Economic Aggression & Self-Defense in International Law: The Arab Oil Weapon and Alternative American Responses Thereto

Paul Stephen Dempsey
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** Attorney-Advisor, Interstate Commerce Commission, Washington, D.C.; A.B.J., University of Georgia, 1972; Free University of Brussels, 1974; The Hague Academy of International Law, 1974; J.D., University of Georgia, 1975. The author is presently enrolled as a Master of Laws candidate in International Law at George Washington University. The opinions expressed herein are those of the author only, and should by no means be construed as opinions held by the Interstate Commerce Commission, or by any other governmental agency.
I. INTRODUCTION

Of all the conflicts on the face of this small planet [having a possibility of escalation into global warfare], the region that has the greatest potential of leading the world's major powers into direct (and possibly nuclear) confrontation is the Middle East. Since World War II, a sea of blood has washed the sands of Sinai, Golan, Gaza and the West Bank in a continuing conflict which is ostensibly religious, unquestionably territorial and arguably ad infinitum. The inability of both Jews and Arabs to peacefully determine the future of Palestine has led to a deepening sense of insecurity in the entire world community — fears which become more acute as the conflict draws the Great Powers toward a direct confrontation.\(^1\) In recent years, restraint on the

part of industrialized nations entered the arena of economics as Arab nations directly confronted the West with devastating embargoes on the export of petroleum and incredible increases in the price of oil. The aggressive manipulation of the region's primary natural resource, petroleum, has had such a significantly detrimental economic effect upon the world’s industrialized nations as to raise the possibility of military intervention.

October of 1973 brought war again to the Middle East, with an Arab military assault upon Israeli forces on Yom Kippur. That same month, the economic stability of the world's industrialized nations (which had theretofore grossly underestimated the vast economic significance of the Arab oil weapon) was severely threatened when Arab members of the Organization of Petroleum Exporting Countries (OPEC) utilized oil as a political weapon, and embargoed exports of petroleum for five long months. Another substantial economic blow was struck by OPEC with massive increases in the price of oil, from $2.10 per barrel on October 1, 1973, to well over $10.00 per barrel today.

This note shall attempt to provide an analysis of the international legal implications of the Arab oil embargo of 1973-74, and the entire range of retaliatory responses which the United States might conceivably employ should a future embargo of petroleum be initiated. The first portion of this note will endeavor to analyze the question of whether the Arab oil embargo was a legal employment of economic force. The latter portion of this posed Solution, 4 Int'l. Law. 379 (1970); Bassiouni & Fisher, The Arab-Israeli Conflict — Real and Apparent Issues: An Insight into its Future From the Lessons of the Past, 44 St. John's L. Rev. 399 (1970); Dinstein, The Legal Issues of "Para-War" and Peace in the Middle East, 44 St. John's L. Rev. 466 (1970).

2 See Paust & Blaustein, The Arab Oil Weapon — A Threat to International Peace, 68 Am. J. Int'l L. 410 (1974), who argue, "The Arab strategy constitutes the deliberate employment of an economic instrument of coercion (the oil "weapon") against other States and peoples in order to place intense pressure upon their freedom of choice. Although this strategy is primarily dependent upon the use of an economic instrument of coercion, the full dimension of the coercive process has involved the interrelated use of diplomatic and ideological instruments as well as the coordinate use of military forces against the State of Israel. As such, the Arab oil embargo is in violation of international law, as formulated in the United Nations Charter and key supporting documents." Id. at 412. "The United Nations, for example, could declare that there has been a violation of those provisions dealing with the use of coercion, the promotion of friendly relations, the promotion of self-determination, the promotion of equal rights of nations large and small, the promotion of social progress and better standards of life in larger freedom, the peaceful settlement of disputes, and the maintenance of international peace and security. In certain situations, the use of any economic coercion could constitute a form of 'economic aggression.' And where the impact of economic coercion upon the target group...
article will attempt to determine what types of American retaliatory measures would be justifiable under existing principles of international law in response to a future Arab oil embargo and the resultant economic strangulation which could conceivably result.

II. THE FACT SITUATION: STRANGULATION AND THE ARAB OIL WEAPON

A. The Nation-State Petroleum Cartels: OPEC & OAPEC

Abderrahman Khene, the former Secretary-General of OPEC, has stated that the cartel was created "as a means of self-defense" against unilateral price decisions made collectively by privately owned multinational oil companies with respect to the natural resources of its member States. Prior to 1960, these international corporations held almost absolute control over both the flow and the price of oil.

In 1948, the posted price of oil was established by the companies at $2.17 per barrel. This price was gradually and unilaterally increased to $12.65 per barrel.

