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Economic Coercion and the General Assembly: a Post-Cold War Assessment of the Legality and Utility of the Thirty-Five-Year Old Embargo Against Cuba

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Economic Coercion and the General Assembly: a Post-Cold War Assessment of the Legality and Utility of the Thirty-Five-Year Old Embargo Against Cuba

ABSTRACT

The nature of the conflict between the United States and Cuba has clearly been changing since the fall of Communism in Eastern Europe. Deprived of foreign communist subsidies, Cuba has been forced to begin economic reform. Yet, the United States has retained its embargo against Cuba. Does the long-standing embargo violate international law? In an attempt to answer that question, this Note examines the status of a norm prohibiting the unilateral use of economic coercion and whether there has been any post-Cold War movement toward such a norm.

Over the past thirty years, despite several notable United Nations resolutions, developing nations failed to establish a clear norm prohibiting economic coercion. Cuba has attempted to parlay international anger into world condemnation of alleged U.S. economic coercion in the wake of U.S. passage of the Cuban Democracy Act of 1992, which impacts third party states while clamping down on Cuba. Indeed, from 1992 to 1994 the U.N. General Assembly overwhelmingly passed several resolutions critical of the United States. However, analysis of the text of the resolutions and the positions of individual voting members reveals that there has been little or no movement toward a norm prohibiting the use of economic coercion.

Still, there has been increasing pressure on U.S. policy makers to ease the embargo. Quite simply, as Castro has begun economic reform, U.S. businesses are growing tired of watching their international competitors snap up potentially lucrative opportunities in Cuba. The lesson appears to be that, in the post-Cold War era, underdeveloped nations stand to benefit much more from free trade than from the futile pursuit of international legal norms concerning economic coercion.

TABLE OF CONTENTS

I.	INTRODUCTION.....	903
II.	THE HISTORICAL BACKGROUND SURROUNDING THE EMBARGO	906
III.	THE CUBAN DEMOCRACY ACT OF 1992.....	912
IV.	THE LEGAL STATUS OF ECONOMIC COERCION AND OF THE EMBARGO PRIOR TO RECENT UNITED NATIONS ACTIVITY.....	915
A.	<i>Customary Law</i>	918
B.	<i>The U.N. Charter and Attempts to Interpret It.</i>	920
	1. The Charter's Language.....	920
	2. The General Assembly's Attempts to Interpret Article 2(7) to Include a Norm Prohibiting Economic Coercion	920
	3. The Legal Results of the General Assembly's Attempts to Interpret Article 2(7) to Include a Norm Prohibiting Economic Coercion	922
	a. Does the General Assembly Have Authority to Declare Law?	922
	b. What is the Legal Effect of a General Assembly Declaration?	922
	c. Analysis: the Legal Effect of the Resolutions Concerning Economic Coercion.....	925
C.	<i>GATT & OAS Charter</i>	928
D.	<i>Cold War Era Produced No Clear Norm</i>	930
V.	THE GENERAL ASSEMBLY AND THE EMBARGO, 1991-1994	931
A.	<i>Analysis of the United States Position</i>	932
	1. The U.S. Position in 1992	932
	2. The U.S. Position in 1993	933
	3. The U.S. Position in 1994	935
B.	<i>Analysis of the Cuban Position and of the Positions of Other Voting Members: Were There Any Developments Related to Economic Coercion or the Long-Standing Embargo?</i>	936
	1. The Draft Resolution of 1991	936
	2. The Resolution of 1992.....	938

	a.	Developments Outside the United Nations.....	938
	b.	The Cuban Position.....	939
	c.	Language of the Resolution ..	940
	d.	Positions of Other U.N. Members.....	942
3.		The Resolution of 1993.....	944
	a.	The Cuban Position.....	944
	b.	Language of the Resolution ..	945
	c.	Positions of Other U.N. Members.....	946
4.		The Resolution of 1994.....	947
	a.	The Cuban Position.....	947
	b.	Language of the Resolution and Positions of Other U.N. Members.....	947
	C	<i>No Significant Movement Toward a Norm Prohibiting Economic Coercion.....</i>	949
VI.		THE UTILITY AND IMPACT OF THE EMBARGO IN LIGHT OF WORLD ECONOMIC CHANGES IN THE POST-COLD WAR PERIOD	950
	A.	<i>Economic Pinch.....</i>	950
	B.	<i>Foreign Investment in Cuba</i>	952
	C.	<i>The Big Picture.....</i>	956
VII.		CONCLUSION	957

I. INTRODUCTION

For Cuba, the end of the Cold War meant the end of massive Soviet aid.¹ Without Soviet aid and with an economy in dire straits, Fidel Castro faced an unprecedented scene of political unrest near a ferry dock in Havana on August 5, 1994.² A crowd

1. The U.S. State Department claims that Soviet subsidies to Cuba ultimately reached \$6 billion per year. Alexander F. Watson, *Update on U.S. Policy Toward Cuba*, 5 U.S. DEPT ST. DISPATCH 751, 752 (1994) [hereinafter *Update-1994*] (statement by State Department Representative Alexander Watson, Assistant Secretary for Inter-American Affairs on October 8, 1994). Others estimate that the aid totalled about \$5 billion per year. See Pat M. Holt, *The OAS Should Reconsider Its 1962 Expulsion of Cuba*, CHRISTIAN SCI. MONITOR, May 5, 1994, at 19 (authored by former Chief of Staff of the Senate Foreign Relations Committee); *After Vietnam, Cuba?*, ECONOMIST, FEB. 12, 1994, leaders sect., at 17, available in LEXIS, News Library, Curnws File.

2. See *Protesters Battle Police in Havana; Castro Warns U.S.*, N.Y. TIMES, Aug. 6, 1994, § 1, at 2; see also Michael R. Gordon, *Castro's Threat to Unleash Refugees Brings A Warning By U.S.*, N.Y. TIMES, Aug. 7, 1994, § 1, at 17. The unrest is considered the worst since the 1959 Revolution. See *Update-1994*,

of 20,000 to 30,000 gathered in anticipation of a ferry hi-jacking by refugees bound for the United States.³ Refugees had taken over at least three other ferries in the previous ten days.⁴ In response to the riots, Castro blamed U.S. policies and threatened to release a wave of refugees upon Florida, as he had done in the 1980 Mariel boat lift.⁵ He soon made good on his threat. By mid-August, U.S. officials were straining to cope with the influx of humanity.⁶ Castro then demanded that any immigration talks include discussion about ending the thirty-three-year-old embargo.⁷

The Clinton Administration, however, announced on August 27, 1994 that immigration talks with Fidel Castro would not involve easing the embargo.⁸ Representative Robert Torricelli (D-N.J.), one of the key backers of legislation tightening the embargo, declared that no U.S. President should even consider reversing a long-standing policy in response to such a blatant "act of intimidation."⁹ The State Department emphasized that maintaining the embargo was simply the best way to bring about the desired change in Cuba, and that any easing of the embargo would "delay, not hasten, reform."¹⁰ Thus, the Clinton

supra note 1, at 752; see also *The Doors Inch Open in Castro's Cuba*, ECONOMIST, Nov. 19, 1994, at 45.

3. *Protesters Battle Police in Havana; Castro Warns U.S.*, *supra* note 2 (U.S. State Department crowd estimate).

4. Gordon, *supra* note 2.

5. *Id.* In the 1980 Mariel exodus, Castro unleashed 120,000 refugees upon the United States, many of whom were criminals released from prison. *Id.* See also Jorge Dominguez, *U.S. Policy Toward Cuba in the 1980's and 1990's*, in THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL SCIENCE: TRENDS IN U.S.-CARIBBEAN RELATIONS 165, 167 (1994) (stating that many of the refugees were criminals convicted of serious crimes).

6. See Bob Benenson, *Dissonant Voices Urge Clinton to Revise Policy On Cuba*, CONG. Q. WKLY. REP., Aug. 20, 1994, at 2498 (20,000 fled to Florida from August 1 through August 26). The U.S. Coast Guard picked up 3,253 Cuban refugees on August 23 alone. *Id.* Another 3,096 were picked up on August 24. Steven Greenhouse, *Flight From Cuba; Clinton Will Open Talks With Cuba on Refugee Crisis*, N.Y. TIMES, 28 Aug. 1994, at A1.

7. For a news report dealing with Castro's demand for talks on the embargo, see Greenhouse, *supra* note 6.

8. *Id.*

9. Robert G. Torricelli, *Keep the Embargo*, WASH. POST, Sept. 11, 1994, at C7 (editorial by the Representative (D-N.J.) who was one of the main sponsors of the Cuban Democracy Act of 1992).

10. See Tom Kenworthy, *U.S. Rejects Expansion of Talks With Castro; Administration to Stick to Migration Discussions*, WASH. POST, Aug. 29, 1994, at A14 (statement by Undersecretary of State Peter Tarnoff). This policy of attempting to isolate Cuba to bring about change is, generally, a continuation of the policy of the Bush Administration. For the Bush Administration's policy see Robert S. Gelbard, *U.S. Policy Toward Cuba*, 3 U.S. DEPT ST. DISPATCH 314-15 (1992) (statement by Robert S. Gelbard, Principal Deputy Assistant Secretary for

Administration established itself as a firm supporter of the embargo and the Cuban Democracy Act of 1992 (CDA or the Act), which tightened the embargo in an effort to encourage human rights reform and democratization.¹¹

Domestic and foreign sources have increasingly criticized certain aspects of the ongoing embargo and the CDA. For instance, on September 9, 1994, the Chairman of the House Foreign Affairs Committee and the Chairman of the Senate Foreign Relations Committee called for a gradual lifting of the embargo.¹² And, on October 26, 1994, the United Nations General Assembly voted for the third year in a row to adopt a resolution entitled "Necessity of ending the economic, commercial and financial embargo imposed by the United States of America against Cuba."¹³

After describing the history behind the embargo, this Note first considers the status of an international legal norm prohibiting the unilateral use of economic coercion. Particular attention is paid to whether there has been, in light of recent Assembly votes, any post-Cold War development in the status of such a norm. Next, the Note briefly examines recent economic developments in Cuba that affect the utility of continuing the embargo. This Note concludes that open economic forces in the post-Cold War era are proving much more useful to Cuba in its

Inter-American Affairs, April 18, 1992, before the House Committee on Foreign Affairs).

11. See Update-1994, *supra* note 1.

12. Senator Claiborne Pell (D-R.I.) and Representative Lee Hamilton (D-Ind.), *The Embargo Must Go*, WASH. POST, Sept. 8, 1994, at A19. Change in Cuba will come from "an invasion of people, ideas, and information," wrote the two chairmen, "not [from] a tightened embargo or a blockade." *Id.* Such an approach recalls the toppling of the Berlin wall in 1989, as East Europeans became increasingly aware of attractive developments in the West. *U.S. Interest in Post-Cold War Latin America and the Caribbean: Hearing Before the Subcomm. on Western Hemisphere Affairs of the House Comm. on Foreign Affairs*, 102d Cong., 1st Sess. 77-78 (1991) (statement of Arturo Valenzuela, Director of the Center for Latin American Studies, Georgetown University).

Congress has been well advised of the advantages to be gained from a policy of opening up to Cuba. In a February 1991 subcommittee hearing involving three foreign affairs scholars, one foreign scholar warned Chairman Torricelli that the U.S. embargo provides "one of the strongest supports of the Castro regime that the regime has." *Id.* at 76 (statement of Joseph S. Tulchin, Director of the Latin American Program, Woodrow Wilson International Center for Scholars). A second scholar agreed, explaining that isolation feeds the "fundamental source" of Castro's support: nationalism. *Id.* at 78 (statement of Arturo Valenzuela). The third scholar disagreed, feeling that the Soviet Union would try to retain some influence in Cuba. *Id.* at 76 (statement of Georges A. Fauriol, Director of the Americas Program, Center for Strategic and International Studies).

13. See, e.g., G.A. Res. 49/9, U.N. GAOR, 49th Sess., Agenda Item 24, U.N. Doc. A/RES/49/9 (1994). For a detailed discussion of the resolution for each year, see *infra* Part V.

fight to end the embargo than the futile pursuit of an international legal norm prohibiting economic coercion.

II. THE HISTORICAL BACKGROUND SURROUNDING THE EMBARGO

U.S. President Kennedy proclaimed a formal embargo against all trade with Cuba on February 3, 1962.¹⁴ Within a year and a half, the U.S. government passed implementing regulations, which have generally remained in place through the present day.¹⁵ As explained by the Treasury Department, the embargo prohibits all financial and trade transactions with Cuba by persons subject to U.S. jurisdiction.¹⁶ Examination of some of

14. Proclamation No. 3447, 3 C.F.R. 157 (1959-1963), *reprinted in* 22 U.S.C. at 551 (1988).

15. The embargo is administered through the Department of the Treasury and the Department of Commerce. *See generally* MICHAEL P. MALLOY, ECONOMIC SANCTIONS AND U.S. TRADE § 6 (1990 & 1994 Supp.) (discussing relevant current regulations in detail). The Treasury Department's Cuban Assets Control Regulations (CACR's), 31 C.F.R. pt. 515 (1994), went into effect on July 8, 1963. *See id.* at § 515.201(d) (noting effective date). The relevant Commerce Department regulations are found at 15 C.F.R. pts. 768-799 (1994).

The CACR's can be seen as based on either of two alternative statutory authorities. *See Regan v. Wald*, 468 U.S. 222, 225 n.1 (1984) (discussing the alternative bases for the Treasury's issuance of new restrictions on travel to Cuba). President Kennedy's Proclamation cited Title 22 as its authority, but the court in *Regan v. Wald* treats the CACR's as based on the Trading With the Enemy Act of 1917 (TWEA), 50 U.S.C. app § 1 *et seq.* (1988). 468 U.S. at 225, n.1. When President Kennedy proclaimed the embargo in 1962, section 5(b)(1) of TWEA allowed the President to regulate foreign trade "during the time of war or during any other period of national emergency declared by the President." *See* 50 U.S.C. app. § 5 (note on 1977 Amendment to § 5(b)(1)). And in 1962, a national emergency was in effect concerning security threats posed by the Korean War and the aggression of "communist imperialism." Proclamation No. 2914, 3 C.F.R. 99 (1949-1953), *reprinted in* 50 U.S.C. app. at 1187 (1988).

In 1977, Congress changed the TWEA so that the President now can only exercise the section 5(b)(1) power in a time of war—not in other times of national emergency declared by the President. 50 U.S.C. App. § 5(b) (1988). Congress, however, permitted the grandfathering of measures that were currently in place, such as the Cuban embargo. *Id.* The only limitation that affects the grandfathered measures is that the President must make yearly determinations that the policy continues to be in the national interest. *Id.*

16. *See U.S. Policy and the Future of Cuba: The Cuban Democracy Act and U.S. Travel to Cuba: Joint Hearing Before the House Comm. on Foreign Affairs, Subcommittee on Economic Policy, Trade and Environment; Western Hemisphere Affairs; and International Operations*, 103d Cong., 1st Sess. 20 (1993) [hereinafter *Joint Hearing*] (statement of the Honorable R. Richard Newcomb, Office of Foreign Assets Control, Department of the Treasury). Mr. Newcomb explained that people on U.S. soil, as well as overseas subsidiaries of U.S. companies, were deemed subject to U.S. jurisdiction. *Id.* There have, however, traditionally been exceptions to the embargo policy for limited cash remittances to family members in Cuba, for certain travel transactions, and for specially licensed overseas

the historical events surrounding the imposition and maintenance of the embargo reveals that the function of the embargo has evolved over time.

The United States has been heavily involved in Cuban affairs since at least the turn of the 20th century. After emerging victorious from the Spanish-American War, the United States imposed the infamous Platt Amendment on the Cuban Constitution.¹⁷ Although the Platt Amendment was eliminated by 1934, extensive U.S. interests remained. In 1959, just before the revolution, U.S. businesses transacted \$500 million (about \$2.5 billion in 1994 dollars) per year in commerce with Cuba,¹⁸ and U.S. nationals had invested billions of dollars on the island.¹⁹ From Cuba's perspective, the most vital economic link to the United States was the yearly sugar quota that the United States purchased under the Sugar Act of 1948.²⁰ In 1959, Cuba depended on sugar for seventy-seven percent of its export value.²¹

subsidiaries of U.S. companies. *Id.* But, the Cuban Democracy Act changed this situation. *See infra* Part III.

17. The United States conditioned its removal of troops from Cuba on Cuba's inclusion of the Platt Amendment in its new constitution. PHILLIP BRENNER, *FROM CONFRONTATION TO NEGOTIATION: U.S. RELATIONS WITH CUBA* 98 (1988). The amendment assured United States dominance over Cuba by stipulating that the United States had the right to intervene in Cuba, that the United States had to approve any treaty in which Cuba gave another state special rights, and that the United States could establish a naval base on the island. JULES R. BENJAMIN, *THE UNITED STATES AND THE ORIGINS OF THE CUBAN REVOLUTION* 62-65 (1990). After some cajoling of members of the sitting Cuban Constitutional Convention, *id.* at 64-65, the Cubans agreed to the Platt Amendment in 1901. BRENNER, *supra*, at 7. The United States intervened militarily three times before the Platt Amendment was formally abrogated in 1934. *Id.* at 9, 97. The naval base at Guantanamo Bay still exists today. *Id.* at 7.

18. *Cuba Scouting For Investors*, USA TODAY, Dec. 27, 1994, at 6B.

19. U.S. citizens' property, which was nationalized by Castro, is valued by the U.S. government today at \$5.6 billion. Christopher Marquis, *Sweeping Bill Targets Investment in Cuba; Would Punish Nations, Lenders, Companies*, THE RECORD, Feb. 10, 1995, at A17, available in LEXIS, News Library, Curnws File. (discussing proposed legislation). The value of the property in 1962 was \$1.8 billion. *See* 4 DEP'T ST. DISPATCH 102, 103 (1993). The companies that lost the most upon nationalization included International Telephone and Telegraph (\$131 million), Moa Bay Mining (\$88.3 million), American Sugar (\$81 million), Standard Oil (\$71.6 million), and Texaco (\$51 million). *See Cuba Scouting For Investors*, *supra* note 18.

20. Sugar Act of 1948, 7 U.S.C. § 1100 et seq. (1994) (original version at 61 Stat. 922 (1947)) (expired on Dec. 31, 1974).

21. SUSAN SCHROEDER, *CUBA: A HANDBOOK OF HISTORICAL STATISTICS* 414 (1982) (charting sugar as a share of yearly total export value). Sugar had comprised 89% of Cuba's total export value in 1950 and 80% in 1955. *Id.* Even after the revolution, sugar remained central to the Cuban economy, comprising 77% of the export value in 1970 and 89% in 1975. *Id.* In the early 1990's, sugar still accounted for 75% of export earnings. *Fact Sheet: Cuba*, 4 U.S. DEP'T ST. DISPATCH 102, 105 (1993). Only during Cuba's recent economic tailspin did

Of those sugar exports, seventy percent were bought by the United States at a premium contract price equal to eighty percent over the world market price.²²

The rupture between the two nations was caused by a series of events that began with the 1958 U.S. decision to stop supporting the increasingly repressive Batista regime.²³ At the time, the U.S. media²⁴ and some members of the Eisenhower Administration considered Castro to be a welcome alternative to Batista.²⁵ However, after Castro's successful revolution in January 1959, the situation began to change. In late 1959 and early 1960, following a series of Cuban acts hostile to U.S.-owned sugar companies on the island, the United States began to talk of reducing the vital sugar quota.²⁶ At the same time, Cuba began to develop trade links with the Soviet Union, especially in the oil industry.²⁷

Pressure came to a head in June of 1960 when Cuba seized U.S.- and British-owned oil refineries that had refused to process

tourism overtake sugar production as Cuba's main source of income. *Cuba's Economy Hits Bottom, May Be Recovering-U.N.*, REUTERS, Dec. 20, 1994, available in LEXIS, News Library, Curnws File. For more details on that sugar tailspin, see *infra* Part VI.

