "policy science" writers is that the policy underlying the words of Article 2(4) represents a certain type of goal and that anything that violates this broad goal should be deemed illegal under the instrument. To these writers, Article 2(4) encompasses a principle far broader than the prohibition of the use of armed force in order to interfere in the sovereign rights of another State. To them, the Charter represents an attempt to prohibit the use of coercion "of such an intensity, efficacy, and magnitude as to threaten the security of another State significantly." Essentially, they see Article 2(4) as providing a broad and wide-ranging attempt to restrict the use of State action that limits, in some significant and inappropriate way, the decisions that other States make. The important question is not whether the original drafters of the Charter intended to prohibit economic diplomacy within their condemnation of the use of "force" in Article 2(4), but whether the use of such means frustrates the purposes and goals of the international system as articulated throughout the Charter.

To support the policy-oriented reading of the instrument, these writers have argued that the General Assembly has reflected the goals of the Charter in numerous resolutions and that the Charter itself

39. See KOSKENNIEMI, supra note 12, at 170-80 for a good discussion of the "New Haven School" of international law.
41. Id. at 416.
42. See MYRES MCDouGAL & FLORENTINE FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER 157-216 (1961) (dealing with the definition of "aggression" in this light).
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makes its goal values clear through its wording prohibiting the use of "force" not of "armed force." The latter of these two points rests upon the notion that the Charter in certain areas (notably Articles 41 and 46, as well as the preamble to Section VII) specifically refers to "armed force" while Article 2(4) mentions "force" without the limiting term "armed." To them, this disparity in the language within certain articles of the Charter suggests that the term "force should receive a broader reading in respect to the application of Article 2 than in the rest of the Charter." The position is further strengthened in their eyes by the clear goal of Articles 1 and 2 of eliminating the threat of the use of armed force between States. Therefore, the question is not whether a particular State has used force as the term might have been understood by the drafters of the Charter, but whether its acts are comparable in the degree of danger to international peace and security, as well as coercive impact on the international community, as is the use of armed force.

As mentioned earlier, a substantial amount of effort has been expended on the question of whether the use of certain types of economic diplomacy amounts to "aggression" on the part of the acting State. As has also been stated, much of this analysis proceeds within the general context of a discussion of Article 2(4) to the issue at hand. Many of the publicists on this subject tend to collapse the concept of aggression under Article 39 and the use of force under Article 2(4) of the Charter so that they are treated as interchangeable concepts. However, the only purely textual relevance to this issue, insofar as the Charter itself is concerned, relates to Article 39. Article 39 states in relevant part:

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

As this language illustrates, the only real relevance to consideration of


44. Brosche, supra note 2, at 20.
45. Paust & Blaustein, supra note 5, at 416.
47. U.N. Charter art. 39.
whether something constitutes "aggression" is that the Security Council has an obligation to act, under Article 41 and 42, to end such action. Nonetheless, in understanding the position of economic diplomacy in international law, it is useful to examine the attempts the United Nations has made to define "aggression."

The efforts by various units of the United Nations to define "aggression" have proven to be some of the main vehicles for the condemnation of the use of economic diplomacy as violative of international law. Many of the Third and Second World States have attempted to define "aggression" in such a way that the exercise of certain forms of economic diplomacy would constitute aggression for the purposes of the use of that term within the Charter.

The Soviet Union proposed the following definition for aggression to one of the special committees on the Question of Defining Aggression (the Committee):

3. [A] State shall be declared to have committed an act of economic aggression which first commits one of the following acts:
   (a) Takes against another State measures of economic pressure threatening the bases of its economic life, in violation of its sovereignty and economic independence;
   (b) Takes against another State measures preventing it from exploiting or nationalizing its own natural riches;
   (c) Subjects another State to an economic blockade.

The discussion that took place within the Committee itself indicates that the delegates supporting the proposal intended to apply a very broad and strict definition of the concept of aggression. Therefore, the proposed definition of "aggression" clearly includes within the ambit of "economic coercion" much of what this Note has described as economic diplomacy. Several of the delegates to the Committee stated that some actions they characterized as economic aggression were fundamentally similar to "armed aggression." According to the delegate from Iran, "any act which served the same ultimate purpose as the armed attack or involved the use of coercion to endanger the independence of a State should be considered as aggression." The significance of this definition can be seen in light of the view taken by the Bolivian delegate who argued that while Article 39 of the Charter did not itself provide a basis for the eradication of economic aggression,

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48. See sources cited supra note 46.
50. REPORT OF THE SPECIAL COMMITTEE ON THE QUESTION OF DEFINING AGGRESSION, U.N. Doc. A/AC.66/L.11 (1953) [hereinafter REPORT DEFINING AGGRESSION]. Moreover, the delegates from the States of the Dominican Republic, Syria, and Bolivia also clearly held similar views on what constituted "economic aggression" for the purposes of the Charter.
such State action did violate three basic principles derived from different provisions of the Charter. According to Mr. Araoz, the exercise of such measures constituted a violation of the principles of sovereign equality, political independence, and protection against intervention in Member States' domestic affairs.\(^{51}\) Thus, while the literal language of the Charter does not contain a substantive prohibition of "aggression," economic diplomacy can be seen as proscribed by the basic principles of the organization.\(^{52}\)

Many of the industrialized First World States' delegates to the Committee strongly opposed such arguments, asserting that the proposed construction offered by certain delegates amounted to a de facto amendment of the Charter. The United States, in particular, noted that there was a chance that the expansion of the term "aggression" to include economic acts could result in dangerous implications for the right of self-defense under Article 51. Moreover, it asserted that while it is true that economic independence is an important interest of the State, this form of independence could not be considered to be on the same level as political independence. Political independence is only implicated by the use of armed force.

Serious flaws existed in both the "restrictive" approach to the use of economic diplomacy, reflected in the positions of many of the delegates of Second and Third World countries, and the more expansive position put forth by the industrialized States. In the first place, the restrictive approach defined the concept of "economic aggression" through reference to a State's sovereignty and "economic independence."\(^{53}\) This position in fact begged the question that was before the Committee. The question really was what constituted the scope of a State's economic sovereignty in which it could operate without the interference of other States. Thus, if a State has no sovereign right to conduct international trade with other States, the exercise of economic diplomacy depriving it of such trade cannot be a violation of the target State's rights. Consequently, even assuming that the concept of "economic aggression" was included within the Charter's meaning of the term aggression, the definition of the term that was offered by these "restrictive" States failed to illustrate what economic actions properly fell within its ambit in that it was premised on a tautological position.