In 1973, the oil embargo caused the price to rise to $11.65 per barrel. This price increase resulted in intense fear or anxiety (not at all demonstrable in this case), the use of economic coercion could constitute a form of impermissible terrorist strategy." Id. at 413, 414. See contra, Shihata, Destination Embargo of Arab Oil: Its Legality Under International Law, 68 AM. J. INT'L L. 591 (1974), who asserts, "Far from being a 'weapon for blackmailing the West' or a 'threat to international peace'; it has been employed as an instrument for the respect and promotion of the rule of law in an area of international relations where such a rule has long been forsaken for the rule of superior military force. In either use of that instrument, Arab oil-exporting countries were in fact following the steps of a great number of other States which have used their export regulations to further their foreign policies. Only the objective of the Arab States seems to have been more legitimate. The Arab States took that measure not to weaken unfriendly countries but merely to discourage third countries from violating their obligations of neutrality toward them and from continuing their encouragement of, or their acquiescence in, an illegal situation." Id. at 625, 626.

Certainly, legal factors should not be the sole determinant of policy-making in any area of political importance, any more than military, economic, or other factors ought to be the sole determinant. Legal issues should, however, be an integral part of the decision-making process. Ehrlich, The Legal Process in Foreign Affairs: Military Intervention — a Testing Case, 27 STAN. L. REV. 637, 641 (1975).

OPEC consists of the following 12 States: Algeria, Ecuador, Iran, Iraq, Indonesia, Kuwait, Liberia, Nigeria, Qatar, Saudi Arabia, United Arab Emirates and Venezuela. Canada is the only major Western exporter which is not an OPEC member. The dozen OPEC nations account for 85 percent of all the oil which moves in foreign commerce. These countries produce 54 percent of all the oil in the world and hold 64 percent of the earth's currently proven reserves. OPEC is rapidly becoming the world's most powerful cartel, controlling the price and supply of a commodity which is the life blood of industrialized societies, and vital to food production. OPEC's Oil and Money Machine: How It Works, U. S. NEWS & WORLD REP., Oct. 28, 1974, at 37, 38.
ally reduced by the oil companies to $1.80 by August of 1960. The controlling multinational corporations asserted that these reductions were required because of excessive world supply and a need to remain competitive in Japanese and European markets. On the other hand, the oil-producing nations viewed these price reductions as a threat to their own economic independence and development, inasmuch as the taxes and royalties imposed upon the posted price had previously been their principal sources of income.5

Thus, OPEC was founded in 1960. Its initial purposes were: (a) to reverse the price reduction which the controlling corporations had instituted as a result of overcapacity;6 and (b) to defend and stabilize the oil price structure which then existed.7 It was originally established as a movement de resistance against arbitrary and unilateral decisions by the major oil companies. It exists today as an association of nations dedicated to the protection of their national interests in the production and exportation of oil.8

OPEC was viewed by its members as an organization having economic goals. Following the Arab-Israeli War of 1967, several Arab States felt that an additional organization should be created which would employ petroleum resources as a political weapon to achieve Arab goals vis-à-vis Israel. Consequently, the Organization of Arab Petroleum Exporting Countries (OAPEC) was created in 1968.9

OAPEC was established to enable the oil-producing nations to present a united front to both the multinational petroleum corporations and the consuming nations. Its politico-economic nature was characterized by Saudi Arabian Oil Minister Baki

7 A study for the special committee of the U.S. House Banking and Currency Committee concluded that the price cuts of 1959 and 1960 imposed by the oil companies triggered the formation of OPEC. OPEC's Oil and Money Machine: How it Works, U. S. NEWS & WORLD REP., Oct. 28, 1974, at 37.
8 Amuzegar, OPEC in the Context of the Global Power Equation, 4 DEN. J. INT'L & POL'Y 221 (1974). The history and development of OPEC is analyzed in Mirvahabi, Claims to the Oil Resources in the Persian Gulf: Will the World Economy Be Controlled by the Gulf in the Future? 11 TEX. INT'L L. J. 75 (1976). Recent dissension by certain OPEC nations over what the price of petroleum should be has created severe economic and political strains within the organization. See The Strain on OPEC, NEWSWEEK, Jan. 24, 1977, at 46.
9 Supra note 5, at 619.
Yamini as “making oil a genuine weapon to serve the interest of the producing countries and the Arab countries in general.”

B. The Impending Crisis

The United States government could not reasonably contend that the oil embargo of 1973 was an entirely unforeseen *modus operandi* of the Persian Gulf States. The short-lived embargo placed on shipments of petroleum to the United States during the Six-Day War\(^\text{11}\) should have been ample warning for OAPEC’s action at Kuwait.