22. Brian H. Pollitt and G.B. Hagelberg, *The Cuban Sugar Economy in the Soviet Era and After*, 18 CAMBRIDGE J. ECON. 547, 564 (1994) The United States paid a premium due to the nature of international sugar-marketing arrangements. See DONALD L. LOSMAN, INTERNATIONAL ECONOMIC SANCTIONS: THE CASES OF CUBA, ISRAEL, AND RHODESIA 26 (1979). Most sugar from sugar-producing nations is sold under a contractual arrangement with the world's large sugar consumers. The residual sugar market is small, as all the large consumers already have contracts. Once the U.S. cancelled the Cuban sugar quota, the price of sugar on the residual market could, in theory, have been severely depressed by the unexpected glut of Cuban sugar, leaving Cuba in a desperate position. *Id.*

23. RAY S. CLINE & ROGER W. FONTAINE, FOREIGN POLICY FAILURES IN CHINA, CUBA, AND NICARAGUA: A PARADIGM 130-34 (1992) (discussing United States stoppage of arms deliveries to Cuba).

24. *Id.* at 120-130 (chronicling press reports that favored Castro and disfavored Batista).

25. *Id.* at 109-20 (detailing policy disagreements within the Administration).

26. On May 17, 1959, Prime Minister Castro signed the Agrarian Reform Act, which limited the acreage that could be legally owned by private companies. The remainder was to be expropriated with compensation to the owners. JANE FRANKLIN, THE CUBAN REVOLUTION AND THE UNITED STATES: A CHRONOLOGICAL HISTORY 26 (1992) (providing an excellent daily chronology of events, although with a noticeable pro-Cuban slant). The United States subsequently rejected the proposed terms of compensation. *Id.* at 27. Meanwhile, Senator George Smathers (D-Fla.) proposed a cut in the sugar quota. *Id.* Agitation increased for cutting the sugar quota after Cuba expropriated property of U.S. sugar companies in January, 1960. *Id.* at 29.

27. Cuba signed trade and aid agreements, including an oil agreement, with the Soviet Union when the Soviet Deputy Prime Minister Mikoyan visited Cuba in February, 1960. *Id.* at 29-30.

newly imported Soviet crude oil.²⁸ In response, Secretary of State Christian Herter appeared before Congress on June 22 to recommend legislation that would authorize the President to reduce the sugar quota.²⁹ In early July, just before Cuba authorized the nationalization of all U.S. commercial property in Cuba,³⁰ Congress approved, and Eisenhower implemented, legislation eliminating the remainder of the 1960 sugar quota.³¹ Eisenhower stated, "This action amounts to economic sanctions against Cuba."³² Cuba retaliated on August 6 by nationalizing \$1 billion worth of U.S. private investment on the island.³³ On October 14, all large commercial enterprises were nationalized, including twenty more U.S. companies.³⁴ Eisenhower's cancellation of the entire sugar quota for 1961³⁵ became inevitable. The embargo had, for all practical purposes, begun.

As the U.S.-Cuban relationship deteriorated, however, Cuba was able to successfully avoid economic disaster. The potential for such a disaster seemed real, since the United States alone accounted for about seventy percent of both Cuban imports and

28. *Id.* at 31. See also *U.S. Protests Seizure of American Oil Refineries*, 43 DEPT ST. BULL. 141 (1960) (note from the U.S. ambassador to Cuba delivered to the Cuban Ministry of Foreign Relations on July 5, protesting the seizure of U.S.-owned oil refineries). The ambassador's note emphasized that the oil did not come from the companies' own sources of supply, that the companies had thus far produced oil for the Castro regime despite a backlog of \$50 million owed to them, and that the seizures were contrary to Cuban law. *Id.* at 141-42.

29. See *Presidential Authority Sought to Reduce Sugar Quotas*, 43 DEPT ST. BULL. 58 (1960) (Secretary Herter's statement to the House Committee on Agriculture). According to Secretary Herter, the primary reason for the legislation was to "safeguard" U.S. consumers against fluctuations in the supply and price of sugar. For support, he cited the relevant developments in Cuba, namely the land redistribution and the increasing trade links with the Soviet Union, the Eastern Bloc, and China. *Id.* at 58-59. Since Cuba was the greatest single supplier of sugar to the United States, the Secretary urged the United States to diversify its sources and reduce dependence. *Id.* at 59. Strong ideological concerns clearly influenced his statement.

30. FRANKLIN, *supra* note 26, at 31.

31. Proclamation No. 3355, 3 C.F.R. 80 (1959-1963), reprinted in *President Reduces Cuban Sugar Quota for Balance of 1960*, 43 DEPT ST. BULL. 140 (1960) (White House press release dated July 6, asserting that because the behavior of Cuba makes it an unreliable future supplier, the quota reduction serves the national interest).

32. FRANKLIN, *supra* note 26, at 31.

33. BRENNER, *supra* note 17, at 98 (contains a useful chronology of events); see also FRANKLIN, *supra* note 26, at 32.

34. FRANKLIN, *supra* note 26, at 35; see also BRENNER, *supra* note 17, at 98.

35. Proclamation No. 3383, 3 C.F.R. 100 (1959-63), reprinted in *President Sets Cuban Sugar Quota at Zero for First Quarter of 1961*, 44 DEPT ST. BULL. 18 (1961) (statement by the President on December 16, noting Cuba's continued hostility to the United States and Cuba's increasing sales of sugar to communist states).

exports prior to 1961;³⁶ and, nonsocialist nations, as a group, accounted for over ninety-seven percent.³⁷ At the same time, as U.S. trade with Cuba was reduced to virtually nothing,³⁸ ideology brought Cuba and the Soviet Bloc together.³⁹ By 1962, Cuba had successfully shifted over 80 percent of its imports and exports to socialist trading partners.⁴⁰ In response to Eisenhower's July 1960 quota cuts, the U.S.S.R. immediately agreed to buy the 700,000 tons remaining in the year's quota.⁴¹ The socialist bloc responded similarly to Eisenhower's elimination of the 1961 quota.⁴²

From 1961 through 1964, the U.S.-Cuban relationship deteriorated further along ideological lines. After the United States broke off diplomatic relations with Cuba on January 3, 1961,⁴³ "anti-Castro Cubans supported by the United States"⁴⁴ launched the ill-fated Bay of Pigs invasion on April 17. By December 1961, Castro proclaimed: "I am a Marxist Leninist and I shall be one till the end of my life."⁴⁵ Accordingly, in January

36. *Cuba Scouting For Investors*, *supra* note 18.

37. This statistic pertains to trade in 1959 and is reported by LOSMAN, *supra* note 22, at 25 (charting Cuban Foreign Trade, 1959-67).

38. *Id.* at 21.

39. *Id.* at 24-26 (explaining why Cuba did not increase its trade with its second-largest trading partner, Western Europe). With regard to exports, Western Europe already had sugar contracts. *Id.* at 26 (discussing the nature of the sugar market). With regard to imports, Cuba no longer had hard currency to pay out, since currency had been earned primarily from sugar trade with the United States. *Id.* The United States made sure that Cuba did not receive credit from international lending agencies or from other Western nations' lending institutions. BRENNER, *supra* note 33, at 13. The socialist bloc was simply willing, because of political and ideological reasons, to finance trade with Cuba through grants and credits. LOSMAN, *supra* note 22, at 26. Cuba's negative trade balance with the socialist bloc ballooned, and formed a debt that Cuba may never pay back. *Id.*; see also Brian Killen, *Russia Considers New Imports of Cuban Raw Sugar*, REUTER EUR. BUS. REP., Jan. 10, 1995, available in LEXIS News Library, Curnws File (stating that the 1995 Cuban debt to Russia of 17 to 20 billion "convertible roubles" is a stumbling block in current trade relations, though the value of one "convertible rouble" is not clear, ranging anywhere from one dollar to one-fiftieth of one dollar).

40. LOSMAN, *supra* note 22, at 25 (charting Cuban Foreign Trade, 1959-67). The percentages fluctuated from 1962 to 1967, but by 1967, socialist imports and exports remained approximately 80%. *Id.*

41. FRANKLIN, *supra* note 26, at 31.

42. *Id.* at 37. As a direct response to the U.S. cut, socialist nations agreed to buy four million tons of Cuban sugar. *Id.*

43. BRENNER, *supra* note 17, at 98. For a discussion of U.S. policy making concerning the embargo in the Eisenhower and Kennedy Administrations, see generally BENJAMIN, *supra* note 17, at 188-211.

44. These are the terms used by the U.S. Department of State to describe the Bay of Pigs effort. See *Fact Sheet: Cuba*, *supra* note 21, at 103.

45. BRENNER, *supra* note 17, at 99. Earlier, in April 1961, Castro had announced that the revolution was socialist. *Id.* at 98.

1962 the State Department officially characterized Cuba as "a bridgehead of Sino-Soviet imperialism within the inner defenses of the Western Hemisphere."⁴⁶ The official implementation of the embargo on February 6, 1962 amounted to Cold War action aimed at "isolating" Cuba and "reducing the threat posed by its alignment with the communist powers."⁴⁷ After the Cuban missile crisis of October 1962 and after the discovery that Cuba was exporting arms to Central America in 1964, the Organization of American States (OAS)⁴⁸ agreed to adopt a regional embargo against Cuba.⁴⁹

No net change occurred in the U.S.-Cuban relationship during the 1970s. In the early to mid-70s, a period of detente occurred as Cuba, according to the U.S. State Department, de-emphasized the export of its revolution.⁵⁰ This thawing of relations, however, was short-lived. By the late 1970s, Cuba became militarily involved in conflicts in Ethiopia and Angola.⁵¹

46. *Department Reports on Cuban Threats to the Western Hemisphere*, 46 DEPT ST. BULL. 129, 130 (1962) (summary section of the State Department document entitled "The Castro Regime in Cuba", discussing Cuba's dictatorial regime, its military buildup, and its increasingly exclusive trade relations with communist states).

47. See Proclamation No. 3447, *supra* note 14 and accompanying text.

48. The Organization of American States (OAS) is a regional organization that has limited authority under Chapter VIII of the U.N. Charter to deal with regional disputes. MARGARET DOXEY, *INTERNATIONAL SANCTIONS IN CONTEMPORARY PERSPECTIVE* 20 (1987). The OAS Charter was adopted at the Ninth International Conference of American States in 1948. 1 F.V. GARCIA-AMADOR, ED., *THE INTER-AMERICAN SYSTEM: TREATIES, CONVENTIONS, AND OTHER DOCUMENTS*, part 1, 67-69 (1983).

49. See DOXEY, *supra* note 48, at 60-61 (1987) (describing U.S. success in gaining the support of the Organization of American States after a cache of Cuban arms was found in Venezuela); cf. FRANKLIN, *supra* note 26, at 71 (speaking merely of U.S. "charges" of exported Cuban arms to Venezuelan guerrillas).

50. *Fact Sheet: Cuba*, *supra* note 21, at 103-04. A number of factors demonstrated the thaw in relations. The Organization of American States voted in 1975 to remove the regional embargo and to make continued measures voluntary. *Id.* In 1976, the Ford Administration agreed to relax certain restrictions on trade between Cuba and foreign subsidiaries of U.S. corporations. See Jason S. Bell, Comment, *Violation of International Law and Doomed U.S. Policy: An Analysis of the Cuban Democracy Act*, 25 U. MIAMI INTER-AM. L. REV. 77 (1993) (providing useful history about the restraints on foreign subsidiaries' trade with Cuba, leading up to the restraints in the Cuban Democracy Act of 1992). Further, although diplomatic relations remained officially broken, Cuba and the United States agreed on September 1, 1977, to establish "interest sections" for each other in their respective capitals. *Fact Sheet: Cuba*, *supra* note 21, at 104.

51. *Fact Sheet: Cuba*, *supra* note 21, at 104; see generally BRENNER, *supra* note 17, at 20-24 (detailing the impact that Cuban military involvement in Africa had on U.S. policy makers). Although Canada refused to break trade relations with Cuba during the 1960s, Canada suspended aid to Cuba in 1977 due to Cuban military involvement in Angola. *Canada Calls for End to Ban on Cuba*, TORONTO STAR, Aug. 30, 1994, at A10 available in LEXIS, News Library, Curnws

Closer to home, dictators in both Grenada and Nicaragua were overthrown and replaced by leaders who embraced the Cuban regime.⁵² These events reinforced the Carter Administration's views about the existence of a Soviet expansion plan.⁵³ During the 1980s, the Reagan Administration, characterized by its anti-communist zeal, moved to tighten the embargo.⁵⁴

In sum, U.S. policy makers, from the 1960s through the Reagan Administration, addressed Cuba not as an underdeveloped Caribbean neighbor but as a threatening adversary in the critical East-West conflict.⁵⁵ With the fall of both the Berlin Wall and the U.S.S.R. that Cold War conflict came to an abrupt end. With massive Soviet aid gone,⁵⁶ Cuba could no longer pose an expansionist threat.⁵⁷ Yet, despite such radical, post-Cold War change, the embargo has remained in place, and was even strengthened by the Cuban Democracy Act of October, 1992.

III. THE CUBAN DEMOCRACY ACT OF 1992

President Bush signed the Cuban Democracy Act⁵⁸ on October 23, 1992. The Act explicitly acknowledges the radical

File (providing some history of Canadian relations with Cuba, in light of Canada's resumption of aid in June 1994).

52. See BRENNER, *supra* note 17, at 23 (discussing the renewed U.S. perception of Cuba as a major enemy).

53. See *id.* at 22-23. The 1980 Mariel boat lift also exacerbated already strained relations. *Id.* at 23; see also *supra* note 5 (discussing the Mariel boat lift).

54. See generally BRENNER, *supra* note 17, at 31-41 (describing the policy of the Reagan Administration).

55. See generally *id.* at 32-33 (citing U.S. Departments of State and Defense, *The Soviet-Cuban Connection on Central America and the Caribbean*, Washington D.C., March 1985, at 1-2.)

56. See *supra* note 1.

57. With Soviet aid gone, Cuba ended military assistance to Nicaragua after the Sandinista's electoral defeat in 1990. *Fact Sheet: Cuba*, *supra* note 21, at 103. And, Cuban troops pulled out of Angola by July 1991. *Id.* Further, after peace came to El Salvador in January 1992, Castro stated that his support for insurgents was a thing of the past. *Id.* By January 1995, the Cuban air force and navy were in disrepair, and the military had turned to supervising tourism, food distribution, and farmers markets. Santiago Aroca, *Military Taking Over Cuban Economy*, MIAMI HERALD, Jan. 23, 1995, at A8, available in LEXIS, News Library, Curnws File. For discussion of the wrecked Cuban economy, see *infra* Part VI.

58. Cuban Democracy Act of 1992, Pub. L. No. 102-484, 106 Stat. 2575 (codified at 22 U.S.C. §§ 6001-6010 (Supp. V 1993)). The Cuban Democracy Act has been discussed extensively by other commentators. See Kam S. Wong, Comment, *The Cuban Democracy Act of 1992: the Extraterritorial Scope of § 1706(a)*, 14 U. PA. J. INT'L BUS. L. 651 (1994) (dealing also with the economic ramifications of the embargo for U.S. business); Julia P. Herd, Note, *The Cuban Democracy Act: Another Extraterritorial Act That Won't Work*, 20 BROOK. J. INT'L L.

changes in the Soviet Union and Eastern Europe that threatened Cuba's food and oil supplies.⁵⁹ Describing the situation as an "unprecedented opportunity" for the United States and the international democratic community "to promote a peaceful transition to democracy in Cuba,"⁶⁰ the Act calls attention to Cuba's intransigence in its disregard for human rights and democratic values.⁶¹ The Act's explicit statement of policy declares that the United States will reduce the embargo in "carefully calibrated ways" if Castro responds with positive developments.⁶² In the meantime, to take advantage of this "unprecedented opportunity," the Act tightened the embargo in highly controversial ways.

Two provisions of the Act have especially angered the world community. First, § 1706(a) of the CDA removes a previous loophole that had allowed offshore foreign subsidiaries of U.S. companies to obtain licenses from the Treasury Department.⁶³ That loophole had allowed hundreds of millions of dollars of trade to flow to Cuba in recent years.⁶⁴ Even U.S. allies in the

397 (1994) (providing an analysis of extraterritorial jurisdiction under the RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES); Trevor R. Jefferies, Note, *The Cuban Democracy Act of 1992: A Rotten Carrot and a Broken Stick?*, 16 HOUS. J. INT'L L. 75 (1993) (providing a section by section analysis of the Act); Bell, *supra* note 50 (providing useful historical background on the extraterritorial provision relating to foreign subsidiaries of U.S. companies); Allen DeLoach Stewart, Comment, *New World Ordered: The Asserted Extraterritorial Jurisdiction of the Cuban Democracy Act of 1992*, 53 LA. L. REV. 1389 (1993) (providing a unique argument for the unconstitutionality of part of the Act under U.S. law, as well as discussion about the international law aspects).

59. Cuban Democracy Act § 1702(5), (6), 22 U.S.C. § 6001(5), (6) (Supp. V 1993).

60. *Id.* at § 1702(1), (4), (7), 22 U.S.C. § 6001(1), (4), (7) (Supp. V 1993).

61. *Id.* at § 1702(6), 22 U.S.C. § 6001(6) (Supp. V 1993).

62. *Id.* at § 1703(7), 22 U.S.C. § 6002(7) (Supp. V 1993). The requisite positive developments include free and fair elections, *id.* at § 1703(8), 22 U.S.C. § 6002(8) (Supp. V 1993), but, more generally, the movement toward democracy and respect for human rights. *Id.* at § 1703(6), 22 U.S.C. § 6002(6) (Supp. V 1993).

63. *Id.* at § 1706(a), 22 U.S.C. § 6005(a) (Supp. V 1993) (prohibiting the issuance of future licenses under the Cuban Assets Control Regulations, 31 C.F.R. § 515.559 (1994)). The explicit changes to the embargo effected by the CDA are explained in *Joint Hearing*, *supra* note 16, at 20. For the history of the loophole, see Bell, *supra* note 50, at 88.

64. The amount of trade permitted with Cuba under this loophole equalled (in millions) \$332 in 1989, \$705 in 1990, \$718 in 1991, \$336 in 1992, and \$1.6 in 1993. *Joint Hearing*, *supra* note 16, at 21. The 1993 numbers show the immediate, dramatic impact of the CDA. *Id.* This impact resulted from the Treasury Department's determination to enforce the CDA provisions, despite the issuance of blocking orders by Canada and Great Britain. *Id.* The blocking orders made it illegal, under domestic law, for subsidiaries on British and Canadian soil to comply with the CDA. *Id.*

European Community stated that § 1706(a) illegally asserts extraterritorial jurisdiction, forcing firms on foreign soil to forgo business to comply with U.S. foreign policy.⁶⁵ Many U.S. commentators also agree that the extraterritoriality of § 1706(a) is contrary to international law.⁶⁶ Nevertheless, the flow of trade from the offshore foreign subsidiaries has all but stopped.⁶⁷

Second, § 1706(b)(1) of the CDA prohibits any ship from entering a U.S. port if that ship has visited a Cuban port in the previous six months.⁶⁸ According to European Community (EC) statements, this provision violates international law.⁶⁹ Yet, the Treasury Department believes that this measure has been successful in diverting trade from Cuba.⁷⁰

The controversy surrounding these measures was not unexpected. In fact, the Bush Administration had originally opposed the Cuban Democracy Act.⁷¹ Respecting foreign sovereignty, the Administration had argued against commanding foreign nations to cooperate with U.S. policy aims.⁷² Any such command, said the Administration, would diminish world support for U.S. policy and would provide Cuba with a new opportunity to portray itself as a victim.⁷³ Yet, as the 1992 presidential election approached, Bush-opponent Bill Clinton proclaimed his support for the CDA to influential anti-Castro Cuban-American voters in

65. See Note of April 7, 1992, from the Delegation of the Commission of the European Communities and the Embassy of Portugal to the U.S. State Department, in Letter Dated 11 June 1992 from the Charge d'affaires a.i. of the Permanent Mission of Cuba to the United Nations addressed to the Secretary-General, U.N. GAOR 47th Sess., Appendix, Agenda Item 39 of the Preliminary List, at 2, U.N. Doc. A/47/273 (1992) [hereinafter Note of April 7, 1992]; see also *Démarche of April 18, 1990 from the Delegation of the Commission of the European Communities and the Embassy of Ireland to the U.S. State Department, in Letter Dated 11 June 1992 from the Charge d'affaires a.i. of the Permanent Mission of Cuba to the United Nations addressed to the Secretary-General*, U.N. GAOR 47th Sess., Appendix to Annex 1, Agenda Item 39 of the Preliminary List, at 3, U.N. Doc. A/47/272 (1992) [hereinafter *Démarche of April 18, 1990*].