On the other hand, the position of the industrialized States was also problematic in many respects. The distinction that was proffered

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51. Id. at 24.
52. E.g., Art. 1.
53. See REPORT DEFINING AGGRESSION, supra note 50.
between economic and political independence seems quite artificial in that it does not delineate where one starts and the other stops. Moreover, the conclusion that Article 51 would be implicated amounted to little more than a straw man argument in that Article 51 itself specifically states that it only applies in the case of an "armed attack." This language in the instrument places application of Article 51 outside the realm of mere economic aggression.

As mentioned earlier, the importance of the definition of the concept of "economic aggression" is not immediately clear on the face of the provisions of the Charter itself. However, it may have been quite important indeed given much of the debate that has taken place within the United Nations. As an example, a full committee of the International Law Commission recommended that the use of "economic aggression" be made an international criminal violation in the Draft Code of Offenses Against the Peace and Security of Mankind. Moreover, in the event that the Security Council was to find that certain economic activity should be classified as aggression, it could possibly order a number of very serious sanctions under Articles 41 and 42 of the U.N. Charter. The Security Council has very broad and powerful authority and may order economic sanctions, including the total international embargo of trade with the State by all members of the United Nations, and even may order the use of military force in order to end the aggression.

In the end, the question of whether economic aggression could be considered to be aggression under the Charter was settled in the favor of those who wished to apply a restrictive definition to the term. The final text of the resolution which was passed by unanimous consent of the General Assembly indicates that "[a]ggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent

54. U.N. CHARTER Art. 51 (reproduced supra note 35).
55. The Draft states,
The intervention by the authorities of a State in the internal or external affairs of another State, by means of coercive measures of an economic or political character, in order to force its will and thereby obtain advantages of any kind [shall be a violation of international law].
56. See Article 42 of the U.N. Charter, which provides:
Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.
U.N. CHARTER Art. 42.
with the Charter of the United Nations, as set out in this definition."\(^{57}\) This definition, on its face, implies that the debate on whether the use of economic diplomacy amounts to aggression is over. However, some commentators have noted that the possibility still exists that such forms of unarmed conduct may constitute aggression since nothing in the resolution forecloses a broader reading of the language of the Charter.\(^{58}\)

Some commentators have cited Article 2(3) of the Charter in their discussion of the legality of the exercise of economic coercion. Article 2(3) deals with pacific settlement of disputes between members of the United Nations. Some of these writers find that Article 2(3) places an affirmative obligation on States not to exercise economic diplomacy while they are engaged in a dispute with another State:

> [I]t is quite clear that embargoes, boycotts, blockades, reprisals, or other kinds of economic ... pressure do not constitute procedures of pacific settlement. They are not peaceful means and not appropriate for the solution of disputes. The use or imposition of such measures would constitute a violation of the obligation to settle international disputes by peaceful means [under Article 2(3) of the Charter].\(^{59}\)

This position is subject to several criticisms. First, the argument assumes that the use of economic diplomacy is neither "peaceful" nor useful in bringing about the settlement of disputes between States.\(^{60}\) As discussed earlier, conceivably, certain economic actions might be taken that would endanger international peace. However, it is a significant stretch to argue that all forms of economic action related to the attainment of political ends are likely to cause a breach of the international peace. Many of these actions themselves\(^{61}\) do not require the use of armed force for their execution and therefore would not clearly constitute a nonpeaceful means of dispute settlement. Secondly, the position adopted here is strikingly utopian. Professor Harmut Brosche seems to suggest that virtually no form of "coercive" conduct of one party to a dispute against another is legitimate under the scheme of the Charter. The very fact that a dispute has arisen between the parties implies that some form of coercive activity has been taken. For in-


\(^{58}\) See Brosche, supra note 2, at 30.

\(^{59}\) Id. at 32. Accord Blum, supra note 5, at 15:

[Most boycotts] are ... unquestionably incompatible with the duty of states, under article 2(3) of the Charter, to settle their international disputes by peaceful means and are likely to exacerbate international tensions and to endanger international peace and security the maintenance of which is the central objective of contemporary international society.

\(^{60}\) Baldwin, supra note 5, at 345-47.

\(^{61}\) E.g., the boycott, embargo, or other reprisals as opposed to a blockade.
stance, it seems that few legitimate "disputes" between States could occur if one party to the dispute did not exercise some form of political persuasion or imply that certain negative consequences would arise in their relations with one another if the other State continued in its objectionable conduct.

C. General Assembly Resolutions

Commentators also argue that the principle of nonintervention supports the use of economic diplomacy's illegality. The principle of nonintervention in the sovereign affairs of States is specifically included in Article 2(7) of the Charter. Moreover, this principle has been extensively interpreted and amplified by the subsequent work of the General Assembly in this area of the law. Many commentators have seized upon this obligation as the strongest argument that the use of economic diplomacy has been generally outlawed.

The U.N. General Assembly possesses no general lawmaker power of its own accord, unlike the Security Council. This fact has prompted many people to argue that its resolutions are of no weight at all in an argument concerning international law. The position has been widely and properly rejected by the majority of scholars in the field. Of course, it is true that the resolutions are not legally significant in and of themselves; they are, however, evidence of the formation of customary norms of international law and provide very strong interpretive guidance in the meaning of U.N. Charter provisions in much the same way (although not as authoritatively) as do decisions of the International Court of Justice. Thus, we may look to the actions of the General Assembly in order to guide us in understanding certain provisions of the Charter and the formation of customary international law, where there has been substantial agreement among the major blocs of members of the General Assembly.

The General Assembly has repeatedly taken action in the form of resolutions. Among the international instruments that are most com-
monly cited relating to the legality of economic diplomacy are the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty (the Declaration on the Inadmissibility of Intervention),\textsuperscript{68} the Essentials of Peace Resolution,\textsuperscript{69} the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations (the Declaration Concerning Friendly Relations),\textsuperscript{70} and the Resolution on Permanent Sovereignty over Natural Resources (the Resolution on Sovereignty over Resources).\textsuperscript{71} The latter two of these resolutions are the most often cited and the most important actions by the General Assembly in this area of the law.