Typical of the rhetoric produced by Arab leaders prior to the implementation of the embargo was this declaration made in an international seminar on “Oil as a Weapon” which was held in Baghdad during November of 1972:

Arab oil can and should be used against the imperialist aggression and occupation, for the liberation of Arab occupied territory and the restoration of the national rights of the Palestinian people, particularly the right of self-determination.\(^\text{12}\)

In a study prepared prior to the October 1973 embargo for the U.S. Senate Committee on Interior and Insular Affairs, it was expressly foreseen that:

The growing proportion of total U.S. energy supply coming from foreign sources, or from particular regions, blocs or countries, magnifies the potential impact on the U.S. economy from a variety of contingencies including wars or international political confrontations and insurrection or sabotage in the producing regions. Moreover, the recent effectiveness of the cartel of petroleum exporting countries and explicit threats by many of them, have raised the chilling possibility of a general or selective embargo by the Organization of Petroleum Exporting Countries (OPEC), all the Arab countries, or some other large bloc of exporters to enforce their economic or political demands. To offset or deter any of these contingencies, the

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\(^{11}\) Boorman, *supra* note 10, at 207. That effort lasted from June 4 to August 29, 1967, and was aborted due to the tremendous loss of revenues to Arab oil-producing States and the negligible effect upon the United States. However, in 1973, increased demand by consuming States and effectively concerted action which precluded most transshipments, combined with the unavailability of alternative sources in required quantities, operated to make the oil embargo a highly effective political and economic weapon. *Id.* at 207-208.

United States currently has neither a significant reserve of producing capacity relative to the current or expected volume of imports (as it had during earlier Middle East crises) nor significant oil storage capacity.\(^\text{13}\)

In August of 1973, King Faisal of Saudi Arabia emphasized that although his government did not want to "place any restriction on our oil exports to the United States . . . America's complete support of Zionism against Arabs makes it extremely difficult for us to continue to supply U.S. petroleum needs and even to maintain our friendly relations with the United States."\(^\text{14}\)

C. Yom Kippur and the Arab Oil Embargo: RIP

On October 6, 1973, a number of Arab States launched an armed attack upon Israeli forces situated in territory which had been seized by Israel during the Six-Day War of 1967.\(^\text{15}\) Within 24 hours, the Executive Committee of the Palestinian Liberation Organization requested an immediate cessation of the production of all Arab oil. Three days after the outbreak of hostilities, Kuwait called an emergency meeting of Arab oil ministers for a discussion of "the role of oil in light of current developments."\(^\text{16}\) On October 15, the U.S. Department of State announced that the United States had begun to resupply Israel with military equipment.\(^\text{17}\)

On October 17, 1973, 11 days after the fourth Arab-Israeli war erupted, the Organization of Arab Petroleum Exporting Countries (OAPEC), meeting in Kuwait, decreed the imposition of oil embargoes and cutbacks in an effort to support the Arab at-

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\(^{13}\) The study was not, however, released until after October of 1973. A. Tussing, Toward a Rational Policy for Oil and Gas Imports 4 (1973). Compare B. Brodie, Foreign Oil and American Security (1947).

\(^{14}\) Quoted in Boorman, supra note 10, at 205-206.


The Yom Kippur War was the costliest and most dangerous military engagement in 25 years of Middle East tension. Winding Up War, Working Toward Peace, Time, Nov. 5, 1973, at 37. In 18 days of ferocious fighting, as many as 7,700 Egyptians, 7,700 Syrians and 4,500 Israelis were killed or wounded — the largest number of casualties for all three nations in any war since 1948. Brilliant Moves in Final Battle, Time, Nov. 5, 1973, at 44.


\(^{17}\) On October 19, President Nixon requested that Congress appropriate $2,200 million for the current fiscal year in military assistance to Israel. Id. at 594.
tempt to regain territory lost to Israel during the 1967 conflict. These Arab nations agreed: (a) to reduce overall production by at least 5 percent, with an escalation of an additional 5 percent for each succeeding month until all Israeli forces had been withdrawn from Arab territories, (b) to embargo all exports of petroleum to the United States, and (c) to reward "friendly" nations by assuring them of continued petroleum supplies at their monthly averages for the first 9 months of 1973.