66. For views of U.S. commentators who have analyzed the extraterritorial provisions of the CDA under the RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, see, e.g., Herd, *supra* note 56 at 418-24; Bell, *supra* note 50 at 106-18; Stewart, *supra* note 58, at 1392-99.

67. See *supra* note 64 (providing statistics on the flow of such trade both before and after implementation of the CDA).

68. Cuban Democracy Act § 1706(b)(1), 22 U.S.C. § 6005(b)(1) (Supp. V 1993).

69. Note of April 7, 1992, *supra* note 65; see also *Démarche of April 18, 1990, supra* note 65.

70. Joint Hearing, *supra* note 16, at 37-38.

71. U.S. Policy Toward Cuba, 3 U.S. DEP'T ST. DISPATCH 312, 316-17 (1992) (statement of Robert S. Gelbard, Assistant Secretary for Inter-American Affairs, before the House Committee on Foreign Affairs, April 8, 1992).

72. *Id.*

73. *Id.* at 316.

Florida. Not to be outdone, President Bush agreed to support the Act, signing it on October 23, 1992.⁷⁴ The pressures of the tight 1992 campaign and the block of influential voters in Florida appear to have dictated U.S. policy toward Cuba.⁷⁵

As the Clinton Administration points out, the CDA does include some measures aimed at reaching out to the Cuban people;⁷⁶ but, the main thrust of the Act is to continue the long-standing embargo, even to tighten it, in hopes of pressuring Castro toward reform. The following sections will examine the legality of such economic coercion, especially in light of recent U.N. activity.

IV. THE LEGAL STATUS OF ECONOMIC COERCION AND OF THE EMBARGO PRIOR TO RECENT UNITED NATIONS ACTIVITY

While the U.N. Charter clearly prohibits the use or threat of *armed force* in international relations,⁷⁷ the existence of a norm

74. For a well-developed account of the relationship between the CDA and the presidential campaign of 1992, see Bell, *supra* note 50, at 96-98; see also DOMINGUEZ, *supra* note 5, at 172-73.

75. For a criticism of the U.S. policy as pure symbolism for electoral purposes, see DOMINGUEZ, *supra* note 5, at 175. Dominguez echoes the widely-held opinion, see, e.g., *supra* note 12 and accompanying text, that tightening the embargo, as opposed to opening up to Cuba, fuels Castro's nationalist appeal at home. *Id.*

76. *The Cuban Democracy Act: One Year Later*, 4 DEP'T ST. DISPATCH 853, 855 (1993) (statement of Alexander F. Watson, Assistant Secretary for Inter American Affairs, before the House Foreign Affairs Committee, November 18, 1993). The administration claims that the policy of the Cuban Democracy Act says "no" to a dictatorial government" while giving "an emphatic 'yes' to the people who suffer under it." *Id.* The act allows donations of food to individuals and nongovernmental organizations in Cuba, and it permits the licensing of shipments of medicine and medical supplies to Cuba. Cuban Democracy Act § 1705(b), (c), 22 U.S.C. § 6004(b), (c) (Supp. V 1993). The State Department claims that, in the first year of the Cuban Democracy Act, the Treasury Department issued over \$3 million worth of such licenses. *The Cuban Democracy Act: One Year Later*, *supra*, at 854.

The Act also includes measures aimed at establishing effective telecommunications and direct mail links with Cuba. Cuban Democracy Act § 1705(e), (f), 22 U.S.C. § 6004(e), (f) (Supp. V 1993). Indeed, U.S. long distance companies began direct dial service to and from Cuba on November 25, 1994. *Planning Helps Ease Travel Efforts*, USA TODAY, Dec. 27, 1994, at 6B.

77. U.N. CHARTER art. 2, para. 4 contains such a prohibition. See Derek W. Bowett, *Economic Coercion and Reprisals by States*, 13 VA. J. INT'L L. 1, 1-2 (1972) (stating that there is general agreement that Article 2(4) prohibits the use or threat of armed force in reprisal).

prohibiting *economic* force is an entirely different matter.⁷⁸ The critical first issue in analyzing the legality of the embargo is whether an international legal norm exists that prohibits the unilateral use of economic coercion. If no such norm exists, the U.S. embargo is simply an act of "retorsion," an inherently legal act taken against another state.⁷⁹ If, on the other hand, such a norm does exist, the U.S. embargo must then be analyzed as a "reprisal" or, in more modern terms, a "countermeasure."⁸⁰ A countermeasure is an illegal act that, under certain conditions,⁸¹ is deemed legally permissible as self-help.⁸²

A 1981 work on the legality of the U.S. embargo against Cuba concluded that the embargo was illegal by categorizing it as a reprisal (or countermeasure) and then evaluating it under specific legal requirements.⁸³ This section of the Note examines relevant sources of international law⁸⁴ and addresses the all-important

78. See generally Tom J. Farer, *Political and Economic Coercion in Contemporary International Law*, 79 AM. J. INT'L L. 405 (1985) (stating that states' diplomatic interactions naturally involve coercion of various forms).

79. See ELIZABETH ZOLLER, PEACETIME UNILATERAL REMEDIES: AN ANALYSIS OF COUNTERMEASURES 5-6 (1984) (defining retorsion).

80. See OMER ELAGAB, THE LEGALITY OF NON-FORCIBLE COUNTERMEASURES IN INTERNATIONAL LAW 4 (1988) [hereinafter ELAGAB-1988] (distinguishing between reprisals and countermeasures).

81. For extensive treatment of the conditions to which countermeasures are subjected, see generally *id.* at 10-36. As wholly legal acts, retaliatory measures are not subject to the legal restraints that limit countermeasures. ZOLLER, *supra* note 79, at 43-44. As a result, retaliatory measures can, in fact, be even more devastating to target nations than countermeasures. *Id.*

82. For a discussion of the role of self-help in international law, see ZOLLER, *supra* note 79, at 4.

83. Paul A. Shneyer & Virginia Barta, *The Legality of the U.S. Economic Blockade of Cuba Under International Law*, 13 CASE W. RES. J. INT'L L. 451, 457 (1981). Shneyer and Barta infer that the embargo against Cuba is a reprisal for no other reason than their discovery of the general topic of "embargoes" listed under the topic of "reprisals" in the 1968 *Digest of International Law*, published by the U.S. State Department. *Id.* (citing 12 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 321-329 (1968)).

Additionally, Shneyer and Barta find the embargo illegal under what they call a "contemporary" legal standard that gives increasing weight to General Assembly resolutions. *Id.* at 468-77. For a different approach to General Assembly resolutions, see *infra* Part IV.

84. Article 38 of the Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055 [hereinafter I.C.J. Statute], is generally considered to contain a complete statement of the sources of international law. IAN BROWNIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 3 (4th ed. 1990); see also SIR ROBERT JENNINGS AND SIR ARTHUR WATTS, EDs., OPPENHEIM'S INTERNATIONAL LAW 24 (9th ed. 1992) [hereinafter OPPENHEIM'S-9th ed.]. Accordingly, any norm relating to economic coercion must be rooted in an Article 38 source. The sources most relevant for economic coercion are found in Article 38, paragraph 1: "a) international conventions, whether general or particular, establishing rules

expressly recognized by the contesting states; b) international custom, as evidence of a general practice accepted as law." I.C.J. Statute, *supra*, art. 38.

Professor Jonathan I. Charney argues that "general international law," also listed as a source of international law in paragraph (1)(c) of Article 38, should be considered a relevant source of law when there are pertinent resolutions and proposals from the United Nations General Assembly or from other multilateral organizations. Jonathan I. Charney, *Universal International Law*, 87 AM. J. INT'L L. 529, 546 (1993). Such activity by official organizations, posits Professor Charney, can result in more rapid formation of norms than would occur through the regular process for the development of "international custom," without requiring the strict formality of a specific international convention or treaty. *Id.* at 546-47. Most importantly, such general international law would be binding on all states, despite objections by a few recalcitrant states. *Id.* at 529. Professor Charney argues that such new rules for the formation of international law are necessary because the world seeks to deal with modern issues, such as global environmental problems, in which the cooperation of all states is necessary. *Id.*

As for General Assembly resolutions relating to economic coercion, a number of other commentators have discussed them as interpretations of the U.N. Charter. See *infra* Part IV-B.3(b). This Note will proceed in a similar manner, rather than present a separate analysis under Professor Charney's theory about general international law.

For two reasons, such a separate analysis is not necessary. First, the separate analysis would be largely redundant because, not surprisingly, the factors that Professor Charney lists as relevant to the formation of general international law are very similar to the factors that are relevant in identifying authoritative interpretations of existing international law. Compare Charney, *supra* at 544-45 (listing specific factors) with *infra* text accompanying note 113 (listing specific factors). Thus, an inquiry into the existence of a norm concerning economic coercion should come to the same determination regardless of whether Professor Charney's analysis or a more traditional analysis is used. More broadly, Professor Charney's general international law appears, for most purposes, to be largely equivalent to either rapidly formed international custom, involving the input of official multilateral international organizations, or interpretation of existing international law.

The second reason that this Note will not present a separate analysis under Professor Charney's theory is that his theory elevates Article 38, paragraph (1)(c) to a position that is out of step with Article 38's history and with how the International Court of Justice (I.C.J.) has used Article 38. This point merits discussion at some deep, jurisprudential levels that this Note will not attempt to reach, other than to provide the following statements.

Due to the strong influence of positivism, Article 38 gives "decisive" weight to the will of states as the source of international law. OPPENHEIM'S-9th ed., *supra*, at 24-25. See generally L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE 106-107 (H. Lauterpacht ed., 8th ed. 1955) (describing the broad influence of positivism) [hereinafter OPPENHEIM'S-8th]; GERHARD VON GLAHN, LAW AMONG NATIONS: AN INTRODUCTION TO PUBLIC INTERNATIONAL LAW 33 (6th ed., 1992) (discussing the predominance of the positivist school). But see OPPENHEIM'S-9th, *supra*, at 25 n.9 (citing OPPENHEIM'S-8th, *supra*, at 106-107, to state that rigid adherence to positivism has been abandoned); Charney, *supra*, at 542-43 (showing how the emergence of *jus cogens* norms after World War II undermines positivism). Significantly, when paragraph (1)(c) was being written, specific revisions were made to prevent the I.C.J. from basing rulings, as the natural law proponents would have liked, simply upon subjective principles of justice. BROWNLEE, *supra*, at 15-16. The authors of Article 38 recognized that such broad power to render subjective rulings would be mistrusted by international governments. *Id.* at 16.

question, glossed over by the 1981 work: whether an international legal norm that prohibits the unilateral use of economic coercion exists.

As a practical matter, much of a typical state's international trade activity involves a form of coercion.⁸⁵ Consequently, any norm concerning economic coercion must adequately define what is prohibited. This section of the Note concludes that prior to the recent U.N. votes on the embargo, a norm prohibiting the use of unilateral economic coercion had not been established.

A. Customary Law

As manifest in a classic statement by Emmerich de Vattel, customary international law has long permitted nations to conduct their trade relations in any way they see fit:

It is clear that it is for each Nation to decide whether it will carry on commerce with another or not. If it wishes to allow commerce with a certain Nation, it has the right to impose such conditions as it shall think fit; for in permitting another Nation to trade, it grants the other a right, and every one is at liberty to attach such conditions as he places to his voluntary concessions.⁸⁶

Thus, historically, there has been no norm prohibiting the use of economic coercion.

Accordingly, as even Professor Charney acknowledges, Charney, *supra*, at 536, the I.C.J. has used the paragraph (1)(c) source sparingly. BROWNLEE, *supra*, at 17. The most common use of that source has been for rules of evidence, rules of procedure, or jurisdictional questions. *Id.* at 16, 18. In sum, paragraph (1)(c) has been applied where rules cannot be expected to form from state practice, but where, at the same time, rules are necessary to make international law into a viable system. *See id.* at 16. Paragraph (1)(c) simply does not, and was never intended to recognize "general principles of law" as the basis for major, new substantive norms in international law.

Professor Charney would invoke general international law to help solve some of the world's pressing, modern problems. But, those problems are, clearly, political ones. Changing the legal theories behind the development of international law cannot get around that. Rather, in light of the Article 38 drafters' wariness about including too much natural law content, adding more natural law content today is more likely to undermine the current level of acceptance for the international legal system than to solve any major modern problems.

85. Derek W. Bowett, *International Law and Economic Coercion*, 16 VA. J. INT'L L. 245, 248 (1976).

86. EMMERICH DE VATTEL, *THE LAW OF NATIONS* 41 (Charles G. Fenwick trans., Carnegie Institute of Washington 1916)(1758)(this edition in english is part of a set that also includes a french version of the work); *see also* Clinton E. Cameron, Note, *Developing A Standard for Politically Related State Economic Action*, 13 MICH. J. INT'L L. 218, 222 (1991)(citing the same material from another translation).

There has been some debate⁸⁷ about whether portions of the U.N. Charter and various General Assembly resolutions have constituted sufficient state practice and *opinio juris*⁸⁸ to create a customary legal norm prohibiting economic coercion. In the 1986 case of *Military and Paramilitary Activities (Nicaragua v. United States)*, however, the International Court of Justice (I.C.J.) addressed the propriety of the U.S. embargo of Nicaragua under customary international law.⁸⁹ The court found that the embargo did not amount to a violation of the customary law of non-intervention.⁹⁰ Rather, just like de Vattel, the I.C.J. stated that, in the absence of a treaty, one state has no obligation to continue trade relations with another any longer than it sees fit.⁹¹ Thus, the court made clear that customary law did not, through 1986, prohibit economic coercion.

87. See, e.g., Sir Ian Sinclair, *The Significance of the Friendly Relations Declaration*, in *THE UNITED NATIONS AND THE PRINCIPLES OF INTERNATIONAL LAW: ESSAYS IN MEMORY OF MICHAEL AKEHURST* 8-20 (Vaughan Lowe & Colin Warbrick eds., 1994) (presenting a variety of views about whether resolutions can legitimately constitute state practice or *opinio juris*, or both).

88. State practice and *opinio juris* are the two elements necessary to create customary law. See *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 97-98 (June 27). See also Charney, *supra* note 84, at 537 ("uniform state practice in international relations combined with an *opinio juris* produces international law"). Exactly what state actions constitute state practice can be debated. See Sinclair, *supra* note 87, at 8-20. *Opinio juris* is a "subjective element," beyond a state's practice, comprised of a state's opinion that its practice reflects a legal obligation. See *Military and Paramilitary Activities*, *supra* at 97-98; Charney, *supra* note 84, at 543. For a general overview on the formation of customary international law, see BROWNIE, *supra* note 84, at 4-11.

89. *Military and Paramilitary Activities*, *supra* note 88, at 14. For a concise overview of this lengthy case, see also GERHARD VON GLAHN, *LAW AMONG NATIONS: AN INTRODUCTION TO PUBLIC INTERNATIONAL LAW* 190-200 (6th ed., 1992). On the issue of economic coercion, Nicaragua complained that the United States had done three things that, although permissible when taken alone, cumulatively amounted to a violation of the customary law of nonintervention: 1) the United States cut its aid to Nicaragua; 2) the United States cut the sugar quota purchased from Nicaragua; and 3) the United States instituted a trade embargo against Nicaragua. *Military and Paramilitary Activities*, *supra* note 88, at 125-26.

90. *Military and Paramilitary Activities*, *supra* note 88, at 126.

91. *Id.* at 138. The I.C.J. did, however, hold that the United States had violated other customary legal norms by supporting military and paramilitary activities against Nicaragua. *Id.* at 109-10, 121-122. The court further held that the United States had violated a specific economic treaty between the two nations. *Id.* at 140, 148. Because of some jurisdictional aspects of the case, however, the court did not deal with norms from the U.N. Charter or the OAS Charter. *Id.* at 138. The court also declined to discuss the GATT. *Id.* at 125-126.

B. The U.N. Charter and Attempts to Interpret It

1. The Charter's Language

There are several sections of Article 2 of the U.N. Charter that nations and commentators have interpreted to include a norm prohibiting the use of economic coercion.⁹² While Article 2(4)'s prohibition of the use or threat of force may seem to be the most logical place to find such a norm, the Charter's 1945 *travaux preparatoires*⁹³ clearly demonstrate that Article 2(4) was not intended to apply to *economic* force.⁹⁴ If the U.N. Charter is to be considered a regulator of economic coercion, it must fulfill that role through Article 2(7) and its principle of non-intervention.⁹⁵ As the following subsections explain, U.N. General Assembly resolutions have failed in their attempts to distill any specific norm against economic coercion from the vague principle of non-intervention.

2. The General Assembly's Attempts to Interpret Article 2(7) to Include a Norm Prohibiting Economic Coercion

Three General Assembly resolutions, adopted in 1965, 1970, and 1974, form the backbone of the current argument that economic coercion is prohibited under the principle of non-intervention.⁹⁶ In the 1965 Declaration on Intervention, adopted

92. In addition to Articles 2(4) and 2(7) of the U.N. Charter, which are discussed in the text above, one commentator has suggested that Article 2(3) be used to regulate economic coercion. Cameron, *supra* note 86, at 250-252. However, Article 2(3) has received little attention from nations and commentators, and today seems little more than a corollary of Article 2(4). See ELAGAB-1988, *supra* note 80, at 197-98.

93. *Travaux preparatoires* are "the materials constituting the development and negotiation of an agreement." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §325 cmt. e (1987) [hereinafter RESTATEMENT (THIRD)]. The *travaux preparatoires* lend insight into the "genuine will" of the signatories at the time of the signing. See BRUNO SIMMA, ED., THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 37-38 (1994). Thus, they serve as an aid in interpreting the U.N. Charter. *Id.* Some argue that the value of the *travaux preparatoires* diminishes as more and more nations that did not participate in the original creation of the treaty become U.N. members. *Id.*

94. Most commentators agree that Article 2(4) does not pertain to economic force, since a proposal to include a prohibition of "economic force" in the Charter was overwhelmingly rejected in 1945. See, e.g., ELAGAB-1988, *supra* note 80, at 197-200; Bowett, *supra* note 85, at 245.

95. ELAGAB-1988, *supra* note 80, at 199-200.

96. See Cuba's argument to the General Assembly, *infra* Part V-B; see generally ELAGAB-1988, *supra* note 80, at 202-12 (citing these resolutions while debating the legality of economic coercion).

without a dissenting vote and with only one abstention, the General Assembly "solemnly declares," "No 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 or to secure from it advantages of any kind."⁹⁷ Then, in 1970, the General Assembly adopted the Declaration on Friendly Relations without a vote, under apparently unanimous agreement.⁹⁸ That Resolution's first operative section "solemnly proclaims" seven principles, one of which is "the principle concerning the duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter."⁹⁹ The resolution then specifically elaborates upon the duty of non-intervention, using virtually the same language as that quoted above from the 1965 Declaration on Intervention.¹⁰⁰ In 1974, as part of a resolution containing the Charter of Economic Rights and Duties of States, similar language was repeated a third time by the General Assembly and adopted by a margin of 120 to six, with ten abstentions.¹⁰¹ However, there is much debate about whether the General Assembly actually has authority to "declare" law and whether such "declarations" can ever have binding legal effects.