The Declaration Concerning Friendly Relations provides that “[n]o State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind.”\textsuperscript{72} The language of this instrument seems to place a powerful regulation on the use of economic diplomacy which suborns the sovereignty of any other State, or which coerces it to grant any kind of concession, despite the confusing use of the conjunctive “and” instead of the disjunctive “or” in its language.

However, the strength of the regulation is one that is defined by the scope of the meaning of the term “sovereignty.” This type of tautology has been explored earlier in this Note.\textsuperscript{73} The problem is that the Declaration Concerning Friendly Relations never defines the word “sovereignty;” yet the substance of the legal norm is one that is premised on conflicting claims of sovereignty between the acting and the target state. The entire question in this area of the law relates to how far State sovereignty extends and how much interference in State action must be tolerated under international law. If a State has no sovereign right of access to the international markets of other States, then another State’s embargo or boycott of it does not interfere with the affected State’s sovereignty. Moreover, the issue of whether the other State has a sovereign right not to trade with it also raises a similar problem. If one State has the sovereign right \textit{not} to trade with other

\textsuperscript{68} Declaration on the Inadmissibility of Intervention, supra note 43.


\textsuperscript{70} Declaration Concerning Friendly Relations, supra note 43.

\textsuperscript{71} Resolution on Sovereignty over Resources, supra note 43.

\textsuperscript{72} Declaration Concerning Friendly Relations, supra note 43, at 123.

\textsuperscript{73} See supra note 52 and accompanying text.
States (as it may have according to other resolutions of the General Assembly), and another State argues that its actions are subordinating the target State's sovereign rights, then there would be a conflict in claims to sovereignty. The Declaration Concerning Friendly Relations provides no guidance as to which right should be seen as superior to the other.\textsuperscript{74}

In the Resolution on Sovereignty over Resources, the General Assembly emphasized "the duty of all States to refrain in their international relations from military, political, economic or any other form of coercion aimed against the territorial integrity of any State and the exercise of its national jurisdiction."\textsuperscript{75} It has been claimed that the language of the resolution reflects a customary norm against the use of economic coercion. However, if this interpretation were correct, the resolution would constitute an extremely narrow customary norm of international law. By the language of the instrument itself, the obligation only affects coercive acts that are aimed at the territorial integrity or national jurisdiction of the State. Thus, the economic measures prohibited would be only those that threatened the borders of the State or that impeded the operation of the State's own ability to enact and execute its internal laws:

Serious problems exist with the position that these instruments reflect decisive evidence of the formation of a general rule against the exercise of economic diplomacy. Both the Declaration Concerning Friendly Relations and the Resolution on Sovereignty over Resources reflect a less-than-true consensus of U.N. members. The Declaration Concerning Friendly Relations was adopted by the General Assembly without a vote and was subject to many concerns by the leading industrial powers concerning the haste in which it was enacted.\textsuperscript{76} The Resolution on Sovereignty over Resources was adopted by the General Assembly on a vote of 108 to 1 to 16. The decisive nature of the vote \textit{on its face} seems to be substantial evidence of formation of a customary norm of international law. However, the provision referring to the use of economic coercion is itself somewhat collateral to the instrument, which primarily focused on the issue of sovereignty over natural resources in which the use of coercion was only a secondarily related matter. Moreover, many of the world's most economically important States opposed the resolution either in the form of the opposing vote

\textsuperscript{74} See Ian Brownlie, \textit{Legal Status of Natural Resources in International Law (Some Aspects)}, 162 R.C.A.D.I. 245, 305-07 (1979).

\textsuperscript{75} \textit{Resolution on Sovereignty over Resources, supra} note 43, at 61.

\textsuperscript{76} \textit{Baldwin, supra} note 5, at 351.
(cast by Great Britain) or through the use of an abstention. Further, the resolutions are so ambiguously phrased and abstractly pitched as to be of minimal use in determining what the rule of customary international law is. Therefore, the evidentiary value that these resolutions serve for proving the formation of a binding rule of customary international law is somewhat suspect.

This discussion indicates that considerable disagreement exists about the applicability of the U.N. Charter and its underlying principles to the type of State action addressed in this Note. However, some conclusions can be drawn from the language of the Charter, its travaux préparatoires, subsequent practice, and General Assembly Resolutions. While there has been considerable debate about the applicability of Article 2(4) of the Charter, the emerging consensus is that it does not contain a prohibition of the use of economic diplomacy. This position is consistent with the language of the Charter. While it is possible to read the term "force" as meaning something more than the use of physical power, it seems strained to suggest that the term can refer to the sort of pressure that is exerted by the use of economic action as a matter of common usage. Moreover, the Charter must be read within the context in which it was drafted and each provision must be viewed in the light of its role in the document as a whole. The primary concern of the drafters of the Charter was the prohibition of the use of military action and threats among the members of the international community and not the use of economic sanctions.

Article 2(4) should also be read in the light of the rest of the instrument. If the use of economic diplomacy were read to constitute force, there would be a serious conflict between Article 2(4), Article 51, and the other areas of the Charter which make reference to "aggression" or "armed force." The most logical conclusion to draw from this discussion is that Article 2(4) was meant to proscribe the use of some sort of physical force, but is not necessarily limited to armed force.

The position of Article 2(3) of the Charter in this debate is perhaps more important. Certain forms of economic activity might become so onerous as to be likely to frustrate the pacific settlement of disputes. An action that would deprive the citizens of a State from

78. See, e.g., BALDWIN, supra note 5, at 340 (particularly sources cited in n.17); Bowett, supra note 5, at 245; Kausch, supra note 5, at 31; Lillich, supra note 6, at 234.
79. Farer, supra note 5, at 410.
80. See Blum, supra note 5, at 13; Brosche, supra note 2, at 30-32.
pursuing economic activity that is necessary for survival or from maintaining some hope for economic advancement would create a real possibility that the affected State would lash out forcefully against its opponents. Thus, the responsibility of States to act in such a way as to facilitate the pacific settlement of disputes would place some substantive limits on the kinds of economic action that it might take. Additionally, inherent in the concept of peaceful settlement of disputes is the notion that each interested State should have some sort of opportunity to be heard in negotiations or arbitration before adverse action is taken as a result of the dispute. Therefore, before a State may impose some sort of economic sanction against a State with whom it is engaged in a dispute, it must provide the opposing State with a reasonable opportunity to present its side of the issue and to negotiate for the amicable settlement of the grievance.81