Meeting again in Kuwait on November 4, 1973, Arab utilization of the oil weapon was expanded to a 25 percent cutback in production with an additional 5 percent scheduled for December 1 and every month thereafter until Arab political demands had been satisfied.18

In accordance with their decision, Abu Dhabi, Algeria and Libya ceased shipment of the 520,000 barrels a day which they had previously sold to the United States. Saudi Arabia cut off 600,000 barrels a day to the United States. Previously, six Persian Gulf States had broken off negotiations with Western oil companies and increased the posted price of oil by 70 percent.19

In a communiqué issued on December 8, the Arab oil ministers expressed a willingness to lift the oil embargo against the United States with the beginning of the implementation of a schedule of withdrawal of Israeli forces from Arab territories occupied since 1967.20

On March 18, 1974, 5 months after the initiation of the embargo by Saudi Arabia and Abu Dhabi, most of the Arab States, meeting in Vienna, announced their intention to terminate the oil embargo against the United States and certain other countries.21

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20 Supra note 16, at 596.

21 Iraq refused to attend the Vienna meeting, and Libya and Syria refused to lend their "assent" to the lifting of the embargo or to any increase in overall production. Moreover, Algeria indicated that it was only lifting the embargo temporarily, until June 1. Additionally, it was not decided that the oil embargo against Denmark, The Netherlands, Portugal, Rhodesia and South Africa should be ended. Paust & Blaustein, The Arab Oil Weapon — A Threat to International Peace, 68 AM. J. INT'L L. 410, 412 (1974).
III. ECONOMIC COERCION AS AGGRESSION

A. The Intent of the Actors

It is not to be doubted that a great deal of economic activity initiated by a State in the interest of optimizing its economic self-interests causes a concomitant injury to the economic values held by other States. The structure of the world economic system contains inherent inequities which cause unavoidably detrimental consequences to innocent participants. The economic laws by which international trade and commerce are governed bestow wealth upon some nations and poverty upon others.

It does not appear desirable to constrain all forms of persuasive activity initiated by one State over another, for in an interdependent world it is necessary (or, indeed, vital as a sanctioning device in international law) that States be permitted to exercise some measure of influence over the policies and conduct of their neighbors in the world community. It does appear desirable, however, in an efficient system of world public order, that forms of coercive activity, which might be unnecessarily or unreasonably destructive to the essential values of an innocent target State, or which might significantly endanger international peace and security, be effectively regulated or even prohibited.

These types of inevitable economic injury are to be sharply distinguished from various types of intentional injury which have been utilized in various degrees by States intending to wage economic warfare. The latter includes, but by no means is limited to: (a) Freezing a target's assets; (b) imposing import and export embargoes; (c) blacklisting foreign firms and individuals who deal with the target; (d) reducing foreign supplies by preclusive purchasing; (e) manipulating foreign exchange markets; (f) withdrawing or refusing credit; and (g) creating artificial scarcity and high prices.

Perhaps an appropriate consideration which might lend some assistance to the determination of whether various economic measures employed by a State should or should not be considered illegal per se is that which has been suggested by Professor Bowett — whether the action taken by the involved State can be attributed to an improper motive or intent. A determination

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22 See also M. McDougal & F. Feliciano, Law and Minimum World Public Order 197 (1961).
24 See Bowett, Economic Coercion and Reprisals by States, 13 Va. J. Int'l L.
that the predominant purpose of the acting State was to cause an illegitimate deprivation or destruction of values of the target State, rather than a virtuous attainment of ends (that is, maximization of legitimate values) might be considered as *prima facie* or even conclusive evidence of illegality. Thus, the *mens rea* of the OAPEC actors shall now be examined in an effort to determine their culpability.

The avowed purpose of the partial embargo and production cutbacks of October 1973 as expressed at the initiation thereof was “the liberation of the Arab territories occupied in the 1967 War and the recovery of the legitimate rights of the Palestinian people in accordance with the United Nations resolutions.” Upon termination of these coercive economic measures, the Vienna communiqué emphasized that their primary purpose had been “to draw the attention of the world to the Arab cause in order to create the suitable political climate for the implementation of Security Council Resolution 242 which calls for the complete withdrawal from the Arab-occupied territories and for the restoration of the legitimate rights of the Palestinian people.”

It is argued by the Arabs that not only did the 1967 Israeli attack upon Arab forces constitute an illegal military aggression, but the occupation by Israel of the Sinai Peninsula, the West Bank of the Jordan River and the Golan Heights of Syria since the war also represents a continuous infringement upon the territorial sovereignty of the partially-occupied States, and thereby constitutes illegal conquest.

Resolution 242, proposed by Great Britain and adopted unanimously by the Security Council in November 1967, emphasizes “the inadmissibility of the acquisition of territory by war” and calls upon the “withdrawal of Israeli armed forces from territories occupied in the recent conflict.” The implementation of this resolution was an express objective of both the Arab attack upon Israeli forces in October of 1973 and the Arab oil embargo.