97. *Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty*, G.A. Res. 2131, 20th Sess., 1408th plen. mtg., Agenda Item 107, U.N. Doc. A/RES/2131(XX)/Rev.1. (1965), reprinted in 1965 U.N.Y.B. 87-95. The lone abstention was by the United Kingdom. See 1965 U.N.Y.B. 94.

98. *Declaration on the Principles of International Law Concerning Friendly Relations and Cooperation Among States*, G.A. Res. 2625, 25th Sess., 1883rd plen. mtg., Agenda Item 85, U.N. Doc. A/RES/2625(XXV) (1970), reprinted in 1970 U.N.Y.B. 787.

99. *Id.* at 790.

100. *Id.* The one minor difference is the replacement of the word "or" with "and" in the phrase "subordination in the exercise of its sovereign rights or to secure from it advantages of any kind." (emphasis added). An explanation of that minor change is offered in Gillian White, *A New International Economic Order?*, 16 VA. J. INT'L L. 323, 330 (1976).

101. See G.A. Res. 3281, 29th Sess., 2315th plen. mtg., Agenda Item 48, at art. 32, A/RES/3281(XXIX) (1974), reprinted in 1974 U.N.Y.B. 401-407. This time, the language relating to economic coercion, found in Article 32 of the resolution's Charter of Economic Rights and Duties of States, simply dealt with "subordination of the exercise of [a nation's] sovereign rights," completely dropping the part about securing advantages. *Id.* The resolution was not supported by the Western economic powers. Among those voting against it were the United States, the United Kingdom, and West Germany; among those abstaining were Canada, France, Italy, and Japan. See 1974 U.N.Y.B. 402-03. It is significant to note, however, that most of the controversy in the vote concerned Article 2, which dealt with compensation for nationalized property. See *id.* at 394-97, 401 (providing the vote tally for the controversial section). When a separate vote was taken on the language relevant to economic coercion, the result was 119 to zero, with 11 abstentions. *Id.* at 402.

3. The Legal Results of the General Assembly's Attempts to Interpret Article 2(7) to Include a Norm Prohibiting Economic Coercion

a. Does the General Assembly Have Authority to Declare Law?

One argument is that General Assembly resolutions are mere recommendations and nothing more. Proponents of that argument would state that, except for certain internal and administrative matters,¹⁰² the U.N. Charter has only granted the General Assembly the power to recommend.¹⁰³ Alternatively, Professor Blaine Sloan points out that the General Assembly has, since its inception, been passing resolutions that are declaratory and interpretive of existing law.¹⁰⁴ He persuasively argues that because of their form and intent, the General Assembly's declaratory resolutions cannot be dismissed as mere recommendations.¹⁰⁵ Still, as Professor Sloan concedes, the firm establishment of the propriety of "law-declaring" resolutions within the General Assembly does not answer all the questions about the legal *effects* of such resolutions outside the U.N.¹⁰⁶

b. What is the Legal Effect of a General Assembly Declaration?

Decidedly not a legislative body with its own power to create binding international obligations,¹⁰⁷ the General Assembly can still issue resolutions that relate to international law in two significant ways. First, a resolution can arguably represent, either or both state practice and *opinio juris*, the two elements necessary for the formation of new customary international

102. For elaboration upon the clear binding force of the General Assembly's decisions concerning internal matters, see Blaine Sloan, *General Assembly Resolutions Revisited, 40 Years Later*, 58 BRIT. Y.B. INT'L L. 39, 52-61 (1988) [hereinafter Sloan-1988]; see also Rosalyn Higgins, *The Development of International Law By the Political Organs of the United Nations*, 59 PROC. AM. SOC. INT'L L. 116 (1964).

103. See U.N. CHARTER Art. 14.

104. Sloan-1988, *supra* note 102, at 45-46.

105. Blaine Sloan, *Interpreting the U.N. Charter*, 1 PACE Y.B. INT'L L. 61, 122 (1989)[hereinafter Sloan-1989] (quoting Oscar Schacter, *The Crisis of Legitimation in the United Nations*, 50 NORDISK TIDSSKRIFT FOR INTERNATIONAL RET: ACTA SCANDINAVICA JURIS GENTIUM 3, 3-4 (Alf Ross memorial lecture, 1981)).

106. Sloan-1988, *supra* note 102, at 44-45.

107. General Assembly resolutions are generally not binding, BROWNIE, *supra* note 84, at 14, and are, *prima facie*, unable to create legal obligations. *Id.* at 699 n.94. *But see* Sloan-1989, *supra* note 105, at 121-22 (stating that General Assembly resolutions may go more than half way toward establishing a new source of law).

law.¹⁰⁸ Second, resolutions can contain statements of existing law that are already binding without reference to the resolution.¹⁰⁹ While it can be quite tedious to determine whether a new customary law has been formed through General Assembly resolutions,¹¹⁰ the I.C.J. has already given its opinion on the status of a customary law prohibiting the use of economic coercion.¹¹¹ Thus, this Note will concentrate on the value of the three aforementioned resolutions as interpretations of the existing law of the U.N. Charter. The argument that the U.N. Charter, as interpreted, prohibits economic coercion, has not been directly ruled upon by the I.C.J.¹¹²

The legal effect of a resolution as an interpretation of existing law is determined by much more than simply whether it passes by a majority vote. It depends on a number of factors, which can broadly be grouped into three categories: 1) the resolution's terms and intent; 2) delegates' voting patterns and support; and 3) state practice.¹¹³ If, under the first factor, the General Assembly does not use terms that express an intent to declare or interpret law, resolutions will remain mere recommendations, as provided in the

108. For a thorough presentation of the spectrum of views on the role of General Assembly resolutions in the formation of customary international law, see generally Sinclair, *supra* note 87. Sinclair's useful compilation of views highlights the debate about whether a nation's vote for a resolution constitutes state practice and how much practice is needed to establish a rule of customary international law. Sinclair subscribes to a middle position, in which a nation's vote endorsing a particular norm at least constitutes evidence of *opinio juris* with respect to that norm. *Id.* at 27. Nevertheless, Sinclair recognizes that there is little agreement about the role of General Assembly resolutions in the formation of customary international law. *Id.* (quoting Shakespeare's Caliban stating "the isle is full of noises").

109. See Oscar Schacter, *United Nations Law*, 88 AM. J. INT'L L. 1 (1994). Schacter emphasizes that resolutions can gain binding force as authentic interpretations of the U.N. Charter or as affirmations of recognized customary international law. *Id.* at 3.

110. See *id.*

111. See *supra* Part IV-A.

112. See *supra* note 91 (discussing the I.C.J.'s refusal to discuss the norms from the U.N. Charter in the 1986 case of Military and Paramilitary Activities). Note, however, that the I.C.J.'s indication in the Military and Paramilitary Activities case that there is no customary law prohibiting the use of economic coercion is still highly relevant to the above question concerning an interpretation of the U.N. Charter. The reason is that if state practice and *opinio juris*, with respect to economic coercion, are insufficient to create customary law, the state practice may also serve to destroy or at least weaken a norm derived from the U.N. Charter. The bottom line is that state practice, though absolutely essential in establishing customary law, is also highly relevant to determining the state of the law in a treaty or international agreement. See RESTATEMENT (THIRD), *supra* note 93, § 325(2) & cmt. c. (following Article 31(3) of the Vienna Convention in a section entitled "Interpretation of International Agreement").

113. Sloan-1988, *supra* note 102, at 138.

U.N. Charter.¹¹⁴ But, building on the well-established principle that parties to a treaty may make an authentic interpretation of it,¹¹⁵ and on the principle that delegates to the U.N. have an inherent power to represent their respective nations,¹¹⁶ a number of commentators have generally agreed that resolutions that manifest an intent to be *law-declaring* should be given weight as probative evidence of the state of the law.¹¹⁷ The weight given those interpretations will be based upon a balance of the three factors.¹¹⁸

114. See U.N. CHARTER, art. 14.

115. Sloan-1989, *supra* note 105, at 59.

116. *Id.* at 44-45.

117. Compare the following views: Schacter, *supra* note 109, at 1-3 (providing an extreme view that the General Assembly can create binding law where delegates manifest the requisite intent, though admitting that the binding quality is seriously undermined by the negative votes or subsequent nonobservance of the law by states particularly affected, or both); Sloan-1988, *supra* note 102, at 59-60 (providing an extreme view that a norm from a nearly unanimously adopted resolution should be presumptively binding, unless clearly rejected in subsequent state practice); BROWNIE, *supra* note 84, at 699-700 (providing a moderate view that resolutions and declarations provide evidence of the state of the law and of the meaning of texts, and thus have "considerable legal significance"); Sinclair, *supra* note 87, at 9 (quoting O. Schacter, 178 HAGUE RECEUIL DES COURS 111, 116-17 (1982-V) (providing a moderate view that law-declaring resolutions are evidentiary with respect to the state of the law and that other pertinent data should be assessed)).

Clearly, commentators vary as to how much weight should be given to law-declaring resolutions as compared to state practice and *opinio juris* outside the United Nations. Interestingly, Professor Sloan's three factors, *supra* text accompanying note 113, specifically refer to factors both inside and outside the United Nations. The other scholars' parenthetical remarks, *supra*, do the same. Seemingly, very little is excluded from the analysis.

The following appears to be a sensible conclusion: declarations are attempts to create standards, but the attempts will be legally insignificant unless states proceed to follow the standards with a regularity that at least approaches that which is required for the formation of customary law. The remaining ambiguity in this conclusion probably means, in a practical sense, that in international litigation, one side can cite declarations and resolutions to provide an easy articulation of a norm for a court, should the court wish to find that a customary legal norm has been created.

Professor Charney has provided some reasons why a court should wish to ease the requirements for the formation of new, binding international law. See Charney, *supra* note 84, at 529. But his articulated reasons concern global environmental problems and other modern issues, not a classic issue such as economic coercion. Thus, at least with respect to economic coercion, maintaining a close analogy to customary law appears appropriate. For a more general critique of Professor Charney's propositions, see *supra* note 84.

118. See *supra* note 117 (compiling scholars views that demonstrate the relevance of these factors).

c. Analysis: the Legal Effect of the Resolutions Concerning Economic Coercion

Of the three resolutions cited above, the 1970 Declaration is the clearest expression of an intent to declare law. Its final paragraph states that the U.N. Charter's principles, now embodied in the Declaration, "constitute basic principles of international law."¹¹⁹ Since support for the Declaration was unanimous, some commentators have gone so far as to declare it an authentic or authoritative interpretation of the U.N. Charter by the nations that are party to it.¹²⁰ Others have cast doubt on such a far-reaching statement.¹²¹ In either case, assuming *arguendo* that states' approval of the 1970 Declaration involved law-declaring terms and intent, the 1970 Declaration—even bolstered by the related 1965 and 1974 resolutions—failed to establish a binding norm dealing with economic coercion. That failure is evident in the terms of the 1970 Declaration and in subsequent state practice.

Terms

The language relating to economic coercion in the 1970 Declaration was intentionally left vague to achieve consensus on the overall agreement. As stated in 1975 by the British representative to the Special Committee on Friendly Relations,

[The Declaration] represents on many points . . . an accommodation between conflicting and strongly held views, between the exigencies of the *lex lata* and the pressures for

119. G.A. Res. 2625, *supra* note 98.

120. Sloan-1989, *supra* note 105, at 121-22 (deeming the 1970 Declaration an authentic interpretation); Schacter, *supra* note 109, at 3 (deeming the 1970 Declaration to be authoritative).

121. One who casts such doubt is commentator Sir Ian Sinclair, the United Kingdom's Representative to the Special Committee on Friendly Relations, who was present during five of the six years in which the Declaration was developed. See Sinclair, *supra* note 87, at 1 (providing autobiographical information). Sinclair now characterizes the 1970 Declaration's all-important final paragraph, see *supra* text accompanying note 113, as merely "an afterthought," tacked on simply to encourage states to be "guided" in their relations by the Declaration's principles. Sinclair, *supra* note 87, at 26. Further, he states that rather than constituting an interpretation of existing law under the U.N. Charter, the Declaration contains some formulations of *lex ferenda* (statements of developing law) alongside formulations of *lex lata* (existing law). *Id.* at 16. Sinclair cites other commentators who agree that mere recommendations easily creep into the supposedly law-declaring resolutions. See, e.g., *id.* at 17-18.

For further comments casting doubt on the law-making intent of certain Western representatives with respect to the 1970 Declaration, see Cameron, *supra* note 86, at 236 (noting the haste with which the Declaration was prepared and the ongoing Western objections).

recognition of an emerging *lex ferenda*. . . . As such, it has all the imperfections which a document of this nature might be expected to have. . . and some quite deliberate ambiguities.¹²²

Even commentators who believe that some forms of economic coercion are prohibited realize that the Declaration's language is so general as to be virtually meaningless.¹²³ The language simply concerns "exercising sovereign rights" and "securing advantages"¹²⁴—themes that lie at the heart of virtually all forms of international diplomacy.¹²⁵ This language cannot provide any clear standards to guide states in their foreign policy activity.¹²⁶

State Practice

State practice in relation to a negative norm, such as a norm prohibiting the use of economic coercion, is inherently difficult to assess.¹²⁷ Since 1983, however, the General Assembly has been

122. Sinclair, *supra* note 87, at 7. For a similar view see ELAGAB-1988, *supra* note 80, at 208-209 (quoting a 1970 U.N. representative who stated that the lack of precision precluded real application of the principles and permitted "all sorts of abuse"); cf. 1970 U.N.Y.B. 787 (stating that the desired unanimity was obtained only after a great deal of "subtle balancing" of the text).

123. See Richard B. Lillich, *Economic Coercion and the "New International Economic Order: A Second Look at Some First Impressions"*, 16 VA. J. INT'L L. 233, 238 (finding the resolutions meaningless because they are too abstract); Bowett, *supra* note 85, at 248 (finding the resolutions' language "so vague as to be useless").

124. See *supra* text accompanying note 97 (quoting the Declaration).

125. Lillich, *supra* note 123, at 239 n. 29 (quoting Muir, *The Boycott in International Law*, 9 J. INT'L L. & ECON. 187, 204 (1974)). The 1970 Declaration, rooted in the concept of sovereignty, remains problematic because sovereignty can logically refer to one state's sovereign right to choose its trading partners just as it can refer to another state's sovereign right to be free of economic coercion. Cameron, *supra* note 86, at 235.

126. Lillich, *supra* note 123, at 238-39 n. 29 (quoting Boorman, *The Arab Oil Weapon and the Ensuing Juridical Issues*, 9 J. INT'L L. & ECON. 205, 230 (1974)).

127. There are two reasons for this difficulty. First, observance of a negative norm will result not in concrete evidence of action, but in unremarkable inaction. See Sinclair, *supra* note 87, at 23. Sinclair says that this is why the I.C.J.'s opinion in the Nicaragua case—dealing with the negative customary law norm against the use of force—concentrates merely on state expressions of *opinio juris* in General Assembly resolutions and seemingly ignores the element of state action. *Id.*

Second, states using economic coercion will almost always articulate a reason for the coercion. They must express their aims if they hope the coercion will shape behavior in the target state and in other "misbehaving" states. See RICHARD J. ELLINGS, *EMBARGOES AND WORLD POWER: LESSONS FROM AMERICAN FOREIGN POLICY* 27 n.13 (1985) ("sanctions are necessarily public"). The problem is that the stated reason will serve to depict the coercive behavior as a justifiable countermeasure or reprisal. See *supra* notes 77-82 and accompanying text. Thus, it becomes difficult, if not impossible, to tell whether the coercing nation

facilitating such assessments by issuing a steady stream of resolutions entitled "Economic measures as a means of political and economic coercion against developing countries."¹²⁸ Ironically, the fact that eight such resolutions were deemed necessary by the developing states since 1983 is evidence that no norm prohibiting economic coercion had been in existence.¹²⁹ The voting patterns on these "economic coercion" resolutions show a distinct split between developing and developed countries.¹³⁰ Without the continuing support in the form of state practice by the economically powerful nations that would be most affected by a norm prohibiting economic coercion, the past and present resolutions concerning such a norm are rendered useless.¹³¹

Outside the United Nations, state practice likewise shows that no norm prohibiting the use of economic coercion was established by the 1970 Declaration.¹³² Other commentators

considered itself bound by any norm against economic coercion in the absence of the prior breach.

128. G.A. Res. 197, U.N. GAOR, 38th Sess., 104th plen. mtg., U.N. Doc. A/RES/39/197 (1983); G.A. Res. 210, U.N. GAOR, 39th Sess., 104th plen. mtg., U.N. Doc. A/RES/39/210 (1984); G.A. Res. 185, U.N. GAOR, 40th Sess., 119th plen. mtg., U.N. Doc. A/RES/40/185 (1985); G.A. Res. 165, U.N. GAOR, 41st Sess., 96th plen. mtg., U.N. Doc. A/RES/41/165 (1987); G.A. Res. 173, U.N. GAOR, 42d Sess., 96th plen. mtg., U.N. Doc. A/RES/42/173 (1987); G.A. Res. 215, U.N. GAOR, 44th Sess., 85th plen. mtg., U.N. Doc. A/RES/44/215 (1989); G.A. Res. 210 U.N. GAOR, 46th Sess., 79th plen. mtg., U.N. Doc. A/RES/46/210 (1991); G.A. Res. 168, U.N. GAOR, 48th Sess., 86th plen. mtg., U.N. Doc. A/RES/48/168 (1993). These resolutions on economic coercion, the latest of which was adopted in 1993, are not law-declaring; but, they "reaffirm" the language concerning economic coercion in the 1970 Declaration and the 1974 Charter of Economic Rights and Duties of States. See, e.g., G.A. Res. 48/168 (1993). The operative sections pointedly "call upon" the international community to adopt urgent measures "to eliminate the use by some developed countries of unilateral economic coercive measures against developing countries. . . as a means of forcibly imposing the will of one state on another." See, e.g., *id.* at 2.

129. See Omer Elagab, *Coercive Economic Measures Against Developing Countries*, 41 INT'L & COMP. L. Q. 682-83 (1992) [hereinafter Elagab-1992]. Just as General Assembly resolutions were used by the I.C.J. in the Nicaragua case to avoid the problem of assessing state practice with respect to a negative norm, see *supra* note 127, resolutions can be used here to show that the economically powerful states do not feel bound by a norm against the use of economic coercion.

130. 1991 U.N.Y.B. 348 (providing the voting records for the 1991 resolution). The vote tally was 97 in favor and 30 opposed, with nine abstentions. Among those voting against the resolution were Canada, France, Germany, Italy, Japan, the United States, and the United Kingdom. *Id.* The U.S.S.R. was among the abstentions. *Id.*

131. See Schacter, *supra* note 109, at 3 ("a declaration will have diminished authority as law if it is not observed by states particularly affected").

132. See Cameron, *supra* note 86, at 249 ("economic diplomacy is rampant in the international community"); ELLINGS, *supra* note 127, at 152-53 (embargoes have been "ubiquitous" in U.S. foreign policy since the end of World War II).

Logically, one could argue that most instances of such economic coercion were undertaken as reprisal instead of as retorsion and, therefore, such reprisals

have listed pre-Declaration¹³³ and post-Declaration instances of the use of economic coercion by many, including the United States, the United Kingdom, the European Community, the U.S.S.R., and the Arab states.¹³⁴ Perhaps most notably, the Arab Oil Embargo—carried out by developing countries themselves—occurred only three years after the 1970 Declaration.¹³⁵

Together with the eight recent resolutions concerning “coercive measures against developing countries,” such state practice indicates the non-existence of a legal norm prohibiting the use of economic coercion.

C. GATT & OAS Charter

The General Agreement on Tariffs and Trade (GATT) appears to be a logical place to find a prohibition of economic coercion. Yet, as Article XXI¹³⁶ makes GATT inapplicable to trade measures undertaken for security reasons, GATT designedly does not cover many situations of economic coercion.¹³⁷ A 1986 GATT tribunal

do not undermine a norm prohibiting unfettered economic coercion. However, experts appear to agree that the pervasive use of economic coercion demonstrates the lack of a norm prohibiting economic coercion. See *infra* text accompanying note 152.