Finally, we come to the issue of whether there is a prohibitory rule of law relating to economic action premised upon the principle of non-intervention as mentioned in Article 2(7) of the Charter and significantly amplified by several resolutions of the General Assembly. While it is arguable that a basis for some sort of prohibition of the use of economic measures exists under these principles, the position has several flaws. The first relates to the tautological nature of the use of many concepts exemplified by the preceding discussion of sovereignty. Further, these concepts are especially abstract and ambiguous even within the field of international law — which is itself riddled with abstraction and ambiguity in many areas. Thus, while it is possible that certain areas of State activity are such important aspects of sovereignty as to be outside of the legitimate range of the use of certain forms of economic diplomacy (i.e., the nationalization of natural resources and the choice of form of government), this category is limited, and somewhat ill-defined. This area of the law remains complicated and unclear and few definite statements may be made about it.

D. The Standard of Conduct Applied by the Publicists of International Law

Assuming for the sake of argument that the Charter or one of its "authoritative" interpretations provides some sort of prohibition of the use of economic coercion, the question that arises is: what form of conduct violates of these norms? As might be expected from the indecisive nature of the debate concerning control of the use of economic

81. 12 MARJORIE M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 322 (1971).
diplomacy under the Charter, there is extraordinary confusion concerning what form and quantity of conduct would violate one of the prescribed norms of State behavior.82

While little scholarship has focused on this question, some commentators have considered what type of conduct should be seen as violative of the principles of the United Nations and the prohibitions placed within the Charter itself. Professor Bowett has formulated the most widely accepted definition of conduct that is violative of the Charter. His definition focuses on the purpose of the acting State in its use of economic diplomacy. Under Bowett's approach the focus of the inquiry would be whether the acting State intended its actions either to threaten the territorial integrity of the target State or to impede the target State's sovereign rights.

While this position has been accepted by many of the most prominent scholars in this field, its utility is somewhat suspect. How does one determine the intent or purpose of a State?83 Professor Bowett has suggested that this should be an objective inquiry84 (as it must be since there is no "mind" of the State to probe). However, the realistic possibility of determining the intent of the modern Leviathan State seems difficult to imagine. States are incorporeal entities who are incapable of having a single "state of mind" or even a common purpose among all the elements of the bureaucracy that forms and executes their policies. In fairness, Professor Bowett certainly appreciates this dilemma and seeks to counter these criticisms with his insistence that his is an objective standard looking to the actions of the State in order to determine the motives for the conduct carried on in its name.

The test of the purpose of the State is destined for manipulation by acting States and its application would undoubtedly result in constant and indecisive allegations and denials of bad motive between the acting and the target States. Moreover, unlike their municipal counterparts, international lawyers have very little experience applying intent-based analysis. International law does not traditionally look to the motive of State actions but instead erects what are essentially strict liability offenses where the motive of the parties is either irrelevant or so obvious on the face of the activity as to be without consequence.85 Thus, Bowett's test, while clearly crafted to address the types of harm

82. See Lillich, supra note 6, at 238-40.
83. See Blum, supra note 5, at 13 for an assessment of an intent-based standard in this field of international law which concludes that such a standard is "artificial."
84. Bowett, supra note 5, at 254-55.
85. Generally, the intent of the party is not a pertinent question in similar areas of the law. For instance, it is obvious that the aggressive use of force contrary to Article 2 or an armed attack mentioned in Article 51 of the Charter is intended to act against the sovereignty and
argued about by the advocates of the illegality of economic coercion, seems so unworkable as to be of little help.

Unfortunately, Professor Bowett's is the only formulation of a test of the legality of the exercise of international economic diplomacy that even approaches precision. The other discussions in this area are focused on providing the international community with only the most abstract principles to guide the debate on the legality of State action in the execution of economic diplomacy. For instance, it has been suggested that the standard of determining the legality of the action taken by States should look to the purpose of the action, its intensity, and effects, or that they should be judged in light of the overall interests of the international community. These positions seem to be inoffensive on their face, but they are framed at such a high level of theoretical abstraction and ambiguity that they become almost impossible to apply in a predictable and fair manner.

No clear and widely accepted definition exists of what conduct constitutes a violation of one of the norms of law that may be inferred from the language of the Charter itself. The absence of a definition creates difficulty for international lawyers because it keeps the debate focused on whether any arguable foundation exists for the illegality of some sort of economic activity but pays little or no attention to what sort of activity is specifically implicated by the existence of a norm in this area. Seemingly all of the advocates of a finding that the Charter provides limiting norms of conduct will admit that not all forms of persuasive economic conduct launched by one State against another would be prohibited, but no scholars or policymakers have engaged in concrete discussion of what sorts of activity would be covered by such rules. This failure has kept the debate at an artificial level of abstraction with seemingly little concrete reference to particular actions of States that would clearly come under one of these norms of State behavior. Therefore, assuming that some sort of norm exists in this area, its contours are so vague and difficult to discern that there is virtually no way that any State could conform its conduct to the bounds of legality. Some attempt must be made to clarify the types of
activity that may be seen as illegal under the Charter or any customary norm which may be relevant.

II. CUSTOMARY NORMS OF INTERNATIONAL LAW

A. The Practice of States

One of the primary deficiencies of the work that has been done in the field of the legality of economic diplomacy in international law is that the writers have concentrated on the work of international agencies in isolation from the actual practice of States. Therefore, this Note will discuss the historical practice of the members of the international community in order to determine what customary norms of behavior may have arisen in this area of the regulation of State action.

While the resort to economic action against States for political ends dates at least as far back as the ancient Greeks according to Thucydides, it was not until the beginning of this century that the type of action that has come to be frequently taken began to be pursued in earnest. At the beginning of the twentieth century, one State was commonly known as the principle practitioner of this type of activity — China. China instituted trading embargoes and boycotts against a number of States. Perhaps the most widely known Chinese activities occurred in the context of the Boxer Rebellion, the U.S. prohibition of Chinese immigration, and several disputes with Japan, including the Japanese occupation of the territory of Manchuria. These actions of the Chinese government caused such a high level of concern that they were one of the main focuses of the Lytton Commission which was sent to the area by the League of Nations in order to investigate the nature of the disputes between Japan and China, and were the source of considerable criticism from the western States at the time of the Boxer Rebellion. In its conclusions, the Lytton Commission avoided making broad statements concerning the legality of State-sponsored economic boycotts and principally found that the boycott was en-

90. By actual practice I mean to distinguish the sort of practice that takes place in the form of government statements and actions on resolutions from those where it actually takes some sort of concrete action through the use of its regulatory functions.