The U.N. system requires that States utilize peaceful means to accomplish legitimate ends, at least in the first instance, and

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1, 5 (1972). Professor Bowett suggests that three types of economic coercion could readily be classified as illegal (economic coercion in violation of (a) specific treaty commitments, (b) general principles of international law, or (c) the principles of non-intervention). *Id.* at 2-3.


3 17 *MIDDLE EAST ECON. SURVEY*, No. 22, Mar. 22, 1974, at 1, 6.
the involved Arab States had tried in vain for 6 years to regain allegedly illegally occupied territory. It has been argued, that:

Governmental action taken by a State within its own territory for the restoration of legal order disrupted by unauthorized acts of others certainly falls within the inherent territorial jurisdiction of each sovereign State. Although such action may be based on the exercise of the State's traditional right to self-help under customary international law or under a broad reading of the U. N. Charter provisions on self-defense, one need not argue the relevance of such concepts in regards to the Egyptian and Syrian measures. The denial to Egypt and Syria, in the particular circumstance of the situation, of the right to take individual or collective action would have resulted in fact in depriving them indefinitely of their essential right to territorial integrity, guaranteed by the U. N. Charter. Without such a right, state jurisdiction, let alone sovereignty, would be nothing but a sham. This obviously explains the fact that not a single state or international organization has characterized the Egyptian and Syrian measures of October 1973 as illegal or even unwarranted.27

Although the Declaration on Friendly Relations contains certain prohibitions with respect to the unrestrained employment of economic coercive measures (see discussion below), it nevertheless provides that:

The territory of a State shall not be the object of military occupation resulting from the use of force in contravention of the provisions of the Charter. The territory of a State shall not be the object of acquisition by another State resulting from the threat or use of force. No territorial acquisition resulting from the threat or use of force shall be recognized as legal.28

B. The United Nations System

1. U. N. Resolutions and Declarations

a. Economic Restraint: Aggression, Coercion and Friendly Relations

It is inevitable that, in an attempt to assert legal control over the use of force in the settlement of disputes between nations, members of the international community should strive to define the word "aggression." During the last 50 years, numerous unsuccessful attempts have been made by both the League of Na-

27 Supra note 16, at 607-608.
tions and the United Nations to arrive at an acceptable definition.\textsuperscript{29} Today, the concept may be of enormous importance under Articles 39 and 51 of the U.N. Charter.

The term "economic aggression" was employed as early as 1916 by the British delegation at the Paris Conference in the drafting of a resolution calling for joint action after the war by the Allies to protect their economic interests against German "economic aggression" by "necessary measures of self-defense."\textsuperscript{30} More recently, a rather vague definition of aggression formulated by Bolivia provides:

\[\ldots\text{ unilateral action whereby a state is deprived of economic resources derived from the proper conduct of international trade or its basic economy is endangered so that its security is affected and it is unable to act in its own defense or to cooperate in the collective defense of peace shall likewise be deemed to constitute an act of aggression.}\textsuperscript{31}\]

The Soviet Union has favored a comprehensive, enumerative definition of aggression specifically providing that economic aggression is committed whenever a State "\ldots takes against another State measures of economic pressure violating its sovereignty and economic independence and threatening the bases of its economic life" or "subjects another State to an economic blockade."\textsuperscript{32} These formulations recognize the principle that, as world trade expands and economic interdependencies flourish, a concurrent growth in the vulnerability of States to economic coercion arises. With the development and refinement of methods of economic warfare, the flow of goods in the international arena


can conceivably be so managed as to inflict a significant measure of coercion upon a target State.\textsuperscript{33} Nowhere has this principle been more clearly demonstrated than in the 5 month Arab embargo of petroleum, which so substantially disrupted the economy of the industrialized world that thinking people were forced to contemplate the very real threat that without fuel the wheels of international industry would grind to a halt.

The U.N. General Assembly has, on a number of occasions, condemned economic means of coercion. For example, the U.N. Declaration on Inadmissibility of Intervention expressly provides: "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."\textsuperscript{34}

The Draft Code of Offenses Against the Peace and Security of Mankind specified that: "The intervention by the authorities of a State in the internal or external affairs of another State, by means of coercive measures of an economic or political character in order to force its will and thereby obtain advantages of any kind."\textsuperscript{35} The U.N. General Assembly's Declaration of the Principles of International Law concerning Friendly Relations and Cooperation among States, which is generally viewed as its most authoritative declaration of contemporary international law, emphasizes "the duty of states to refrain in their international relations from military, political, economic or any other form of coercion aimed against the political independence or territorial integrity of any state . . ." It specifically declares that:

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 and to secure from it the advantages of any kind.\textsuperscript{36}

Article (2) of the International Covenant on Economic, Social and Cultural Rights of 1966 provides that the disposal of natural

\textsuperscript{33} M. McDougal & F. Feliciano, supra note 22, at 196.


wealth and resources must not prejudice "any obligation arising out of international economic co-operation, based on the principle of mutual benefit, and international law," and "[i]n no case may a people be deprived of its own means of subsistence."37 Indeed, economic aggression may be as detrimental to a State’s security and, if illegal, as dangerous a violation of a State’s essential rights as the use of force.38 It would seem that no inherent reason exists why the economic policies of a State should not be considered as aggression if in fact they endanger international peace and security.39

Nevertheless, the majority of Representatives to the Sixth Committee of the General Assembly and in the Special Committees of 1953 and 1956 on the question of defining aggression have apparently assumed that the right of self-defense is restricted to a riposte to the use of force and that forcible action cannot be a lawful reaction to economic aggression.40 The reluctance surrounding its inclusion in a definition of aggression apparently stems from the fears that the Security Council would have been given unlimited power under Article 39 to label various forms of non-military coercive conduct as aggression,41 and that States might assert the right of self-defense under Article 51 to justify the utilization of armed force in order to repel infringements upon their economic values. As to the former anxiety, it must be recognized that a multitude of coercive alternatives exist which do not fall within the war-peace dichotomy but which may nevertheless have economic, social and political consequences unfortunately similar to those of armed intervention. It might, therefore, be desirable for the Security Council to possess some measure of latitude in determining that various forms of non-military coercive conduct constitute aggression. As to the fear that its inclusion “might suggest the right to go to war in self-defense” against “economic aggression,”42 such con-

37 Paust & Blaustein, supra note 21, at 422.
38 Supra note 30, at 24.
39 Id. at 261. One of the primary purposes of the United Nations is the maintenance of international peace and security. See U.N. Charter art. 1, para. 1.
duct would appear to be circumscribed by the established prerequisites to the exercise of self-defense under customary international law: (a) Actual necessity, and (b) proportionality in responding coercion.\textsuperscript{43} It would seem that such limitations would place an onerous burden upon a State attempting to provide a legal justification for the utilization of military means in response to economic coercion. (See discussion below.)

Moreover, at least one authority vigorously opposes the considerable emphasis which has been placed on the interrelation of the concepts of aggression and self-defense — an emphasis which supports the theory that aggression gives rise to the right of self-defense. Professor Bowett argues that the concept of military aggression is entirely too limited for there to be any real correlation between a definition of aggression and a definition of self-defense based upon the need to protect the security of a State against forms of illegal conduct other than the employment of military force.\textsuperscript{44} The purpose of the concept of aggression, he asserts, is to define the circumstances in which the competent organs of the collective security system will take action to maintain international peace and security; while the concept of self-defense defines situations in which a State may employ forceful means to protect those essential rights upon which its security depends.\textsuperscript{45} "It is submitted that in considering whether a situation affords a State the right of self-defense the only relevant concept is that of self-defense; the concept of aggression, as it has been elaborated during the course of the last forty years, has an entirely different purpose and can afford no guide to the question of whether a right of self-defense exists."\textsuperscript{46}

Thus, the fact that economic coercion has not been accepted within the definition of aggression for the purpose of organs of international security bears no relation to the question of whether, against such indirect forms of highly injurious conduct, the individual State whose own security is endangered has the legal right to resort to self-defense.\textsuperscript{47}

\textsuperscript{43} Supra note 33, at 195-196.
\textsuperscript{44} Supra note 30, at 250.
\textsuperscript{45} Id. at 256.
\textsuperscript{46} Id. at 261.
\textsuperscript{47} See supra note 30, at 261.
b. Economic Freedom: Pre- and Post-Embargo Resolutions

The exclusive control by a State over its natural resources was recognized in Resolution 1803 of the General Assembly which provided: "The right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the state concerned." The General Assembly reaffirmed and extended this principle subsequent to the initiation of the Arab oil embargo when, on December 12, 1974, it adopted the Charter of Economic Rights and Duties of States over the vigorous objections expressed by the United States and certain other industrialized nations. This Charter reflects a specific bias toward developing States and memorializes the right of developing countries to engage in concerted action in the disposition of their natural resources. For example, Article 5 provides:

All states have the right to associate in organizations of primary commodity producers in order to develop their natural resources to achieve stable financing for their development, and in pursuance of their aims assisting in the promotion of sustained growth of the world economy, in particular accelerating the development of developing countries.