133. To the extent that nations practiced economic coercion before the 1970 Declaration, the Declaration's evidentiary value as establishing a norm prohibiting the use of economic coercion is weakened. Just as the Declaration itself is evidence, such pre-Declaration state practice is useful evidence in interpreting the Charter. Cf. RESTATEMENT (THIRD), *supra* note 93, § 325(2) & cmt. c. (indicating that state practice is relevant to interpreting international agreements).

134. See Cameron, *supra* note 86, at 241-45 (compiling and analyzing post-WWII uses of economic diplomacy); ELAGAB-1988, *supra* note 80, at 682-83 (discussing several examples of the use of post-Declaration economic coercion).

135. See Cameron, *supra* note 86, at 244 (discussing the 1973 Arab Oil Embargo).

136. General Agreement on Tariffs and Trade, 1947, art. XXI [hereinafter GATT]. Note that this analysis relates directly to GATT-1947. However, from the Uruguay Round, it appears that GATT-1994, made no significant changes with respect to economic coercion. See generally GATT SECRETARIAT, RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS (1994) (providing a compilation of GATT-1994 documents and revealing no apparent changes to Article XXI).

137. See *Report of the Expert Group Meeting*, in AGENDA ITEM 82(b), U.N. GAOR, 44th Sess., Annex, at 12, U.N. Doc. A/44/510 (1989); Richard S. White, *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 & POLY INT'L BUS. 603, 631 (1987) (stating that GATT currently is filled with uncertainties and loopholes with respect to economic coercion). The *Report of the Expert Group*, *supra*, contains a great deal of information about the status of the legal concept of economic coercion. The expert group meeting was convened in Geneva from May 1 to 3, 1989, pursuant to General Assembly Resolution 42/173

ruled that the United States embargo against Nicaragua fell under the Article XXI loophole¹³⁸ and was not prohibited by GATT.¹³⁹ Significantly, the U.S. was not even required to argue its "security"-based reasons for the embargo.¹⁴⁰ Thus, the Nicaragua case confirms one commentator's view that the usefulness of GATT ends right where most instances of economic coercion begin.¹⁴¹ After the decision of the dispute panel, some smaller nations called for GATT reform, suggesting that it cover such situations in the future.¹⁴² Similarly, some experts expressed hope that the Uruguay Round would produce changes with respect to economic coercion.¹⁴³ Economically powerful nations, however, appear to agree that GATT should not cover such situations,¹⁴⁴ and the Uruguay Round appears to have produced no changes with respect to economic coercion.¹⁴⁵

Unlike the U.N. Charter text, which does not mention coercive economic measures, Article 18 of the OAS Charter does contain language that closely parallels that in the 1970 Declaration relating to economic coercion.¹⁴⁶ Although used in a treaty, instead of simply in a declaration, this language is just as

of December 11, 1987 (one of the resolutions dealing with economic coercion against developing countries). *Id.* at 8.

138. The loophole is that GATT explicitly does not apply to trade measures undertaken for security reasons. See GATT-1947, art. XXI.

139. See *U.S. Embargo on Nicaragua Did Not Violate Obligations under GATT, Dispute Panel Rules*, 3 Int'l Trade Rep. (BNA) No. 45, at pp. 1368-69 (Nov. 12, 1986).

140. See Michael J. Hahn, *Vital Interests and the Law of GATT*, 12 MICH. J. INT'L L. 558, 609 (1991) (discussing the "terms of reference," under which the United States agreed to send the dispute to the panel).

141. Cameron, *supra* note 86, at 246-47.

142. See Int'l Trade Rep., *supra* note 139, at 1368-69.

143. *Report of the Expert Group Meeting*, *supra* note 137, at 12.

144. See *U.S., Nicaragua Unsuccessful in Getting GATT Action on Trade Embargo Dispute*, 2 Int'l Trade Rep. (BNA) No. 23, at 765 (June 5, 1985). Canada and the European Community agreed with the United States that a GATT council is not the place to debate a national security question. *Id.*

145. See *supra* note 136. If, hypothetically, the Article XXI loophole were ever closed to the extent that the United States was forced to argue its security based reasons for the embargo, the United States would still have a plausible argument for considering Cuba a security threat. The U.S. argument would simply be that as long as a repressive Castro regime stays in power, refugees present a security problem for the southern coast of the United States. See *supra* notes 4-6 and accompanying text (providing details of the refugee crisis of August 1994).

146. ORGANIZATION OF AMERICAN STATES, CHARTER art. 19 (stating that "[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 advantages of any kind").

vague.¹⁴⁷ Thus, it is subject to the same criticisms as the 1970 Declaration.¹⁴⁸ If a regional prohibition of economic coercion ever existed, repeated instances of U.S. economic coercion of Latin American nations have undoubtedly rendered it meaningless.¹⁴⁹

D. Cold War Era Produced No Clear Norm

In conclusion, while a number of commentators have tried to devise a workable legal definition of economic coercion,¹⁵⁰ presently no useful concept of economic coercion exists.¹⁵¹ After convening an international panel of experts in 1989 to study ways to eliminate economic coercion, the U.N. Secretary-General authoritatively reported in 1993 that "there is no clear consensus in international law as to when coercive measures are improper, despite relevant treaties, declarations, and resolutions adopted in international organizations which try to develop norms limiting the use of such measures."¹⁵²

Yet, during the 1990s, Cuba pushed the issue of economic coercion to the fore in the United Nations General Assembly in an

147. Compare *supra* note 146 (OAS Charter's language relating to economic coercion) with *supra* text accompanying note 97 (1970 Declaration's language related to economic coercion).

148. See *supra* notes 122-26 and accompanying text.

149. Cf. Schacter, *supra* note 109, at 3 (indicating that the lack of support of a norm by the nations most affected by it severely undermines the value of the norm).

150. Professor David Bowett's theory, which examines the coercing nation's intent and the subsequent effect on the target, is perhaps the most well-known. Bowett, *supra* note 77; see also Bowett, *supra* note 85, at 248. Professor Omer Elagab has more recently suggested a similar theory. Elagab-1992, *supra* note 129, at 693-94 (emphasizing the factors of the coercer's intent and impact on the target). Another commentator has suggested the adoption of an antitrust model, which takes into account market share and ideas of unfair competition. Cameron, *supra* note 86, at 251-52.

151. ELAGAB-1988, *supra* note 80, at 208 ("the principle of non-intervention has not crystallized into a clear rule prohibiting non-intervention"); Bowett, *supra* note 85, at 248 (the language in the resolutions is "so vague as to be useless"); Cameron, *supra* note 86, at 253-54 (legal regulation of economic coercion is one of the most unclear areas of international law).

152. *Economic Measures as a Means of Political and Economic Coercion Against Developing Countries: Note by the Secretary-General*, U.N. GAOR, 48th Sess., Agenda Item 91(a), at 1, U.N. Doc. A/48/535 (1993). This 1993 Note by the Secretary-General summarizes the expert panel's report on ways to eliminate economic coercion. The Secretary-General's note recognizes that the international legal system also lacks adequate mechanisms to monitor economic coercion. *Id.* at 1-2. Thus, it recommends that the United Nations and member states work toward developing the concept of economic coercion as well as developing a capacity to deal with such coercive measures. *Id.*

effort to increase the pressure on the United States to end its long-standing embargo.

V. THE GENERAL ASSEMBLY AND THE EMBARGO, 1991-1994

Even if a General Assembly resolution is not law-declaring, it can play an important role in the development of future international law, as well as present international relations. Resolutions concerning normative principles, at a minimum, serve to test the international attitude as to whether "classical" codification through the International Law Commission is within the realm of possibility.¹⁵³ But even beyond any such reference to international law, resolutions certainly express moral judgments and world opinion about particular incidents and disputes.¹⁵⁴ Like international law, such judgments and opinions have the potential to influence the behavior of states.¹⁵⁵ In reality, those moral judgments and world opinions can serve as seeds for the development of future international law.¹⁵⁶ Thus, while the resolutions entitled "The necessity of ending the . . . embargo by the United States of America against Cuba" do not purport to be law-declaring, an analysis of the text of the resolutions, the positions of significant parties, and nations' explanations for their votes reveals a great deal about the post-Cold War status of an international legal norm concerning economic coercion.¹⁵⁷ This section of the Note conducts such an analysis, and concludes that there has been little or no post-Cold War movement toward a norm concerning economic coercion.

153. See Sinclair, *supra* note 87, at 8 (relating the view of G.G. Fitzmaurice, *The Future of Public International Law*, LIVRE DU CENTENAIRE 1873-1973 of the Institut de Droit International, at 233).

154. Sloan-1988, *supra* note 102, at 109, 124.

155. See *id.* at 109 (stating that resolutions concerning specific disputes will affect the conduct of the disputants as well as the attitudes and conduct of third states); *id.* at 123 (describing the important nonlegal effects that resolutions can have on states).

156. *Id.* at 108 (quoting Professor Dupuy, who states that even recommendatory resolutions "affirm 'a legitimacy which anticipates the legality of tomorrow'"). Vague legal norms and developing legal norms, which cannot accurately be said to involve binding legal obligations, are often characterized as "soft law." *Id.* at 106-08.

157. The analysis examines the factors that Professor Sloan considers important in determining the effect of General Assembly resolutions: the terms used, the intent of voting members as manifested in explanatory statements, the voting patterns, and state practice. See *generally id.* at 125-38.

A. Analysis of the United States Position

Unlike most other Western powers,¹⁵⁸ the United States has chosen to treat the resolution presented by Cuba in each of the last three years as a referendum on the legitimacy of the long-standing embargo. Despite this attitude, the U.S. position has evolved in legally significant ways. By 1994, the United States had essentially adopted de Vattel's classic stance that nations are free to conduct their trade relations in any way they see fit.¹⁵⁹ Before reaching that stance, however, the U.S. ambassador to the United Nations came dangerously close, in 1993 and especially in 1992, to suggesting that the United States accept the existence of a legal norm prohibiting the use of economic coercion. As explained in Part IV, acceptance of the existence of such a norm would turn the embargo into a countermeasure,¹⁶⁰ requiring the United States to articulate substantial justifications for maintaining it. Further justification would be unnecessary, however, as long as the United States categorizes the embargo as retorsion.¹⁶¹

1. The U.S. Position in 1992

Before the General Assembly voted on Cuba's resolution in 1992, the U.S. ambassador asserted that the General Assembly should not be involved in this bilateral matter.¹⁶² Explaining the general embargo policy, the ambassador said that the United States "chooses" not to trade with Cuba for good reasons.¹⁶³ First, Cuba nationalized billions of dollars worth of U.S. nationals' property in the early 1960s, and has not made reasonable restitution.¹⁶⁴ Thus, he labelled the U.S. policy a "legitimate response" to this unreasonable behavior.¹⁶⁵ Second, according to the ambassador, Cuba's repressive political regime has denied the Cuban people basic human rights and democratic freedoms.¹⁶⁶

158. See *infra* Parts V-B(2) to V-B(5) (presenting the views of the Western powers with respect to the resolutions). The Western powers focused not on the long-standing embargo, but on the recently enacted CDA. *Id.*

159. See De Vattel's position, *supra* Part IV-A.

160. For a discussion and definition of the legal term "countermeasure," see *supra* notes 77-82 and accompanying text.

161. For discussion and definition of the legal term "retorsion," see *id.*

162. *Provisional Verbatim Record of the 70th Meeting, U.N. GAOR, 47th Sess., at 73-76, U.N. Doc. A/47/PV.70 (Prov. ed. 1992)* [hereinafter *Provisional Verbatim Record-1992*] (statement of the U.S. Ambassador).

163. *Id.* at 73-75.

164. *Id.*

165. *Id.*

166. *Id.*

In characterizing the U.S. position as a "response" to Cuba's illegal behavior, the U.S. ambassador risked signaling to the international community that the United States felt bound by a legal norm prohibiting economic coercion in the absence of the prior breach of law by Cuba. In other words, he could be seen as characterizing the U.S. embargo as a countermeasure. The problem with the ambassador's language is obvious in light of the I.C.J.'s comments in 1986:

If a State acts in a way *prima facie* incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule.¹⁶⁷

If the Cuban embargo case were to appear before the I.C.J., the court could potentially build upon such signs of U.S. acceptance of the norm to establish a customary legal norm prohibiting economic coercion. The I.C.J. could then rule on whether the United States had complied with all the conditions required for the use of countermeasures.¹⁶⁸ Such independent review of U.S. foreign policy decisions seems to be exactly what the United States would want to avoid.

If the case of the Cuban embargo were to appear before the I.C.J., the United States could counterargue that its ambassador's 1992 statement merely explained U.S. reasons for engaging in an act of retorsion. The United States would emphasize the ambassador's language about how the United States "chooses" not to trade with Cuba, asserting that it is free to "choose" to trade with whomever it wishes. But, given the ambassador's unqualified 1992 language about the United States responding to Cuba's illegality, the United States would, in the absence of other evidence, face an uphill battle.

2. The U.S. Position in 1993

Very prudently, the United States attempted to modify its position before the General Assembly in 1993. In a change from 1992, the ambassador spoke of a "political and economic right to exclude as trading partners" those who violate fundamental human rights and show disrespect for human dignity.¹⁶⁹ Closer

167. Military and Paramilitary Activities, *supra* note 88, at 98.

168. For a discussion of the conditions on countermeasures, see ELAGAB-1988, *supra* note 80, at 10-36.

169. U.N. GAOR, 48th Sess., 48th Plen. Mtg. at 13, U.N. Doc. A/48/PV.48 (1993) [hereinafter *48th Plenary Meeting-1993*] (statement of the U.S. ambassador).

to de Vattel's classic position, this language emphasizes a right to choose trading partners without mentioning any specific illegal behavior by Cuba.¹⁷⁰ References to Cuba's illegal nationalizations were conspicuously absent.¹⁷¹

Yet, even without using the word "illegal," the United States still portrayed Cuban behavior as wrongful and the embargo as a reaction to that wrongful behavior. Thus, the ambassador, arguably, still implied that the United States feels bound by a legal norm against the use of economic coercion, a norm from which the United States is exempted with respect to Cuba because of Cuba's disrespect for fundamental human rights.¹⁷²

The United States would argue that the ambassador's 1993 citation of Cuba's human rights abuses was not meant to be an articulation of a legal defense. Rather, the ambassador was simply explaining U.S. policy reasons for maintaining the long-standing embargo. Even if the embargo is perfectly legal, such a public explanation of U.S. policy is necessary for at least two reasons. First, economic coercion cannot function effectively as a foreign policy device without being accompanied by an articulation of its ultimate object.¹⁷³ In the absence of such an articulation, the coercing nation simply cannot expect the target to react in the desired manner.¹⁷⁴

Second, the General Assembly is not a legal forum. Members' votes on non-law-declaring resolutions may be based not just on legal factors but also on moral concerns and other factors, including purely political grounds.¹⁷⁵ It is, therefore, unnecessary to view the ambassador's comments as an

170. *Id.*

171. *Id.*

172. Commentators have raised the issue of the justifiability of countermeasures taken against human rights abuses. See Elagab-1992, *supra* note 129, at 693-94; *Report of the Expert Group Meeting*, *supra* note 137, at 11 (noting briefly that some of the attending experts favored the human rights justification, while others feared it would provide too big a loophole for otherwise illegal conduct).

173. Cf. ELLINGS, *supra* note 127, at 27 n.13. (explaining that economic coercion can serve the dual goals of altering the behavior of the target and deterring others from engaging in similar behavior, both of which are best served by public articulation of the coercer's objectives).

174. *Id.*

175. See Sloan-1988, *supra* note 102, at 123-24. Indeed, the U.S. ambassador pointed out the political implications of the vote. He emphasized that Castro had cited the 1992 resolution as a victory for his revolution and had used the resolution as an excuse not to reform his repressive government. See *48th Plenary Meeting-1993*, *supra* note 169, at 13. According to the ambassador, if the United States were to lift the embargo now, the United States would be left with no means to pressure Cuba for improvements concerning human rights and democratic freedoms. *Id.*

articulation of a legal defense. To the extent that the statement addressed members' moral or political concerns, it serves as evidence that economic coercion and the embargo are, on some level, suspect in the international community.¹⁷⁶ But, it is not surprising that there is a moral norm or "soft law" prohibiting the use of economic coercion.¹⁷⁷

At a minimum, the 1993 U.S. statement indicates that the United States felt bound by moral norms or by soft law with respect to economic coercion. Based on the two aforementioned reasons, however, the United States could plausibly argue that its statement does not indicate that the United States felt bound by a *legal* norm.

3. The U.S. Position in 1994

On the day of the 1994 vote, the U.S. ambassador again portrayed the Castro regime as continuing to flout human rights.¹⁷⁸ But, rather than characterizing the embargo as a justifiable response to Cuba's illegal behavior, the U.S. ambassador issued a statement that closely parallels de Vattel's classic stance: "The United States, like any other nation, has the sovereign right to determine its bilateral relationships, including

176. Cf. *supra* text accompanying note 167 (I.C.J.'s statement that the unqualified articulation of an explanation for conduct demonstrates the state's acceptance of external constraints on its conduct).

177. Professor Sloan's attempt to define "soft law" perfectly describes the status of a norm against the use of economic coercion. Sloan-1988, *supra* note 102, at 107-08 (stating that soft law may simply be a norm with an uncertain status or vague content, or a norm that is unenforceable in court).

Sloan goes on to make the point that moral concerns and "soft law" may be the first step on the way toward the formation of a legal norm. *Id.* at 108, 123. However, the mere existence of a moral or soft law norm does not necessarily indicate movement toward a legal norm. Rather, the proper role of some moral or soft law norms may be to guide an individual actor in a sensitive matter without involving the theoretical legal enforcement power of a political superior. The existence of a moral norm, or of soft law with respect to economic coercion, may simply mean that a legal norm is inappropriate in that area. For an explanation of why a legal norm may be inappropriate for economic coercion, see note 320 and accompanying text.

178. 45th Plenary Meeting, Wednesday, 26 October 1994 At 10 a.m., New York, U.N. GAOR, 49th Sess., at 11-12, U.N. Doc. A/49/PV.45 (1993)[hereinafter 45th Plenary Meeting-1994](statement of the U.S. ambassador). The statement noted recent evidence of a crackdown on human rights in August 1994 and cited the summer exodus of Cubans toward Florida as evidence of increasing dissatisfaction with the Castro regime. Further, the United States deplored the absence of a statement in the resolution, similar to that of the Rio Group in September, encouraging Cuba to make a peaceful transition to democratic freedoms and respect for human rights. *Id.*; see also *U.S. Urged to Lift Its Embargo in Cuba*, N.Y. TIMES, Sept. 11, 1994, sect.1, at 8 (describing the statement of the Rio Group of Latin American and Caribbean presidents).

its trading partners.¹⁷⁹ The U.S. ambassador then simply stated that a review of the embargo's status depended upon Cuba's movement toward democracy and toward international norms regarding human rights.¹⁸⁰ No language hinted that the United States acknowledged the existence of a legal norm against economic coercion.¹⁸¹

Using the right to choose trading partners as the legal basis for the embargo, the United States had finally taken the position that the embargo was an act of retorsion.

B. Analysis of the Cuban Position and of the Positions of Other Voting Members: Were There Any Developments Related to Economic Coercion or the Long-Standing Embargo?

Cuba's original 1991 draft resolution and Cuban statements in each of the following years demonstrate that Cuba's ultimate goal is to obtain a declaration that the *entire* embargo is an illegal act of economic coercion. Yet, the resolutions adopted by the U.N. General Assembly in 1992, 1993, and 1994 deal primarily with the Cuban Democracy Act's extraterritorial measures, and, thus, represent a softened, fallback position as compared to the 1991 resolution. Indeed, when explaining their votes of 1992, 1993, and 1994, many U.N. members carefully distinguished their stance on the CDA's extraterritorial measures from their stance on the long-standing embargo itself. Thus, the following analysis¹⁸² reveals little evidence of post-Cold War movement toward a legal norm against economic coercion and, more surprisingly, little evidence of a shift in world opinion about the long-standing embargo itself. Only in 1994 did the General Assembly begin to show possible signs of change.