92. Neff, supra note 2, at 120.

93. For a list of the boycotts China employed in this time period, see Christopher C. Joyner, The Transnational Boycott as Economic Coercion in International Law: Policy, Place, and Practice, 17 VAND. J. TRANSNAT'L L. 205, 210-12 (1984); Lauterpacht, supra note 8, at 126-27.

forced through the action of private parties. It found, however, the practice of State-sanctioned boycotts disturbing and expressed the hope that "in the interest of all States, this problem should be considered at an early date and regulated by international agreement."

While it is true that the Chinese government was the major user of economic measures in support of foreign policy during the beginning of the twentieth century, numerous other States utilized economic diplomacy during this early period. India enacted an economic boycott as a means of attaining its nationalistic goals against the British as early as 1896 and continued to do so periodically until the last and largest of the boycotts of British milled goods took place in the 1930s. In 1908 the Ottoman Empire launched a boycott of goods from Austria-Hungary in response to that State's annexation of the territories of Bosnia and Herzegovina. Finally, Egypt boycotted a number of British goods in 1924 as a part of its national independence movement.

It is apparent that the use of economic measures by individual States was a somewhat common occurrence at the beginning of this century. After the founding of the League of Nations, the practice of exercising economic measures in order to further foreign policy goals became even more common, with the principle utilizers of such means changing from the developing States to the larger powers of the period. Britain and the United States used economic diplomacy extensively in the interwar period with Britain imposing economic sanctions of one form or another against Yugoslavia for its aggressive activity against Albania, against the U.S.S.R. for the release of certain British citizens, and against Mexico in order to settle certain expropriation claims.

Though States actively utilized economic diplomacy during the interwar period, the period following World War II was even more important for the use of these methods. A broader range of States began to use such actions. For example, the Council for Mutual Economic Assistance and Mutual Cooperation (COMECON), which consisted of most of the Eastern bloc countries, imposed a boycott on trade with

95. Id.
96. Id. at 120.
98. See WADE D. DAVID, EUROPEAN DIPLOMACY IN THE NEAR EASTERN QUESTION 1906-1909, at 101 (1940); Joyner, supra note 93, at 213.
99. Lauterpacht, supra note 8, at 126.
100. HUFBAUER & SCHOTT, supra note 91, at 14 (1983).
Yugoslavia in 1948 as a result of the political rift that had arisen between the Soviet Union and the Tito regime.\textsuperscript{101} The Eastern bloc countries soon found themselves to be at the other end of a trade embargo for certain forms of strategic goods as a result of the action of the Consultative Group and Coordinating Committee for Multilateral Export Controls (COCOM) in 1948.\textsuperscript{102}

Middle Eastern countries were particularly active in adopting certain forms of economic action in the period immediately after World War II. On May 2, 1951, Prime Minister Mohammed Mossadegh announced the nationalization of the oil industry within Iran including the British controlled Anglo-Iranian Oil Company.\textsuperscript{103} As a result, the British and the U.S. governments launched a worldwide coordinated boycott of Iranian oil which played a significant role in the Prime Minister's downfall.\textsuperscript{104}

However, by far the most important use of economic diplomacy related to the Middle East was the Arab League's boycott of Israel after the 1948 War.\textsuperscript{105} This boycott presently is administered in a coordinated fashion by the Central Boycott Office in Damascus which ensures that the boycott is effective in virtually all of the Arab States (with the obvious exception of Egypt, as it is no longer in a state of belligerency with Israel). Moreover, this boycott is broader than many of the economic measures cited previously in that it not only seeks to proscribe trade between Arab League members and Israel, but also attempts to implement a form of "secondary" and even "tertiary" boycott.\textsuperscript{106} Under the secondary boycott, firms that continue to trade with Israel are placed on a "blacklist" of firms that are not permitted to trade in Arab League States. The tertiary boycott is similar but goes further in that it results in the refusal to deal with firms that would not come under the terms of the primary or secondary boycott but which do business with firms that do appear on the primary or secondary blacklist. This is, without a doubt, the most sophisticated form of economic boycott that is currently in existence, although some suggestions have been made that it is beginning to break down in the

\begin{footnotesize}
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\item Id., at 15; Joyner, supra note 93, at 214.
\item For a discussion of the role of COCOM in international trade, see Cecil Hunt, \textit{Multilateral Cooperation in Export Control — The Role of COCOM}, 14 U. TOI. L. REV. 1285 (1983).
\item M. Reza Ghods, \textit{Iran in the Twentieth Century} 187-89 (1989).
\item There are a number of interesting works dealing with the origins of the Arab Boycott. See, e.g., Dan S. Chill, \textit{The Arab Boycott of Israel} (1976); Walter H. Nelson & Terence C.F. Prittie, \textit{The Economic War Against the Jews} (1977); Aaron J. Sarna, \textit{Boycott and Blacklist} (1986).
\item Andreas F. Lowenfeld, \textit{Trade Controls for Political Ends} 313-21 (2d ed. 1983).
\end{enumerate}
\end{footnotesize}
aftermath of the Persian Gulf war and the initiatives of the United States to bring the Arabs and Israelis to the peace table.\textsuperscript{107}

Not even this action — the general Arab Boycott — is the most famous of the uses of economic measures for political ends in the Middle East. The action that has been without a doubt the most commonly discussed within this area of international law was the 1973 Arab Oil Embargo of certain States that supported Israel in the 1973 War.\textsuperscript{108} Scholars that have investigated the legality of this conduct of the Arab States under international law have disagreed and no particularly definitive conclusion on the subject exists. However, it is important to note that the action provoked extremely strong criticism from the western oil-consuming States at the time of the embargo.\textsuperscript{109} In particular, some U.S. officials suggested that it might become necessary that they use military force to gain access to the Arab oil if the position continued to worsen.\textsuperscript{110} This Western reaction to the Arab Oil Embargo undoubtedly constituted the strongest objection from the members of the industrialized First World States to the use of economic diplomacy and turned the usual situation, where the First World State took the action of economic diplomacy while the affected Third or Second World States raised the objection that the action was illegal under international law, on its head.