Article 5 reinforces this right by imposing upon States which are not members of the cartel a duty "to respect that right by refraining from applying economic and political measures that would limit it," presumably even if the cartel is guilty of coercion under international law, and regardless of whether such "measures" themselves constitute coercion. The last sentence of Article 7 further reinforces this right by imposing upon States a duty "to cooperate in order to eliminate obstacles that hinder" the mobilization and utilization by another State of its resources through any means of its choosing.

51 Supra note 49, at 315.
It is well established that a certain degree of economic coercion is inevitable in a State's day-to-day interaction. Fundamental community policy does not seek to prohibit such coercion, inasmuch as it does not appear to pose a significant threat to the existing system of minimum world public order.52 Articles 2(4) and 51 of the U.N. Charter are deemed by Professors McDougal and Feliciano to be among the several provisions of the Charter which provide a basis for a system of world public order.53

Article 2(4) of the Charter requires that all members refrain from certain types of impermissible coercion. It provides:

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

The question immediately arises as to what types of force are contemplated by the Article. Is it limited in its applicability to "armed aggression," or does it apply broadly to cover aggregious forms of "economic coercion"? Certainly, it must be realized that various forms of non-military coercion can have at least as deleterious an effect upon a target State as certain forms of armed coercion, and thereby constitute as substantial a threat to the maintenance of international peace and security. Could it have been the intent of the framers to permit the former to go totally unregulated, while concentrating solely upon the latter?

Perhaps the strongest argument for a broad interpretation of Article 2(4) is to be found in the language of the provision itself.54

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52 Supra note 33, at 197.
53 Id. at 126-127.
54 For an elaboration of the argument that a broad interpretation should be given the concept of "force" within Article 2(4), and that, in particular, its definition encompasses economic as well as political coercion, see Comment, The Use of Nonviolent Coercion: A Study in Legality Under Article 2(4) of the Charter of the United Nations, 122 U. Pa. L. Rev. 983 (1974). The argument for an expansive interpretation of the principles contained in the U.N. Charter included the following assertion:

The United Nations Charter has a constitutional character, and it is an axiom of constitution-drafting that the instrument must be imbued with enough force and clarity to make it effective, and yet have enough flexibility and expansiveness to ensure against obsolescence. The framers were undoubtedly aware of the possibility that new forms of international coercion would rise to prominence in future generations. They must also have known that these changes in the complex-
The framers did not embellish the word "force" with restrictive adjectives which would have effectively limited its scope. Yet they could not have been unaware of the inherent vagueness of the word. Where they intended to restrict its scope, such as in Article 46, they affirmatively eliminated the patent ambiguities by utilization of the adjective "armed."\footnote{5} It must be emphasized, however, that the inclusion of economic coercion within the definition of force in Article 2(4) does not alter the gladiatorial theory of survival which governs the arena of world trade, so long as the stakes remain commercial. It is only when a nation undertakes to utilize its economic power "against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations" that the norm of Article 2(4) is violated.\footnote{56}

Article 51 of the Charter provides that "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations . . ."\footnote{57} Thus, Article 51 retains a State's inherent right to individually or collectively defend itself when its fundamental values are threatened by aggression. These defensive measures are not expressly limited to armed responses, but may presumably include other forms of responding coercion (for example, economic embargoes). Thus, when read together, Articles 2(4) and 51 of the Charter prohibit the threat or utilization of force by a State except as authorized by the Charter or for individual or collective self-defense against another State in the preservation of political independence or territorial integrity.
These are circumstances when the utilization of such coercive measures would have been lawful under pre-existing principles of customary international law.

C. Customary International Law

It has been traditionally recognized that foreign trade is exclusively a matter of national sovereignty. International commerce has frequently been manipulated in order to advance foreign policy objectives and to achieve political ends. History is replete with examples where restrictions upon both imports and exports have been employed for purposes of exerting diplomatic pressure upon a target State. Professor Eagleton has asserted: "A state is free to set up almost any barrier to trade and intercourse against one or all states. She may prohibit trade entirely, or in certain articles, or with certain states; she may establish high tariffs against some or all States so far as customary international law is concerned (though there are many treaty limitations)." Moreover, it has been observed:

That the regulation of foreign trade is normally a right within the sovereign prerogatives of an independent country is too well established to permit disagreement in the context of existing international law. Individual nations have historically regulated imports by imposing tariffs, inspections, quantitative and qualitative restrictions, and numerous other conditions and barriers to international trade. They have frequently regulated exports as well, including recently, complete cut-offs where deemed necessary to retain adequate domestic supply without inflation. The question, then, is whether such regulation becomes illicit when directed against a particular country or countries for purposes of diplomatic pressure.