1. The Draft Resolution of 1991

In 1991, the year that the embargo was first placed on the General Assembly's agenda, Cuba's efforts were directed primarily at having the U.S. embargo condemned as illegal economic coercion. Cuba directly alleged that the embargo was aimed at "imposing on it the political, social, and economic order which the

179. *45th Plenary Meeting-1994, supra* note 178, at 11.

180. *Id.*

181. *Id.* at 11-12.

182. As stated at the beginning of this section, the analysis will concern the text of the resolutions, the positions of the parties, and nations' explanations for their votes. See *supra* note 157 and accompanying text.

United States authorities consider most fitting."¹⁸³ Although the Cuban argument briefly referred to extraterritorial measures that violate the sovereignty of third party states, it focused on the violation of Cuban "sovereignty" and the Charter's "principle of non-intervention."¹⁸⁴

After the embargo was placed on the agenda, Cuba issued a document in October 1991 that emphasized both the embargo's extraterritorial measures¹⁸⁵ and its economic coercion.¹⁸⁶ With the controversial provisions of the Cuban Democracy Act still a year away from becoming law, the allegations of extraterritoriality¹⁸⁷ were a bit premature. But, Cuba forcefully stated in the document that U.S. "economic coercion" violated norms that are "universally acknowledged to have attained the status of binding international law."¹⁸⁸ In support of its position, Cuba cited the 1970 Declaration on Friendly Relations, the GATT, and the OAS Charter.¹⁸⁹

The draft resolution that Cuba presented to the General Assembly in November 1991 focused directly on economic coercion.¹⁹⁰ The preamble "recall[s]" the language related to economic coercion in the 1965 Declaration on Intervention and

183. *Explanatory Memorandum, in Letter Dated 16 August 1991 from the Permanent Representative of Cuba Addressed to the Secretary-General, U.N. GAOR, 46th Sess., Annex, at 2, U.N. Doc. A/46/193 (1991)* [hereinafter *Explanatory Memo*]. A subsequent document from the Latin American Parliament, submitted in support of Cuba, highlighted the "relaxing of cold war tensions" as a timely reason for ending the embargo. *Resolution passed by the 13th Regular General Assembly of the Latin American Parliament on 2 August 1991, in Letter Dated 16 August 1991 from the Permanent Representative of Cuba Addressed to the Secretary-General, U.N. GAOR, 46th Sess., Annex, at 2, U.N. Doc. A/46/193/Add.1 (1991).*

184. *Explanatory Memo, supra* note 183, at 2-3.

185. *Letter Dated 25 October 1991 from the Charge d'Affairs a.i. of the Permanent Mission of Cuba for the United Nations Addressed to the Secretary-General, U.N. GAOR, 46th Sess., Annex, Agenda Item 142, at 3-5, U.N. Doc. A/46/599 (1991).*

186. *Id.* at 5-6.

187. *Id.* at 5 (emphasizing that the United States would not allow U.S.-controlled companies located overseas to make investments in Cuba or to finance trade activities or joint ventures in Cuba).

188. *Id.* at 6.

189. *Id.* at 5-6. The document also cited the Vienna Convention on the Law of Treaties. *Id.* at 6. Other commentators have explained how a portion of that treaty relates to economic coercion. See, e.g., ELAGAB-1988, *supra* note 80, at 153-64.

190. See *Necessity of Ending the Economic, Commercial, and Financial Embargo Imposed by the United States of America Against Cuba, U.N. GAOR, 46th Sess., Agenda Item 142, at 1-2, U.N. Doc. A/46/L.20 (1991)*. Only one preambular paragraph, the sixth of seven, discussed extraterritorial measures. *Id.* The rest of the preambular paragraphs concerned economic coercion and the three-decade-old embargo. *Id.*

the 1970 Declaration on Friendly Relations.¹⁹¹ Then, in explicit terms, the draft resolution indicates "that for more than 30 years, a series of economic, commercial, and financial measures and actions has been applied against Cuba," harming the Cuban people and infringing upon Cuba's sovereignty.¹⁹² The operative section of the resolution pointedly declares that "that policy contradicts principles embodied in the Charter of the United Nations and in international law."¹⁹³

Prior to the passage of the CDA's controversial provisions, the General Assembly, however, refused to accept Cuba's draft resolution.¹⁹⁴ Deciding to withdraw the resolution rather than risk defeat, the Cuban ambassador delivered an impassioned speech on November 11, 1991, blaming the United States for intimidating possible supporters of the resolution.¹⁹⁵ Analysis in the following subsections confirms that the General Assembly simply was not ready to recognize the embargo as illegal economic coercion.

2. The Resolution of 1992

a. Developments Outside the United Nations

Before the November 1992 vote on the embargo, two noteworthy events occurred. First, on December 21, 1991, the Soviet Union officially dissolved.¹⁹⁶ Second, on October 23, 1992, President George Bush signed the controversial Cuban Democracy Act.¹⁹⁷ Both events undoubtedly impacted the mood of the General Assembly. But it was the CDA that gave Cuba a powerful new angle for its resolution and the CDA that so angered the rest

191. *Id.*

192. *Id.*

193. *Id.*

194. See Stanley Meisler, *U.N. Rebuffs U.S. on Cuba Embargo*, L.A. TIMES, Nov. 25, 1992, at A1 ("many governments—under American pressure—persuaded Cuba to withdraw it [in 1991]"); G.A. Decision 46/407, 46th mtg., 13 Nov. 1994 (deciding to defer consideration of the resolution and to include it in the provisional agenda for the 47th session).

195. 46th Plenary Meeting, U.N. GAOR, 46th Sess., 46th Plen. mtg. at 16-18, U.N. Doc. A/46/PV.46 (1991) (statement of the Cuban ambassador). The Cuban ambassador rejected the notion that the embargo was related to the Cold War, instead characterizing it as simply one example of the historical domination of Cuba by the United States. *Id.* at 19-20 (citing evidence from as far back as the early 19th century).

196. David Remnick, *In New Commonwealth of 'Equals', Russia Remains the Dominant Force; Historical Status, Space-Age Arms Ensure Regional Primacy*, WASH. POST, Dec. 22, 1991, at A39.

197. See *infra* Part III.

of the world that even long-standing allies abandoned the United States in the 1992 vote.

b. The Cuban Position

Cuba balanced its argument by concentrating both on the CDA's controversial measures and on economic coercion in general. In some of the documents that were most damaging to the United States, representatives of the European Community (EC) stated that certain CDA provisions were unacceptable as a matter of law and policy, and were contrary to long-standing rules of international shipping.¹⁹⁸ At the same time, Cuba continued to argue unabashedly that economic coercion itself is illegal under specific declarations, resolutions, and treaties including, for example, the 1970 Declaration on Friendly Relations, the 1974 Charter of Economic Rights and Duties of States, the OAS Charter, and GATT.¹⁹⁹

In a dramatic speech on November 24, 1992, just before the vote on Cuba's new 1992 version of the resolution, the Cuban ambassador presented a balanced strategy.²⁰⁰ With respect to free trade, the ambassador portrayed the CDA as a U.S. attempt to usurp not only the sovereignty of Cuba, but also the sovereignty of the international community as a whole.²⁰¹ As the speech progressed, he concentrated more on the long-standing embargo itself. He deplored the U.S. action as anachronistic "in a world where East-West contradictions no longer exist."²⁰² Further, he compared U.S. coercion of Cuba under the CDA to the

198. *Note of April 7, 1992, supra* note 65; *Démarche of April 18, 1990, supra* note 65.

199. For a particularly well-organized statement of Cuba's 1992 position, including citations to many legal documents, see *Necessity of Ending The Economic, Commercial and Financial Embargo Imposed by the U.S. Against Cuba, in Letter Dated 24 August 1992 from the Charge d'Affairs a.i. of the Permanent Mission of Cuba for the United Nations Addressed to the Secretary-General*, U.N. GAOR, 47th Sess., Annex, Agenda, Item 39 of the Provisional Agenda, Annex, at 3-7, U.N. Doc. A/47/400 (1992). This document cites U.S. legislation, U.S. regulations, the U.N. Charter, General Assembly resolutions, and treaties such as GATT and the OAS Charter. *Id.* Beyond repeating the specific arguments made in 1991, this document adds analysis about the denunciation of economic coercion in the Charter of Economic Rights and Duties of States, *id.* at 6, and the prohibition of economic coercion under specific provisions of the GATT. *Id.* at 6-7. Concerning GATT, Cuba said that the United States can no longer even attempt to portray Cuba as a security threat to justify violations of GATT provisions. *Id.* at 7.

200. *Provisional Verbatim Record-1992, supra* note 162, at 3-4.

201. *Id.*

202. *Id.* at 12. The Cuban ambassador emphasized that Cuba could no longer rely on the support of the old socialist trading bloc. *Id.*

historical U.S. coercion of Cuba under the Platt Amendment.²⁰³ After emphasizing the harsh impact of the embargo on the Cuban people, he concluded by asserting that the United Nations is the appropriate forum for addressing the situation in which a small country is suffering "aggression, against the rule of law, at the hand of a great power."²⁰⁴

c. Language of the Resolution

The resolution was approved by a margin of fifty-nine to three, with seventy-one abstentions.²⁰⁵ Cuba seemed to have a victory. Certainly, victory was undeniable with respect to the controversial measures of the CDA. Moreover, members of the press, apparently looking no further than the title of the resolution, stated that Cuba had won condemnation of the long-standing embargo.²⁰⁶ But in reality, the text of the 1992 resolution deals almost exclusively with the CDA and the extraterritoriality issue, not with the embargo itself.²⁰⁷ The 1992

203. *Id.* at 15-16. For details concerning the Platt Amendment, see *supra* note 17.

204. *Id.* at 20.

205. 1992 U.N.Y.B. 234-35 (providing the voting records).

206. See, e.g., Frank Prial, *U.N. Votes to Urge U.S. to Dismantle Embargo on Cuba*, N.Y. TIMES, Nov. 25, 1992, at A1. Significantly, most members of the press totally misconceived the specific nature of the U.N. votes. The *New York Times* writer boldly, but irresponsibly, stated that the 1992 resolution "calls for an end to the 30 year embargo against Cuba." The resolution does absolutely nothing of the sort. Again, the resolution represents a fallback position after a 1991 resolution calling for an end to the embargo was withdrawn for lack of support.

At the beginning of its story on the 1992 resolution, the *Los Angeles Times* actually indicated that the General Assembly's criticism was directed at the "latest" embargo against Castro, in other words, directed at the CDA. Meisler, *supra* note 194. Such an important distinction between the CDA and the long-standing embargo is easy to miss even in the *Los Angeles Times* article, and has been completely ignored by most other members of the press as they have reported on subsequent U.N. resolutions spanning from 1992 to 1994.

207. The following is the full text of G.A. Res. 47/19, U.N. GAOR, 47th Sess., Agenda Item 39, 70th plen. mtg, U.N. Doc. A/RES/47/19 (1992):

Necessity of ending the economic, commercial and financial embargo
imposed by the United States of America against Cuba

The General Assembly,

Determined, to encourage strict compliance with the purposes and principles enshrined in the Charter of the United Nations,

Reaffirming, among other principles, the sovereign equality of States, non-intervention and non-interference in their internal affairs and freedom of trade and international navigation, which are also enshrined in many international legal instruments.

resolution's preamble, clearly referring to the CDA, states that the General Assembly is acting after "having learned" of certain recent measures aimed at strengthening the embargo.²⁰⁸ Further, the preamble specifically states that the General Assembly is concerned with "laws and regulations whose extraterritorial effects" impact the sovereignty of states as well as the freedom of trade and navigation.²⁰⁹ There is absolutely no mention of the General Assembly's famous resolutions from the 1960s and 1970s that speak of economic coercion; nor is the word coercion ever used.²¹⁰ The key operative sections of the resolution simply call for a repeal of those laws referred to in the preamble—in other words, the CDA—that affect "freedom of trade and navigation."²¹¹ In sum, the language of the 1992 resolution merely reflected the General Assembly's reaction to the CDA and did not make any statement about economic coercion or even about the propriety of the long-standing embargo.

Concerned about the promulgation and application by Member States of laws and regulations whose extraterritorial effects affect the sovereignty of other States and the legitimate interests of entities or persons under their jurisdiction, as well as the freedom of trade and navigation,

Having learned of the recent promulgation of measures of that nature aimed at strengthening and extending the economic, commercial and financial embargo against Cuba,

1. *Calls upon* all States to refrain from promulgating and applying laws and measures of the kind referred to in the preamble to the present resolution in conformity with their obligations under the Charter of the United Nations and international law and with the commitments that they have freely entered into in acceding to international legal instruments that, *inter alia*, reaffirm the freedom of trade and navigation.

2. *Urges* States that have such laws or measures to take the necessary steps to repeal or invalidate them as soon as possible in accordance with their legal regime;

3. *Requests* the Secretary-General to submit to the General Assembly at its forty-eighth session a report on the implementation of the present resolution;

4. *Decides* to include the item in the provisional agenda of its forty-eighth session.

208. *Id.*

209. *Id.*

210. *Id.* In the second preambular paragraph, references to the general principles of "non-intervention" and "non-interference" in internal affairs do not relate to economic coercion against Cuba. Those terms, in context, relate to all states' "freedom of trade and navigation," which is mentioned later in that second paragraph, and to the extraterritorial measures described in the third preambular paragraph. Again, the resolution cites none of the traditional declarations concerning economic coercion.

211. *Id.*

d. Positions of Other U.N. Members

During the 1992 voting explanations period, U.N. members took a variety of positions. Some definitely spoke out against U.S. use of economic coercion. For example, the Vietnamese ambassador vehemently denounced the U.S. attempt to subordinate Cuba's will.²¹² The Iraqi ambassador even labeled the embargo a form of aggression.²¹³ These were extreme versions of the sentiments articulated on behalf of the nonaligned²¹⁴ countries by the Indonesian ambassador.²¹⁵ Expressing concern for the suffering of the Cuban people and for Cuban economic development, the Indonesian ambassador explained the nonaligned nations' belief that economic sanctions can "only aggravate" the situation.²¹⁶

Significantly, though not surprisingly, this group of nonaligned states, which condemned the long-standing embargo, is virtually the same group that has supported the series of resolutions dating back to 1983 that call for an end to economic coercion against developing countries.²¹⁷ Their stance on

212. *Provisional Verbatim Record-1992*, *supra* note 162, at 38-42 (statement of the Vietnamese ambassador).

213. *Id.* at 51 (statement of the Iraqi ambassador).

214. The Nonaligned Movement (NAM) originated in 1961, when 25 nations met at the first Conference of Nonaligned Heads of State. ARTHUR S. BANKS, ED., *POLITICAL HANDBOOK OF THE WORLD: 1994-1995* 1077 (1995). Organized largely through the initiative of Yugoslavian President Josip Tito, the NAM initially concerned itself with the accelerating arms race between the superpowers. *Id.* There have been a total of ten conferences since 1961, the most recent of which was in Jakarta, Indonesia, in September, 1992. *Id.* at 1076. The focus of the group has shifted over the years to the advocacy of "occasionally radical solutions" for world economic and other problems. *Id.* at 1077. Thus, in 1973 there were calls for concerted action by "poor nations against the industrialized world." *Id.* The 1992 Conference produced a call for more constructive dialogue between developing and developed nations, but still asked developed nations to give "urgent priority" to establishing "a more equitable global economy." *Id.* at 1077-78.

215. *Id.* at 33 (statement of the Indonesian ambassador).

216. *Id.*

217. Compare 1991 U.N.Y.B. 348 (providing a list of those who voted in favor of the 1991 resolution on economic coercion against developing countries) with BANKS, *supra* note 214, at 1076 (providing a list of members of the Nonaligned Movement). For a list of the eight resolutions on economic coercion against developing countries and, for a description of their content, see *supra* note 124.

One notable addition to the list of nations voting to condemn the long-standing embargo as illegal was the Russian Federation. *Provisional Verbatim Record-1992*, *supra* note 162, at 83-85 (statement of the Russian Federation ambassador). Although the Russian ambassador abstained from voting in 1992, he indicated that, from a "legal viewpoint," Russia did not view economic coercion as a proper means for encouraging observance of human rights or movement

economic coercion has been a constant for at least a decade, well back into the Cold War era.²¹⁸ Thus, their 1992 condemnation of the embargo cannot serve as evidence of any new movement toward a norm prohibiting the use of economic coercion, nor would it change the 1986 I.C.J. opinion in the Nicaragua case.²¹⁹

Angry at the United States for enacting the extraterritorial legislation, the world's economically powerful nations also refused to support the U.S. in the vote.²²⁰ Their reasons, however, were entirely different from those of the nonaligned, developing nations. Voting for the resolution (and against the U.S.), the Canadian delegate specifically stated that his vote did not relate to the dispute referred to in the resolution's title, but was instead intended to express disapproval of the extraterritorial measures of the CDA.²²¹ While avoiding any criticism of the long-standing embargo, the ambassador from the United Kingdom, speaking on behalf of the European Community, also expressed strong opposition to the extraterritorial measures that force third party states to implement foreign policy.²²² He characterized the long-standing embargo as a bilateral measure to be worked out by the United States and Cuba.²²³ Japan explained its abstention simply by expressing an appreciation for the concerns of third party states, while querying whether the resolution could be of any real help in the dispute.²²⁴

These statements of the world economic powers reinforced what was already clear from an examination of the text of the resolution: the 1992 vote provided no evidence of movement toward acceptance of a norm against economic coercion, nor did it provide evidence of any increase in international disapproval of

toward democracy. *Id.* Today, of course, Russia is in a position to receive economic coercion from the United States.

218. See 1983 U.N.Y.B. 412-13 (providing voting records that are virtually identical to the 1991 records on the resolution of the same name).

219. See *supra* notes 89-91 and accompanying text (describing the I.C.J.'s ruling that the U.S. embargo against Nicaragua did not violate the customary law of non-intervention).

220. 1992 U.N.Y.B. 234-35 (providing voting records). Canada and France were the two notable economic powers that voted in favor of the resolution (against the United States), while the remainder of the European Community and Japan simply abstained. *Id.* at 235.

221. *Provisional Verbatim Record-1992*, *supra* note 162, at 86 (statement of the Canadian ambassador).

222. *Id.* at 79-81 (statement of the British ambassador). On behalf of the EC, the British ambassador plainly stated that such measures violate international law. *Id.*

223. *Id.* at 81. The statement added the EC's support for peaceful transition to democracy within Cuba.

224. *Provisional Verbatim Record of the 71st Meeting*, U.N. GAOR, 47th Sess., 71st mtg., at 8, U.N. Doc. A/47/PV.71 (1992) (statement of the Japanese ambassador).

the long-standing embargo against Cuba. The vote simply showed that the world was angered by the recently enacted CDA and its extraterritorial measures.

3. The Resolution of 1993

a. The Cuban Position

In preparation for the vote on November 3, 1993, Cuba renewed its arguments relating to the CDA's extraterritorial measures and to alleged U.S. long-standing economic coercion.²²⁵ One document dealt with extraterritoriality by listing specific international transactions barred by the Cuban Democracy Act.²²⁶ Another document addressed the issue of coercion by describing the embargo's harsh impact on Cuba.²²⁷ And, in order to deprive the United States of any countermeasure justification for the embargo, Cuba challenged the 1992 U.S. claim that Cuba had illegally nationalized U.S. property.²²⁸ Cuba argued that the nationalization had, instead, been legal and that such nationalization was supported by a previous resolution.²²⁹

225. For a detailed presentation of Cuba's 1993 position, including accounts of specific transactions affected by the Cuban Democracy Act and general information about the state of the Cuban economy, see generally *Necessity of Ending the Economic, Commercial and Financial Embargo Imposed by the U.S. Against Cuba: Report of the Secretary-General*, U.N. GAOR, 48th Sess., Agenda Item 30, at 7-16, U.N. Doc. A/48/448 (1993) (Cuba's reply to the Secretary-General's Request for Information, pursuant to the November 1992 Resolution) [hereinafter *Report of the Secretary-General-1992*].