Interestingly, it was the United States that raised the loudest objections to the imposition of the Arab Oil Embargo.\textsuperscript{111} Its position is somewhat ironic given that the United States has probably been the most extensive user of the methods of economic diplomacy.\textsuperscript{112} The United States has placed numerous trade controls concerning the States with which its nationals may trade and has even sought to apply them to its nationals that are operating abroad.\textsuperscript{113} The U.S. Executive Branch has taken many actions severely restricting trade with foreign nationals of certain States and restricting the movement of capital be-
longing to those States under the Trading With the Enemy Act,\textsuperscript{114} the International Emergency Economic Powers Act,\textsuperscript{115} as well as the Export Administration Act.\textsuperscript{116} Among the countries against whom the United States has recently maintained severe economic sanctions are Iran,\textsuperscript{117} Cuba,\textsuperscript{118} Libya,\textsuperscript{119} the Soviet Union,\textsuperscript{120} South Africa,\textsuperscript{121} and most recently Iraq.\textsuperscript{122} Moreover, one of the cornerstones of the U.S. government’s actions against the former Sandinista government in Nicaragua was a virtual trade embargo with that country that was eventually raised in numerous international fora.\textsuperscript{123}

Another example of a hotly debated use of collective economic diplomacy came in the context of the Falkland Islands conflict between the United Kingdom and Argentina.\textsuperscript{124} After the Argentinian armed forces entered into the Falklands, claiming them as a part of Argentinian territory, many of the industrialized States enacted economic sanctions against Argentina. The sanctions were strongly criticized by numerous developing countries (especially those in Latin America) and were eventually condemned by the Organization of American States.\textsuperscript{125}

Finally, the most recent example of economic sanctions, of both those authorized by the Security Council and those undertaken independently, is the strong economic actions imposed against Iraq in re-

\textsuperscript{119} The relevant regulations concerning Libya are set forth at 31 C.F.R. § 550 (1990).
\textsuperscript{121} The transaction controls against South Africa appear at 31 C.F.R. § 545 (1990).
\textsuperscript{124} See Acevedo, supra note 86.
\textsuperscript{125} Id. at 338-39.
taliation for its attempted seizure of Kuwait.\(^\text{126}\) While it is true that many of these sanctions have been undertaken under the authority of the United Nations pursuant to Security Council Resolution, some of them go beyond the strict requirements of those resolutions and, thus, may be seen as having been taken independently of the United Nations.\(^\text{127}\)

B. *International Treaties as Practice*

The action many States have taken in entering into treaties has been cited as additional evidence that a customary norm against certain forms of economic diplomacy has arisen. Perhaps most important among these treaties is the General Agreement on Tariffs and Trade (GATT).\(^\text{128}\) The GATT is a part of the general Bretton Woods system of international economic law arising out of the end of World War II. Article XI of the GATT obliges the Contracting Parties not to place any sort of quantitative restriction on the amount of goods coming from or going to one another. Some authorities have cited article XI as one of the primary examples of the movement toward a customary norm of international law against the exercise of economic diplomacy.\(^\text{129}\) However, within the GATT itself is a provision which seems to authorize the actions that are typically undertaken by States in the area covered in this Note. Article XXI of the GATT provides that the GATT should not be construed to "prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests . . . taken in time of war or other emergency in international relations."\(^\text{130}\) The provision has been used numerous times to justify the imposition of a variety of economic actions taken for political purposes, and has been explicitly recognized by GATT panels as being applicable in some of the most hotly debated uses of economic diplomacy.\(^\text{131}\) From this analysis, it is clear that

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127. As an example, the United States imposed economic sanctions against Iraq almost immediately upon Iraqi actions in Kuwait. The U.S. government continues to refuse to trade with Iraq in food or medicine or to unfreeze any of Iraq's assets despite the Embargo Committee's willingness to allow States to lift economic sanctions so that Iraq may gain access to funds to purchase food and medicine.


129. Neff, supra note 13, at 72.


131. See Hahn, supra note 130, for a good synopsis of the most important cases raised under Article XXI in GATT fora. The EC defended its actions taken against Argentina on the basis of Article 51 of the UN Charter, and its position regarding the use of Article XXI of the GATT
while the GATT generally restricts the use of quantitative measures such as boycott and embargo, it specifically does not seek to control the use of such measures when they are taken as a result of security concerns of the acting party. Therefore, it is very difficult to argue that the GATT itself reflects a trend away from the traditional customary international law where there was seemingly no restriction on the use of economic diplomacy.

A similar argument is frequently made about the importance of the existence of prohibitory language in FCNs that States enter into in order to limit the capability of their international trading partners to place quantitative restrictions or to treat their goods less favorably than they treat those of any other States. However, these treaties, virtually without exception, also include some sort of security exception or vital interest clause that allows the parties to escape the discipline of the treaty when they feel that it is necessary for them to do so.

Some commentators have noted that article 52 of the Vienna Convention on the Law of Treaties is relevant to the issue of the legality of the exercise of economic diplomacy. This article provides that a treaty is void if its conclusion was based on consent of a party "procured by the threat or use of force in violation . . . [of] the Charter of the United Nations." On its face, this provision seems neither to add to nor subtract from the relevance of Article 2(4) of the U.N. Charter to the issue of the exercise of the use of economic diplomacy. However, the drafting history of the provision reflects that its application may be broader than that of Article 2(4), which, as concluded earlier, is of marginal relevance to the regulation of the use of economic diplomacy.

Article 52 of the Vienna Convention was perhaps the most controversial in the convention. Preliminary versions of the article contained explicit language referring to the use of certain types of economic State was generally accepted by the various Contracting Parties. See Trade Restrictions Affecting Argentina Applied for Non-Economic Reasons, GATT Doc. L/5319/Rev.1 (1982). Moreover, the U.S. general embargo of Nicaragua was found to be covered by the scope of article XXI of the GATT, despite the concern of the panel that the actions of the United States seemed to contradict the general spirit of the General Agreement. Id. For an explanation of the procedure used for the discussion of these matters, see Richard S. Whitt, The Politics of Procedure: An Examination of the GATT Dispute Settlement Panel and the Article XXI Defense in the Context of the U.S. Embargo of Nicaragua, 19 LAW & POL'Y INT'L BUS. 603 (1987). An earlier GATT panel found that the U.S. measures affecting Nicaragua's share of the U.S. sugar market did violate article XI of the GATT largely because the United States refused to assert the defense of article XXI. See CONTRACTING PARTIES TO THE GATT, BASIC INSTRUMENTS AND SELECTED DOCUMENTS, Supp. No. 31, at 67 (1983-84) (Report of the panel adopted on March 13, 1984).

132. See Muir, supra note 5, at 200.
133. Id.
134. Vienna Convention, supra note 23, art. 52.
action that would vitiate the consent of the treaty making party. However, this proposed formulation of the article came under strenuous attack by many industrialized States. The wording that appears in the instrument today was adopted despite the apparent fact that the version covering economic measures would have passed had it not been for the threat of the Western States to break the consensus of the Convention’s adoption in toto. Thus, it is possible to conclude that the use of economic measures might constitute the type of force sufficient to vitiate a State's consent to a treaty despite the fact that such action would not constitute force under Article 2(4). However, such a conclusion would militate against the rather plain meaning of the article and would endanger the effective capacity of States to interact with each other if taken to an extreme.

The Charter of the Organization of American States (OAS) is frequently cited for the proposition that the international community is moving toward a restrictive customary international law regulation of the use of economic diplomacy. The OAS Charter provides in Article 18, “[n]o State may use or encourage the use of coercive measures of an economic or political character in order to force the sovereign will of another and obtain from it an advantage of any kind.” This is the clearest prohibitory statement over the use of economic diplomacy within an authoritative document of an international organization. It is often considered a clear exception to the rule, even by those who argue against an interpretation of the U.N. Charter or the customary international law prohibiting the use of economic diplomacy.

From this discussion it can be seen that no current customary law prohibition of the use of economic diplomacy exists. As demon-

137. Id. at 767-68.
No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against the personality of the State or against its political, economic or cultural elements. Id., art. 17. The reference to the damage to the “economic . . . elements” coupled with the concept of indirect intervention suggests that the drafters of the Charter may have meant to implicate the use of economic diplomacy here.
139. For example, a U.S. Federal Court of Appeals noted, “[w]e cannot find any established principle of international jurisprudence that requires a nation to continue buying commodities from an unfriendly source.” Banco Nacional de Cuba v. Sabbatino, 307 F.2d 845, 866 (2d Cir. 1966).
strated by the actual practice of States, the use of economic means for political ends is rampant in the international arena.\textsuperscript{140} Moreover, the majority of publicists in the area, as well as the International Court of Justice,\textsuperscript{141} have held that there is no general customary norm covering the use of economic diplomacy.

Despite the view that international treaty-making of States leads to the formation of a customary norm, there seems to be little concrete action in this direction. Clearly the GATT and some of the other instruments relating to international economic law reflect a trend toward restricting the sovereignty of States in the international economic arena. However, these instruments are constructed with explicit exceptions in the case that the State feels that its actions are dictated by political or military security. Thus, these instruments' control over the action of States seems to end precisely where the discussion of this Note begins: at the use of economic measures related to political ends. It seems difficult then to premise an argument about a trend in the practice of States on such agreements.

The position of the OAS Charter, however, is somewhat different than other international economic treaties. The activity the Charter proscribes clearly includes the use of economic measures for political ends, unlike the GATT and FCN treaties. The actual prohibition of the use of such State action among the OAS countries seems to be a legitimate form of State practice needed for the formation of a future customary norm. It may even point to the existence of a much more substantial possibility of the formation of a regional customary norm pertaining to economic diplomacy. The fact that the Member States of the OAS chose to ban the use of certain forms of economic diplomacy among themselves does not indicate that they had a \textit{legal obligation} under customary international law to do so. Nor is there any particular indication that the treaty crystallized preexisting practice of the States of the Americas. Thus, while the action of the OAS may be seen as a step in the direction of the formation of a customary norm of international law, the international community is quite far indeed from the point where such a norm will be accepted by many of the most powerful States as a binding customary norm of conduct.

\textsuperscript{140} As an example, Hufbauer and Schott found and categorized more than 80 specific instances of such conduct between the end of World War I and 1983 taken by an extremely wide range of States both in terms of economic capacity and ideology in a list that was by no means exhaustive. HUFBAUER \& SCHOTT, supra note 91, at 14-22.

\textsuperscript{141} As the Court stated in its decision on U.S. activity in Nicaragua, "[a] State is not bound to continue particular trade relations longer than it sees fit to do so, in the absence of a treaty commitment or other specific obligation." Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 138 (June 27).
III. STATE ECONOMIC ACTION WITHIN THE GENERAL SCHEME OF THE INTERNATIONAL SYSTEM.

Much debate has taken place within this area of the law, questioning the legality of the exercise of economic coercion in light of the general scheme and goals of the Charter. Yet a great deal of the argument in this field of law seems highly esoteric and divorced from the rough realities of the international community. A considerable number of the arguments have failed to take note of Professor Lillich’s wise admonition that we “must be careful not to confuse lex ferenda with lex lata” in this area of the law.\textsuperscript{142} Many international legal scholars argue for the application of legal norms that will lower the level of tension in the international arena regardless of the international community’s acceptance of such norms. Therefore, scholars often recommend the adoption of utopian norms of conduct to which few States would consent if they were forced to comply with the norms in their own international affairs.

Certain limitations do exist on the use of economic force that have already been accepted by the world community. First, certain obligations arise under Article 2(3) of the U.N. Charter to pursue the pacific settlement of disputes which include both substantive and procedural limitations on the exercise of economic measures of State action. Moreover, the use of such activity is limited in accordance with the principle of nonintervention derived from the totality of the Charter and the subsequent actions of the General Assembly. Further, the use of economic diplomacy of such an extreme magnitude as to threaten the existence of the State or the integrity of its borders might be proscribed under Article 2(4) as well.\textsuperscript{143}

It is difficult to discern what activities would violate these principles. As mentioned earlier, Professor Bowett has suggested a test that looks to the purpose of the acting State. Yet this test is so difficult to apply, given the fact that no State has a singular state of mind, that its utility is questionable. Part of the problem with this test is that it seems to be crafted under the assumption that the primary source of the legal regulation of this conduct is the principle of nonintervention and the prohibition against the use of force in Article 2(4) of the U.N. Charter. However, the primary and clearest prohibition of the use of economic diplomacy is entailed in the responsibility to adhere to policies that facilitate the pacific settlement of disputes as set forth in Article 2(3).