226. *Letter Dated 18 October 1993 from the Permanent Representative of Cuba to the United Nations Addressed to the Secretary-General*, U.N. GAOR, 48th Sess., Agenda Item 30, at 4-10, U.N. Doc. A/48/529 (1993).

227. *Report of the Secretary-General-1992*, *supra* note 225, at 14-15 (citing statistics about the harsh effect that the embargo was having on the Cuban economy).

228. *Letter Dated 9 July 1993 from the Permanent Representative of Cuba to the United Nations Addressed to the Secretary-General*, U.N. GAOR, 48th Sess., Item 30 of the Preliminary List, at 2-13, U.N. Doc. A/48/258 (1993) [hereinafter *Letter Dated 9 July*] (arguing that Cuba's nationalization of U.S. property was not illegal).

229. *Id.* Cuba cited a General Assembly resolution that, though passed amid a great deal of controversy, stated that nations have a right to nationalize upon payment of "appropriate" compensation. *Id.* at 7. Cuba explained that the United States had rejected bona fide offers of compensation and that the real U.S. reasons for maintaining the embargo had nothing to do with the nationalization. *Id.* at 9-13. For two differing assessments of the Cuban offers of compensation, compare Shneyer and Barta, *supra* note 83 (finding the offers quite reasonable) with *Banco Nacional de Cuba v. Sabbatino*, 307 F.2d 845, 861-62 (1962) (stating that the Cuban offer was not adequate or just).

After initially touching on the extraterritoriality issue,²³⁰ the Cuban ambassador's speech presenting the 1993 resolution to the General Assembly dealt at length with Cuban hardship under the embargo and with the transparency of U.S. "pretexts" for maintaining it.²³¹ He emphasized that the simple act of lifting the embargo could bring great assistance to the suffering Cuban people.²³² In closing, he focused on economic coercion, characterizing the vote as fundamental to the U.N. Charter's principles concerning all nations' "right to life, independence, and existence itself."²³³

The General Assembly overwhelmingly adopted the resolution. The number of nations voting in favor of the resolution increased by twenty-nine over the 1992 vote.²³⁴ But again, more significant than the vote tally is an analysis of the text of the resolution and of nations' explanations of their votes.

b. Language of the Resolution

Most of the 1993 text is exactly the same as the 1992 text, with the operative section of the resolution similarly calling for a repeal of laws "referred to in the preamble."²³⁵ Significantly, however, while the preamble again unmistakably refers to the CDA, the 1993 preamble also adds some new elements relating directly to economic coercion and to the long-standing embargo itself.²³⁶ In particular, one paragraph mentions a statement issued by the 1993 Ibero-American Summit concerning the need to eliminate the use of unilateral economic measures for "political purposes."²³⁷ Another new paragraph expresses concern for the "adverse effects" of the embargo on the Cuban population.²³⁸ Thus, while still submitting a resolution that focused on calling for a repeal of the CDA, Cuba succeeded in 1993 in planting a seed of criticism regarding economic coercion and the long-standing embargo.

230. *Id.* at 1.

231. *Id.* at 2-3.

232. *Id.* at 3.

233. *Id.* at 4.

234. See Stanley Meisler, *U.N. Vote Condemns Embargo Against Cuba*, L.A. TIMES, Oct. 27, 1994, at A12. (comparing the voting totals in 1992, 1993, and 1994). The General Assembly adopted the 1993 resolution by the large margin of 88 to 4, with 57 abstentions. *Id.*

235. G.A. Res. 48/16, U.N. GAOR, 48th Sess., Agenda Item 30, at 2, U.N. Doc. A/RES/48/16 (1993).

236. *Id.*

237. *Id.*

238. *Id.*

c. Positions of other U.N. Members

Although the General Assembly supported Cuba on the subtle changes in the resolution, individual nations' explanations of their votes indicated that there had been no significant shift in opinion. In fact, the addition of such language against the embargo cost Cuba the vote of Canada, one of the two major economic powers that had voted for the resolution in 1992.²³⁹ In explaining his 1993 switch to abstention, the Canadian ambassador emphasized that the 1992 resolution had focused solely on the extraterritorial aspects of the embargo.²⁴⁰ Canada was not willing, he said, to express an opinion about the primary embargo, an issue on which it had never commented.²⁴¹ France spoke out to stress that its vote for the resolution was again intended as a denouncement of the illegality of the extraterritorial law.²⁴² The ambassador pronounced, however, that the French vote should "in no way be regarded as political support for Cuba" and its repressive regime.²⁴³ Their positions virtually unchanged since 1992, the representative of the EC²⁴⁴ and the representative of Japan²⁴⁵ again refused to criticize the long-standing embargo.

In sum, the text of the 1993 resolution contained evidence of a subtle attempt by Cuba to tie criticism of economic coercion and the primary embargo to the world's nearly unanimous criticism of the CDA's extraterritoriality. While the 1993 resolution attracted a greater number of votes than did the resolution of 1992, the positions of individual nations remained virtually the same. Most importantly, the positions of the world's economic powers were unchanged.²⁴⁶ Once again, there was no evidence of any post-Cold War movement toward a norm prohibiting the use of economic coercion; nor was there any significant increase in criticism of the long-standing embargo itself.

239. *48th Plenary Meeting-1993*, *supra* note 169, at 10 (statement of the Canadian ambassador).

240. *Id.*

241. *Id.*

242. *Id.* at 12 (statement of the French ambassador).

243. *Id.*

244. *Id.* at 10 (statement of the Belgian ambassador, on behalf of the EC).

245. *Id.* at 13 (statement of the Japanese ambassador).

246. *Cf. Sloan-1988*, *supra* note 102, at 130-131 (stating that a meaningful General Assembly opinion should include the support of those nations whose support is necessary for effective implementation); Schacter, *supra* note 109, at 3 (similarly stating that the value of a General Assembly declaration will be diminished if it is not observed by the states particularly affected).

4. The Resolution of 1994

a. The Cuban Position.

After Cuban representatives fully explained Cuba's position in a document in September 1994,²⁴⁷ the Cuban ambassador presented the 1994 resolution to the General Assembly on October 26.²⁴⁸ First appealing to member nations' right to free trade and navigation,²⁴⁹ he later emphasized Cuban hardship under the embargo²⁵⁰ and Cuban pride in thirty-five years of independence from the United States.²⁵¹ Thus, the bulk of the speech again dealt with the long-standing embargo and economic coercion, closing with a rallying call to "all those who, small though they may be, are striving to defend their independence."²⁵²

b. Language of the Resolution and Positions of Other U.N. Members

Even though the text of the 1994 resolution contained virtually the same message as that of the 1993 resolution,²⁵³ the

247. *Necessity of Ending the Economic, Commercial and Financial Embargo Imposed by the U.S. Against Cuba: Report of the Secretary-General*, U.N. GAOR, 49th Sess., at 4-17, U.N. Doc. A/49/398 (1994) (Secretary-General's report, compiling responses of governments, pursuant to the 1993 resolution). The Cuban statement compiles an extensive list of third states' trade that has been affected by the Cuban Democracy Act, and goes on to describe the cost of the embargo on the Cuban people. *Id.* at 5-17. It also reiterates Cuban arguments about the legitimacy of its nationalizations of property and about the illegality of the U.S. intervention in Cuban affairs. *Id.*

248. *45th Plenary Meeting-1994*, *supra* note 178, at 1-4 (statement of the Cuban ambassador).

249. *Id.* at 1.

250. *Id.* at 2-3.

251. *Id.* at 3 (describing Cuban sovereignty as "a sacred right which we will never renounce").

252. *Id.* at 4.

253. G.A. Res 49/9, 49th Sess., Agenda Item 24, U.N. Doc. A/RES/49/4 (1994). Again, much of the text dealt with extraterritoriality and reiterated the call for a repeal of measures "referred to in the preamble." *Id.* But again, the preamble contained some noteworthy language referring to the primary embargo, beyond the language that unmistakably referred to the CDA. For example, the fourth preambular paragraph takes note of a Decision of the Latin American Economic System, dated June 3, 1994, which plainly calls for a lifting of the embargo. *Id.* The seventh preambular paragraph repeats concerns first stated in the 1993 resolution about the "adverse effects of such measures on the Cuban people." *Id.* Interestingly, the paragraph referring to the Ibero-American Summit, which in 1993 had clearly condemned economic coercion used by one state against another for political purposes, see G.A. Res 48/16, *supra* note 235, only

number of nations voting in favor of the 1994 resolution increased by thirteen over the number from 1993.²⁵⁴ The significant development was that Canada and two European Union (EU) members switched their 1993 abstentions to votes in favor of the resolution.²⁵⁵ Apparently, the fact that the resolution contained some references to the primary embargo, just as it did in 1993, was no longer enough to prevent their votes in support of the resolution. The European Union was now split between abstentions and votes in favor of the resolution.²⁵⁶

Analysis of nations' explanations of their votes reveals a substantial similarity to 1993, with some new signs of change. The Canadian ambassador's explanation emphasized that Canada still objected to the extraterritorial provisions and remained bothered by Cuba's human rights record and democratic development.²⁵⁷ The statement broke new ground, however, by including an opinion that the proper post-Cold War strategy should involve engaging Cuba, not isolating it.²⁵⁸ While the new 1994 statement by the EU representative was quite similar to the 1993 statement, in 1994 the EU representative expressed a measured level of concern for the hardship of the embargo on the Cuban population—decidedly measured, as it was followed by an assertion that the main cause of Cuban hardship is Cuba's

referred to measures that "affect the free flow of trade" in the 1994 resolution. In sum, the resolution's operative section again did no more than call for a repeal of the CDA; but the preamble included noteworthy undercurrents of criticism of economic coercion.

254. Meisler, *supra* note 234 (reporting the overall voting results and the votes of many individual nations). The 1994 resolution was overwhelmingly approved by a vote of 101 to 2, with 48 abstentions.

255. *See id.*. The EU members referred to are Denmark and Luxembourg. *Id.* Note that the name of the European Community was changed to European Union in 1994. THE WORLD ALMANAC AND BOOK OF FACTS: 1995, 844 (Robert Famighetti, ed., 1994).

256. France, along with Belgium, Denmark, Greece, Luxembourg, and Spain voted in favor of the resolution. Great Britain, Germany, Ireland, Italy, the Netherlands, and Portugal abstained. Josh Friedman, *U.S. Embargo of Cuba Scorned in Big U.N. Vote*, NEWSDAY, Oct. 27, 1994, at A15. Russia, accompanied by Ukraine and Belarus, also switched its 1993 abstention to a 1994 vote in favor of the resolution, Meisler, *supra* note 234 (providing Russia's explanation of its 1994 vote, which was substantially similar to its 1993 explanation). 45th Plenary Meeting-1994, *supra* note 178, at 13 (statement of the Russian ambassador).

257. 45th Plenary Meeting-1994, *supra* note 178, at 14-15 (statement of the Canadian ambassador).

258. *Id.* This Canadian criticism seemed to be based on purely political concerns about the best way to bring about reform in Cuba, not on legal principles. Also, some Canadian investors surely have a financial interest in having U.S. dollars flow back into Cuba.

political and economic system.²⁵⁹ Thus, the EU's statement again stopped short of directly criticizing the primary embargo.

Overall, the significant development in the 1994 vote was Canada's shift from simply condemning the controversial CDA provisions to criticizing the long-standing embargo.²⁶⁰ Arguably, the Canadian position may represent the Western seed of a post-Cold War rejection of the legality of economic coercion.²⁶¹ Yet, the Canadian ambassador merely stated a belief about the proper post-Cold War foreign policy strategy and did not speak about any legal norm.²⁶² Thus, in view of the carefully circumscribed statements of the European Union, which decline to even criticize the long-standing embargo, there appears to be precious little fertile Western ground in which such a seed can, at present, take root.

C. *No Significant Movement Toward a Norm Prohibiting Economic Coercion*

Although the United States is suffering unprecedented isolation due to the controversial measures of the Cuban Democracy Act of 1992, the status of a legal norm prohibiting economic coercion remains virtually unchanged. The views of the nonaligned and developing nations have not altered: they have long considered economic coercion to be illegal. On the other hand, developed nations have explicitly stated that their votes protested the CDA's extraterritoriality, not any sort of economic coercion. Canada admittedly changed its position to a degree in

259. *Id.* at 12 (statement of the German ambassador, on behalf of the EU). No doubt, France instigated this criticism of the embargo. A month earlier, French President Mitterand had said that the embargo was unjust. Charles Trueheart, *U.S. Hard-line Stance on Cuba Draws Icy Reviews From Trading Partners*, WASH. POST, Sept. 10, 1994, at A18. The French criticism seemed to be based on a moral, as opposed to a legal, norm. *Id.*

260. Other criticism of the embargo itself was again led by Indonesia, speaking on behalf of the nonaligned nations. *45th Plenary Meeting-1994*, *supra* note 178, at 6. The Indonesian ambassador's 1994 comments concerned "the inapplicability of unilateral economic measures directed against other states for politically motivated reasons." *Id.* Mexico, in voting against the United States for the third year in a row, also stated that pressure by one country on another is not proper. *Id.* at 5-6.

261. In 1993, Norway also spoke out against the use of unilateral sanctions and voted in favor of the Cuban resolution, stating that legitimate sanctions must go through the United Nations. *Id.* at 14. Norway was scheduled to become a new member of the European Union, along with Sweden and Finland, in January 1995, but Norway voted "no" in a November 1994 referendum, and thus remains outside the European Union. Lars Foyen, *Tension Among Nordics After Sweden, Finland Join EU*, REUTERS, Jan. 30, 1995, available in LEXIS, News Library, Curwns File.

262. *Id.* at 14 (statement of the Canadian ambassador).

1994. But from 1991-1994, the EU continued to characterize the embargo as a purely bilateral issue. That EU stance, despite two years of frustration over U.S. refusal to back away from the controversial CDA provisions, strongly indicates that there has been no movement by the world's economic powers toward consensus on a legal norm prohibiting economic coercion.²⁶³

VI. THE UTILITY AND IMPACT OF THE EMBARGO IN LIGHT OF WORLD ECONOMIC CHANGES IN THE POST-COLD WAR PERIOD

Although the legality of the embargo may not have varied in the post-Cold War period, the embargo's utility and impact have been changing. Supporters of continuing the embargo can claim that despite the embargo's lack of success over the past three decades, its efficacy has been restored with the fall of communism.²⁶⁴ As Representative Torricelli pointed out in September 1994, the Soviet Union's massive aid helped to negate the embargo's effects for most of the previous thirty-five years.²⁶⁵ Indeed, data presented in this section shows that the Cuban economy is feeling a renewed post-Cold War pinch. Castro, however, is also beginning to undermine the effectiveness of the U.S. embargo by opening up the economy to other sources of foreign trade and investment.

A. Economic Pinch

Soon after communism began to crumble in Eastern Europe, the Soviet subsidy to Cuba was cut and aid was scaled back. In 1990 Castro was forced to institute his "special period in time of peace" to ration food, fuel, and electricity.²⁶⁶ In Cuba today, there are shortages of everything from food to soap, and power blackouts are common.²⁶⁷ In a visit to Cuba in September 1994,

263. Like the EU, the world's other economic powers show no such movement. Japan's statements in the General Assembly have never even come close to criticizing the embargo. See *supra* text accompanying notes 224, 245. Canada's statements, though critical, do not involve legal criticism. See *supra* text accompanying notes 257-62.

264. Such a rebirth is important, because embargoes normally have their greatest impact immediately after they are imposed. DOXEY, *supra* note 48, at 110-111 (citing J. Galtung, *On the Effects of International Economic Sanctions with Examples from the Case of Rhodesia*, 19 WORLD POLITICS 409 (1967)).

265. Torricelli, *supra* note 9.

266. See *Fact Sheet: Cuba*, *supra* note 21, at 107 (discussing various shortages); see also FRANKLIN, *supra* note 26, at 251 (providing a chronology of events in Cuba).

267. *Planning Helps Ease Travel Effort*, *supra* note 76.

former U.S. Senator and presidential candidate, George McGovern remarked that Cuba was in the worst shape that he had seen at any time during the past twenty years.²⁶⁸

A great deal of the problem can be traced directly to Cuba's loss of Socialist bloc subsidies of its sugar economy. In 1989, the socialist Council for Mutual Economic Assistance (COMECON) bought Cuban sugar at the price of 642 pesos per ton while nations with market economies paid 214 pesos per ton.²⁶⁹ Given the high volume of COMECON purchases, the average price that Cuba received for its sugar in 1989 was 550 pesos per ton.²⁷⁰

After premium prices and, to a lesser extent, volume purchases²⁷¹ were phased out, the impact on the Cuban economy began to snowball. Cuba's overall import capacity was cut from 8.1 billion pesos in 1989 to 2.2 billion pesos in 1992.²⁷² Since intermediate and capital goods made up ninety percent of Cuban imports in 1989, there were no consumer goods to sacrifice. With a shortage of inputs—including fuel, fertilizer, herbicides, and spare parts—Cuban sugar production itself dropped from 8.2 million tons in 1989/90 to four million tons in 1993/94.²⁷³ Poor

268. Micheline Maynard, *Cuba Seeks Partners/U.S. Firms Ready to Tap Opportunity*, USA TODAY, DEC. 27, 1994, at 1B.

269. Pollitt and Hageberg, *supra* note 22, at 565 (providing statistics about the Cuban sugar economy). Premium prices in 1987 meant that one ton of Cuban sugar brought Cuba 4.5 tons of Soviet crude oil; by 1992, one ton of sugar brought only 1.8 tons of oil. *Id.*

270. *Id.*

271. Central and Eastern European purchases declined significantly, from 1.2 million tons in 1989 to 0.16 million tons in 1992. *Id.* The larger ex-Soviet market, however, remained essentially steady in terms of volume, importing 3.4 million tons in 1992. *Id.* The real impact on Cuba was the elimination of the highly subsidized price paid by COMECON purchasers. *Id.* Indeed, because of poor harvest, Cuba was unable to maintain the agreed level of deliveries to Russia under a 1994 deal of sugar for oil. Killen, *supra* note 39. Thus, Russia temporarily halted the return flow of oil. *Id.* By 1995, the Soviets had again begun to supply oil to Cuba, upon Cuba's agreement to make up the sugar deficit in early 1995. *Id.*

272. Pollitt and Hageberg, *supra* note 22, at 565. The U.S. State Department similarly emphasizes that Cuban foreign trade had fallen 75% since the end of the Soviet Union's six billion dollar annual subsidy. *Update-1994*, *supra* note 1, at 752; see also Maynard, *supra* note 268 (reporting that Cuban exports have dropped from \$6.5 billion in 1985 to \$1.7 billion in 1994, with imports dropping from \$8.8 billion in 1985 to \$2.3 billion in 1994).

273. For the figures for 1989/90 through 1992/93, see Pollitt and Hageberg, *supra* note 22, at 565-67. For the 1993/94 figures, see Frances Kerry, *Cuba Says Sugar Industry Open for Foreign Capital*, REUTERS'S EUR. BUS. REP., Oct. 31, 1994. Although the major drop-off in production was from seven million tons in 1991/92 to 4.2 million in 1992/92, Pollitt and Hageberg, *supra* note 22, at 565-66, there was still a decline from 4.2 million to the four million ton level in 1993/94. Kerry, *supra*.

management of the scarce inputs worsened matters.²⁷⁴ The 1993/94 level of production represented the worst harvest since 1918.²⁷⁵ Experts predict another dismal four million ton harvest for 1995.²⁷⁶ As a result, in 1994, Castro announced that the sugar industry would open to foreign investment, with the goal of boosting output back up to six or seven million tons.²⁷⁷

Just as proponents of the Cuban Democracy Act had hoped, the absence of communist bloc subsidies has sent the Cuban economy into a terrible tailspin. Overall, the Cuban economy has declined forty to fifty percent since 1990, after a mere three percent decline during the 1980s.²⁷⁸ Unemployment rates are thirty percent or higher.²⁷⁹ These numbers attest to the hardship that George McGovern witnessed during his September 1994 visit.²⁸⁰ In 1994 the Cuban economy showed no real growth and seemed to hit bottom, yet a small glimmer of hope appeared as further declines were avoided.²⁸¹

B. Foreign Investment in Cuba

The problem for embargo proponents is that Castro has begun serious economic reform. That reform has gone beyond internal changes, such as allowing private farmers markets²⁸²

Carlos Lage, the Cuban Vice-President in charge of economic reforms, reported that the harvests of 1992/93 and 1993/94 had been conducted with just 22% of the technical input of previous years. *Id.*

274. Pollitt and Hagelberg, *supra* note 22, at 566.

275. *Update-1994*, *supra* note 1, at 752.