\textsuperscript{142} Lillich, \textit{supra} note 6, at 234.
\textsuperscript{143} See Farer, \textit{supra} note 5, at 411.
Therefore, this type of illegality is not so much premised on the intention or purpose of the acting State but instead on the nature of the threat to peace that the action entails. The most important measure of the likelihood of a breach of the peace resulting from such activity would seem to be the quantity of economic hardship that is suffered by the target State as a result of the economic sanction directed against it. If the residents and nationals of a particular State are only inconvenienced as a result of the acting State's use of economic diplomacy, or forced to pay a higher, yet affordable, price for a particular good or service there does not seem to be a very high likelihood that it will forcefully retaliate. For example, an embargo on an agricultural commodity such as wheat would not endanger the international peace. Since these commodities are widely available in an almost perfectly competitive international market, any one State's boycott of another would not deprive the target State of the good, but would instead only force it to seek out alternative suppliers which it should be able to obtain with little difficulty.

On the other hand, if a group of States join together so that the coalition controls a very substantial amount of the market in a particular commodity and that group of States acts collectively to embargo another State, there is a much higher chance that their action would endanger international peace. This principle relating to the combination of States was addressed early on in this debate; Hyde and Wehle stated in their 1933 article:

Suppose two or more countries combine to cut off all commercial intercourse with another that is singled out for penalization. . . . It is the uniting or combining of two or more States that transforms conduct to which a single country might fairly have recourse, into conduct which at once attains a sinister aspect, and from which the country against which it is directed may oftentimes justly complain.

However, this vision of the law of economic diplomacy was rejected by some scholars on the theory that some large States would be able to inflict more damage to others by acting unilaterally than a combination of a number of small States acting collectively.

There is some force to this argument, but the answer to it is not that there is no utility in defining the legality of this sort of State conduct with respect to the combination and collusion of States. Instead, the answer is to apply an "essential commodities" doctrine to individ-

144. When the United States launched its grain embargo of the Soviet Union, the U.S.S.R. was able to find many alternative suppliers such as Argentina and Australia.
146. See JULIUS STONE, LEGAL CONTROLS OF INTERNATIONAL CONFLICT 291 (2d ed. 1959); Blum, supra note 5, at 7.
ual State action that is reminiscent of the essential facilities doctrine in U.S. antitrust law. If a singular State itself controls a very significant portion of the market for a particular good as either a producer or consumer, and access to that market is essential to the economic well-being of the boycotted or embargoed State, then the measures the acting State has taken are essentially equivalent to the danger that a combination of States presents to the international peace and should therefore be treated as illegal.

Yet, not all actions of States in combination with one another should be adjudged illegal under the Charter and its principles. Instead, a rule of reason should be applied to State action in determining whether its actions actually enhance or endanger international peace. For instance, if a State has exhibited hostile actions toward another State, it would be perfectly reasonable, and more likely to enhance the international peace, for States to combine together to deprive that State of certain military and strategic goods. Such activity would clearly be legal under the standard of State action proposed in this Note.

This standard is one that focuses on the combination of States with significant market power and States that alone possess a significant market share for a product (or consumer market) that is essential to the attainment of the economic survival of another State. However, the same "essential good" or "essential market" approach would not necessarily be appropriate for the case of the combination of States, in that the combination itself makes the action highly suspect and is more likely to endanger the international peace than the unilateral action of most States.

This formulation of the rule is consistent with the actual reaction of States in the past. The primary example was the Arab Oil Embargo where there was a combination of States with substantial market power attempting to deny certain States a commodity — oil — which is essential to the modern industrially based economies. It is not surprising, therefore, that the action of the Organization of Arab Petroleum Exporting Countries (OAPEC) caused a real threat to the international peace with certain First World actors advocating the use of force as a measure of self-defense under Article 51 of the Charter as a result of the embargo.
Finally, it is important to consider the amount of restriction that should be placed on the exercise of economic pressure in States' international relations. The Charter, much to its credit, has effectively eliminated the legal use of physical force except for the limited purposes of self defense. Therefore, States have been deprived of the primary means which they possessed in the pre-Charter legal scheme to settle serious conflicts with one another (i.e., resort to war). While the effectiveness of the United Nations may be increasing, it is not yet an institution that is capable of solving the most severe international disputes (a primary example being the Arab-Israeli conflict), despite the powers accorded to the Security Council under the Charter. Therefore, States must be able to take certain economic actions against one another as a sort of safety valve. If States are totally proscribed from taking nonviolent acts of retorsion or reprisals against one another, a substantial risk exists that they will simply throw off the restraints of international law and return to the state of anarchy in the field of the use of force.

CONCLUSION

The legal regulation of the use of economic diplomacy is one of the most unclear areas of international law. This Note attempts to explain some views on the subject in order to clarify the prime issues relating to its resolution. However, a great need remains for the international community to adopt clearer norms of behavior in this area of State practice than can be inferred from the very general statements of the U.N. Charter and the various other collaterally related international instruments relating to the issue.

All the States of the international community should come together to work out mutually acceptable norms of conduct in the form of a specific code that respects both the sovereignty of States and the ability of other States to vindicate international law through the use of economic diplomacy. As long as the current situation remains unchanged, the legality of such actions will be open to an interminable debate with little or no clear rules, making it impossible for States to conform their conduct to unambiguous and predictable legal rules.

The extreme confusion in this area of the law is a serious and substantial threat to the maintenance of the international peace given the potentially high level of tension that is often precipitated by the exercise of economic diplomacy. As long as the "rules of the game" in the exercise of such actions remain unclear, States will continue to harbor very wide differences about the limits of acceptable economic conduct. These types of diverse views of the legality of conduct are a prescrip-
tion for misunderstanding, international tension, and perhaps disaster, which may be avoided through the codification of such rules by the world community.