276. *The Doors Inch Open In Castro's Cuba*, *supra* note 2, at 45.

277. *Foreign Investment Helping, Castro Says*, L.A. TIMES, Feb. 9, 1995, at D4 (discussing Castro's new attitude about the need for foreign investment throughout the Cuban economy).

278. A December 1994 report of the U.N. Economic Commission on Latin America states that the Cuban economy contracted by 42% from 1990 to 1993. *Cuba's Economy Hits Bottom, May Be Recovering-U.N.*, *supra* note 21. Maynard, *supra* note 268, reports that Cuban GNP has plunged by 50% since 1990.

279. Maynard, *supra* note 268 (reporting that adult unemployment is 30%). The State Department claims that underemployment and unemployment may be as high as 40%. *Update-1994*, *supra* note 1, at 752.

280. See note 268 and accompanying text.

281. *Cuba's Economy Hits Bottom, May Be Recovering-U.N.*, *supra* note 21 (presenting figures from the U.N. Economic Commission on Latin America). Tourism, mining, and construction all showed growth. *Id.* Tourism was able to overtake the sugar industry as Cuba's greatest source of income, since sugar and agriculture posted declines. *Id.*

282. Micheline Maynard, *Farmers' Markets Are Big Success/Relaxed Rules Ease Shortages*, USA TODAY, Dec. 27, 1994, at 2B. As of October 1994, farmers were permitted to sell part of their produce at deregulated prices at these farmers markets instead of being forced to sell all to the state. See *Foreign Investment Helping, Castro Says*, *supra* note 277. In an interview published in February 1995, Castro said that about 20% of farm production has since been sold at the

and, over the past two years, has involved opening up all industries on the island to foreign investment.²⁸³ Castro himself has come to an understanding that foreign investment is the only thing that can help revive his faltering economy.²⁸⁴ Thus, in January 1995, Cuban Vice-President Lage even spoke at the Davos World Economic Forum—a gathering of top business and political leaders, which Cuba would have scorned just a few years ago—to encourage foreign investors to partake in Cuba's bright future.²⁸⁵

An increasing number of foreign investors seem to agree with Mr. Lage's positive assessment of Cuba's future.²⁸⁶ Companies from Mexico,²⁸⁷ Canada,²⁸⁸ Spain,²⁸⁹ Great Britain,²⁹⁰ France,²⁹¹

farmers markets. *Id.* He estimated that the amount of goods sold on the deregulated market could amount to as much as 30-40% in the future, but he emphasized the need for the state to keep a portion to distribute it evenly. *Id.*

283. See generally, *Foreign Investment Helping, Castro Says, supra* note 277 (presenting the Cuban leader's views on reform).

284. *Id.*

285. Robert Evans, *Cuba Bids for Foreign Investment*, REUTERS'S EUR. BUS. REP., Jan. 29, 1995. The World Economic Forum (WEF) is a private sector club that was started in 1971 by Swiss business school professor Klaus Schwab. Catherine Ong, *More Than Just Another Meeting at Top Guns*, BUSINESS TIMES, Jan. 25, 1995, at 6. Mr. Schwab originally hoped to get European business leaders together to learn about the advanced skills of U.S. management. *Id.* This intellectual summit has grown so much that the gathering at Davos, Switzerland on January 26-31 involved 200 ministers of cabinet rank, including 30 heads of states, plus 850 world business leaders representing companies with annual sales of \$4 trillion. Catherine Ong, *A Marketplace for Ideas That Shape the World*, BUSINESS TIMES, Jan. 25, 1995, at 6. Participants, who may attend by invitation only, set priorities for government and business for the upcoming year. *Id.* Among those invited to participate in 1995 were U.S. President Clinton (via live satellite), U.N. Secretary-General Boutros Boutros-Ghali, filmmaker Oliver Stone, media tycoon Rupert Murdoch, and various other international bankers and entrepreneurs. *Id.*

286. A recent report from the Economist Intelligence Unit (EIU), a division of the London publisher of *The Economist*, claims that investment opportunities in Cuba could turn into a "gold rush." Charles Lunan, *Foreign Firms Pour Money Into Cuba, Book Says; But Miami Writer Finds Little of Interest to U.S. Investors*, SUN-SENTINEL (Fort Lauderdale), Jan. 27, 1995, at 8B, available in LEXIS, News Library, Curnws File (describing the EIU report); *Cuba is Opening for Business*, BUSINESS WIRE, Jan. 26, 1995 (describing the EIU report).

287. Mexico has been the key investor, acquiring interests in Cuban industries including telecommunications, cement, tourism, and oil refining. *Foreign Investment Helping, Castro Says, supra* note 277.

288. Six Canadian firms are currently involved in a joint venture, formed in 1993, for mining Cuban nickel. *Id.*; see also Reese Erlich, *Push To Lift Embargo Gains Momentum in Some Circles*, CHRISTIAN SCI. MONITOR, June 23, 1993, at 9 (discussing the start-up of the Canadian joint venture). More recently, Canadian chemical-maker Sherritt and brewer Labatt have invested in Cuba. Lunan, *supra* note 286.

289. By 1993, a Spanish tourism company had already invested \$78 million in three Cuban hotels. Erlich, *supra* note 288, at 9. Today that investment

and Australia²⁹² have all begun to invest in Cuba and to support its development. Some of the foreign governments themselves have begun to reach out to Cuba with aid. Speaking out against the embargo strategy, Canada agreed to grant Cuba one million Canadian dollars (U.S.\$720,000) in aid in June 1994.²⁹³ Similarly, after French President Mitterand criticized the embargo as "unjust,"²⁹⁴ France agreed in January 1995 to increase the amount of export credits available to Havana to 750 million francs (nearly U.S.\$140 million).²⁹⁵ Another source of aid is Russia, which continues to supply Cuba with \$200 million per year to maintain an electronic spy station on the island.²⁹⁶

Great Britain also signed an Investment Promotion and Protection Agreement with Cuba in January 1995.²⁹⁷ In the agreement, which protects existing and future investment in Cuba, Britain pledged advice and monetary assistance for small-scale development projects.²⁹⁸ At the signing, the British Minister of Trade and Technology declared Britain's intent to help Cuba achieve a transition to a market-oriented economy.²⁹⁹ By early February 1995, a large British trade delegation had traveled to Cuba.³⁰⁰ According to reports, a British sugar trade house agreed

seems wise, since tourism overtook sugar in 1994 to become the biggest income-generating industry for Cuba. See *Cuba's Economy Hits Bottom, May Be Recovering-U.N.*, *supra* note 21.

290. The British currently have two firms, Premier and British Borneo, involved in oil exploration, while an Anglo-Dutch firm, Unilever, set up a joint venture in 1994 with the Cuban state-owned soap and detergent firm. Frances Kerry, *Cuba, Britain Enthusiastic About Business Prospects*, REUTERS EUR. BUS. REP., Feb 8, 1995.

291. Lunan, *supra* note 286 (noting the recent investment of the French distiller Pernod Ricard).

292. *Id.* (noting the recent investment of Australia's Western Mining).

293. Craig Turner, *Canada Ends Moratorium with \$1 Million in Aid to Cuba*, L.A. TIMES, June 21, 1994 at A4; *Canada Will Restore Aid to Cuba*, XINHUA NEWS AGENCY, June 20, 1994.

294. See Trueheart, *supra* note 259 (discussing Canada's differences with U.S. policy).

295. *Cuba's Lage Reaches Economic Agreements in France*, REUTER EUR. BUS. REP., Jan. 31, 1995. France is Cuba's biggest European trading partner. *Id.*

296. In February 1995, the U.S. Congress began to seriously consider cutting aid to Russia because of the \$200 million in military aid to Cuba. See Juan J. Walter, *One-Two Punch Hits Russian Aid Plan*, USA TODAY, Feb. 10, 1995, at 4A; see also, Daniel Williams, *Helms Offers Tough Anti-Castro Bill*, WASH. POST., Feb. 10, 1995, at A31.

297. *UK, Cuba Sign Investment Promotion, Protection Deal*, REUTERS, January 30, 1995.

298. *Id.*

299. *Id.*

300. British politician Baroness Young—chair of the recently launched "Cuba initiative"—led a 40-member trade delegation to visit Castro to discuss

to finance much-needed inputs for Cuba's troubled sugar industry.³⁰¹

Many U.S. investors would like to join their Canadian, Latin American, and European counterparts. Although U.S. firms cannot invest in Cuban businesses at this point, the potential investment jackpots in the Cuban sugar³⁰² and tourism³⁰³ industries have naturally sparked interest. Former Chairman of Chrysler Motors Corporation, Lee Iacocca, now in the entertainment business, even traveled to Cuba in July 1994 for investment talks with Castro.³⁰⁴

Further, Cuba needs everything from infrastructure and agricultural equipment to everyday consumer and food products.³⁰⁵ U.S. firms know that once the embargo is lifted, assistance will flow to Cuba to remedy the current lack of cash.³⁰⁶ Thus, sixty-nine U.S. firms have signed letters of intent with Cuba to give them an inside track on Cuban investment when the embargo ends.³⁰⁷ Others are investing now in non-Cuban industries that promise to flourish once the embargo is lifted.³⁰⁸ Not surprisingly, some are growing impatient and are lobbying Congress for change.³⁰⁹ Some commentators believe that U.S.

developing closer ties with the British private sector. Kerry, *supra* note 290. Cuban officials were encouraged by British interest in tourism and mining. *Id.*

301. *Id.* (the company mentioned was E.D. and F. Mann).

302. The agricultural firm Archer-Daniels-Midland is reportedly ready to step into Cuban sugar cane production. Maynard, *supra* note 268.

303. Carlson, the company behind Radisson Hotels and T.G.I. Friday restaurants, is actively lobbying Congress to lift the embargo. *Id.* Peter Blyth, executive vice-president of Carlson, predicts that Cuba may quickly become a top destination of U.S. travelers. *Id.*

304. See *U.S. Firms, Cuba Turn an Eye Toward Ending 30-Year Freeze; But the Clinton Administration's Insistence on Reform Makes Imminent Change Unlikely*, L.A. TIMES, Nov. 3, 1994, at D5; and Maynard, *supra* note 268.

305. Jim McTague, *Castro Watch: U.S. Business Fondly Looks Toward Castro's Future*, BARRON'S, June 6, 1994, at 40 (noting that products of all kind will be needed on the island); see also Maynard, *supra* note 268 (providing a list of over 25 U.S. companies that Cuba is eager to have on the island).

306. McTague, *supra* note 305.

307. Maynard, *supra* note 268; see also Kerry, *supra* note 273 (discussing U.S. business letters of intent in Cuba).

308. Sara Callian, *U.S. Investors Are Catching Cuba Fever, But Some Pros Advise Playing It Cool*, WALL ST. J., Aug. 31, 1994, at C1. One new mutual fund is attracting interest as it trades on the NASDAQ stock market under the name of CUBA. *Id.* The fund has investments in firms like Royal Caribbean Cruises, Ltd., that could profit from a lifting of the embargo. *Id.* Other investors have shown interest in companies in Florida and Puerto Rico that could easily branch out into Cuba. *Id.* The article notes, however, that some experienced investors believe that the interest in Cuba is premature. *Id.*

309. U.S. entrepreneurs met with Rep. Charles Rangel (D-N.Y.) during the spring of 1994 to express concern about foreign inroads into the Cuban market.

businesses will be the force for change in the embargo policy.³¹⁰

C. *The Big Picture*

Today, the Cuban economy remains in terrible shape. Although a total of \$1.5 billion of foreign investment flowed to Cuba in 1994, it was limited to only a few sectors and, realistically, may not be enough to revive the economy.³¹¹ Despite the rise in foreign investment, domestic dissatisfaction is still a problem for Castro. When frustration mounted over shortages of food, electricity, and public transportation,³¹² Castro faced, on August 5, 1994, the largest public demonstration since he took power in 1959.³¹³ In response, Castro has deployed increased numbers of uniformed and plainclothes police officers.³¹⁴ In addition, he has pressed forward with further economic reforms.³¹⁵

McTague, *supra* note 305. For further examples of lobbying by U.S. firms to lift the embargo, see Maynard, *supra* note 268 (Carlson hotel/restaurant vice-president lobbying Congress); Erlich, *supra* note 288 (describing, as of June 1993, an organization of 50 small- and mid-sized businesses, called the Association for Free Trade With Cuba).

310. For a well-reasoned opinion that business interests within the United States will ultimately force a change in U.S. policy, see Saul Landau and Diana Starratt, *Cuba's Economic Slide*, MULTINATIONAL MONITOR, Nov. 1994, at 12. See also Maynard, *supra* note 268 (noting that U.S. businesses helped to convince U.S. officials to open relations with China, Russia, North Korea, and, most recently, Vietnam).

311. *The Doors Inch Open In Castro's Cuba*, *supra* note 2, at 45.

312. See *supra* Part VI-A.

313. See notes 2-6 and accompanying text. The August 5th demonstration is considered the worst since the 1959 revolution. *Update-1994*, *supra* note 1, at 752; *The Doors Inch Open in Castro's Cuba*, *supra* note 2, at 45. Hundreds or possibly thousands of youths in Havana threw stones at police and ransacked stores. Tim Golden, *A Year After Boat Exodus, Threat to Castro Dissipates*, N.Y. TIMES, Aug. 15, 1995, at A1.

314. Golden, *supra* note 313. Thousands of police were stationed at the site of the 1994 riot as the anniversary was commemorated with a march organized by Castro. *Id.* In the summer of 1995, Castro's deployment of an increased police presence contributed to a more subdued atmosphere in Cuba. See *id.* The desperation of 1994 had "increasingly given way to resignation." *Id.* Additionally, Castro's efforts at reform, see *supra* Part VI-B, have led to some visible improvements, such as farmers markets and shorter lines for public transportation, and have led Cuban officials to boast that the worst is over for the economy. *Id.* Whether any long-term political stability and economic improvement will result remains to be seen.

315. See *Castro Takes One More Step Toward Capitalism*, ECONOMIST, Sept. 9, 1995, at 45 (discussing a new Cuban law, passed September 5, 1995, which allows foreigners to own 100% of enterprises in Cuba, abolishing the former 50% limit). The article, however, notes that a "big reason" for the new law is that foreign investment, estimated by Cuba at less than \$2 billion, has been less than Castro would have liked. *Id.* U.S. investment remains the key. *Id.* at 45-46.

Will foreign investment eventually turn the Cuban economy around and allow Castro to consolidate power? Will U.S. businesses successfully lobby for a change in Cuban policy? Or will social unrest build and force Castro to capitulate? Only time will provide the answers to these questions. What is clear is that U.S. policy makers are growing increasingly frustrated by foreign economic support of the Castro regime³¹⁶ and are feeling pressure at home from U.S. businesses to lift the embargo.³¹⁷

VII. CONCLUSION

Contrary to this writer's initial hypothesis and to indications in the popular press,³¹⁸ the recent U.N. votes concerning the embargo provide no evidence that the post-Cold War international community has moved toward a consensus on a norm prohibiting the unilateral use of economic coercion. Given the largely positive nature of international law,³¹⁹ one explanation for this reality is simple: as long as inequality in terms of economic power persists, the economically powerful have little incentive to sign a treaty or engage in state practice that explicitly recognizes such a norm.³²⁰

316. In September 1994, Senator Bob Dole (R-Kan.) complained that the United States is not going to be able to bring down Castro without some international cooperation. Trueheart, *supra* note 259. Senator Dole specifically criticized Canada for its lack of cooperation. *Id.* On February 9, 1995, Senator Jesse Helms (R-N.C.)—Chair of the Foreign Relations Committee—proposed legislation to reduce U.S. aid to Russia by the \$200 million that it currently sends Cuba in military aid. See *Helms Offers Tough Anti-Castro Bill*, *supra* note 296. In January 1995, Representative Peter Deutsch (D-Fla.) demanded that legislation to aid Mexico through its urgent financial crisis be tied to an ending of Mexico's trade relations with Cuba. William Scally, *Focus: Mexico Aid Plan Said in Trouble*, REUTERS, Jan. 28, 1995; see also Bill Montague and Juan Walter, *Feuding May Stall Loans to Mexico*, USA TODAY, Jan. 19, 1995, at 1B (discussing objections to the loan package).

317. See *supra* note 302-10 and accompanying text.

318. The initial hypothesis was that the post-Cold War international community, feeling more safe and secure, might be moving toward agreement on a norm prohibiting the use of economic coercion. For a discussion of the press' treatment of the recent U.N. activity, see *supra* note 206.

319. See *supra* note 84 (discussing the dominance of positivism in international law today).

320. Cf. H.L.A. HART, *THE CONCEPT OF LAW* 195 (2ND ED. 1961) (explaining that the given fact of approximate equality among individuals makes obvious to those individuals the necessity of engaging in a system of law and morality); *id.* at 198 (explaining that inequality among individuals results in agreement on only minimal rules). It follows from Hart that when there is inequality among individuals, as there is in the international arena, the stronger will not as readily perceive the necessity of engaging in a system of law and morality. Hart hints, in his 1961 publication, that the traditional inequality in the international arena may be changing. *Id.* at 195. But, the very fact that in 1995 economic coercion

The numerous commentators who have endeavored to simply define illegal economic coercion seem to overlook that positive law reality, which is behind the creation of international legal norms.

Recent events surrounding the embargo indicate that rather than legal changes, the end of the Cold War has brought important economic changes, including foreign investment and trade opportunities in previously inaccessible markets like Cuba. Of course, Castro's new economic reforms represent no personal change of heart.³²¹ Deprived of the Soviet bloc's subsidies, Castro is simply grasping for an alternative lifeline. Having been abandoned, Castro is actually in the same position he faced in 1960. But this time his alternative lifeline is based on capitalism and free markets, instead of on centralized economic planning. Just as *perestroika* preceded the collapse of the Soviet Union, so will Castro's grudging economic reforms likely erode his power and lead, ultimately, to major political change in Cuba.³²²

With respect to U.S. foreign policy toward Cuba, the new economic opportunities there promise to serve as one of the main engines of change. U.S. businesses are growing increasingly restless watching the competition enter the Cuban market. U.S. policy makers must acknowledge that if foreign investment continues in Cuba, continuing the embargo may become contrary to U.S. economic interests.

Thus, what the post-Cold War standoff between the United States and Cuba teaches is that underdeveloped nations stand to benefit much more from the pursuit of international free trade than from the pursuit of international legal norms prohibiting economic coercion.

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still harshly impacts developing countries is strong evidence that significant inequality remains.

321. As Castro made clear in an interview published in February 1994, he is opening up the economy, not because he is a capitalist, but because Cuba "would not have had another way out without this participation of foreign capital." *Foreign Investment Helping, Castro Says, supra* note 277. His iron-fisted control of human rights and democratic freedoms has not changed. See *U.S. Firms, Cuba Turn an Eye Toward Ending 30-Year Freeze, supra* note 304.

322. Cf. *Castro Takes One More Step Toward Capitalism, supra* note 315 (hinting that Castro, like China in recent days, may soon experience the problem of "keeping capitalist economics out of communist politics.").

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