1. The Customary International Practice of States: The American Example

The economic practices and legislative promulgations of the United States provide a standard by which to judge the legality or illegality of the OAPEC embargo.

The United States severed all trade relations with Cuba following its expropriation in 1961 of all American-owned prop-

60 Muir, The Boycott in International Law, 9 J. Int'l L. & Econ. 187, 192 (1974). See also Bowett, supra note 24, at 5.
erty without compensation.\textsuperscript{61} The Foreign Assistance Act of 1961 authorized the President to "establish and maintain a total embargo upon all trade between the United States and Cuba,"\textsuperscript{62} and thereby established the municipal law foundation upon which President Kennedy based the institution of the embargo on commercial activity between the two nations in February of 1962.\textsuperscript{63}

The U.S. municipal law statutory bases for the manipulation of economic activity for the achievement of political ends are quite numerous.\textsuperscript{64} For example, United States corporations and their controlled subsidiaries are prohibited by the Trading with the Enemy Act of 1917 from engaging in foreign commercial transactions with certain specified nations during any period of national emergency declared by the President.\textsuperscript{65} The Trade Expansion Act of 1962 prohibits tariff concessions for products of Communist nations, and permits the President to regulate the importation of any commodity deemed to threaten the national security.\textsuperscript{66} The Export Control Act of 1949 declares that the economic policy of the United States shall be to utilize export controls in the furtherance of U.S. foreign policy and "to exercise the necessary vigilance over exports from the standpoint of their significance to national security."\textsuperscript{67} This Act was re-

\textsuperscript{61} The Cuban Law No. 851, expropriating all American property in Cuba, described the U.S. action in amending the Sugar Act of 1948 so as to drastically reduce the Cuban sugar quota as "aggression, for political purposes, against the basic interests of the Cuban economy." The United States Court of Appeals for the Second Circuit in Banco Nacional de Cuba v. Sabbatino, 307 F. 2d 845 (1962), rev'd on other grounds, 376 U.S. 398 (1964), concluded that the "legislative history made it abundantly clear that the main purpose of the amendment was to impose a sanction against an unfriendly nation." 307 F.2d 845, 865 (1962). However, it nevertheless determined that "we cannot find any established principle of international jurisprudence that requires a nation to continue buying commodities from an unfriendly source." \textit{Id.} at 866. The U.S. action, if indeed an economic sanction, may perhaps best be regarded as a reprisal against "the discriminatory, aggressive and injurious economic policies of the Castro regime." Department of State Press Release No. 600 (Oct. 19, 1960), 43 \textit{Dep't State Bull.} 715, 716 (1960). See Bowett, Economic Coercion and Reprisals By States, 13 \textit{VA. J. INT'L L.} 1, 3-4 (1972), and Boorman, \textit{supra} note 10, at 226.


\textsuperscript{64} See Shihata, \textit{supra} note 16, at 609-611, and Muir, \textit{supra} note 60, at 192-193.


placed by the Export Administration Act of 1969 which expressly
affirms the principle that the United States is "to use its econ-
omic resources and trade potential . . . to further its national
security and foreign policy objectives," and provides the Presi-
dent not only with power to prescribe regulations governing ex-
ports from the United States, but also to prohibit exportation "to
any nation or combination of nations threatening the national
security of the United States."68 Pursuant to this legislation,
the U.S. Department of Commerce has promulgated export
licensing requirements and virtually eliminated exportation to
Communist nations of certain designated "strategic" com-
modities.69

The Mutual Defense Assistance Control Act of 1951, more
commonly referred to as the Battle Act, emphasizes the policy
of the United States to proscribe the exportation of various
strategic commodities, including petroleum, to nations threatening
U. S. security, including the Soviet Union.70

Clearly, both the express policy and actual practice of the
United States is to utilize economic manipulative means freely
to achieve desired political ends. For example, Ecuador argued
that the United States used illegal political and economic force
in its suspension of sales of military hardware in response to
Ecuadorian seizure of American fishing vessels within its
claimed territorial waters.

More recently, it has been asserted that the United States,
in its utilization of aggressive forms of economic manipulative
pressure (for example, eliminating and disrupting U.S. and inter-
national credit), undermined the stability of the Allende govern-
ment and contributed to its downfall.71

2. Customary Wartime Practice of States

The right of a belligerent State in time of war to resort to
measures of economic warfare against its adversary and to apply
economic sanctions against third States which violate their
obligations of neutrality is manifest. The imposition of economic
pressure upon the enemy has always been deemed legitimate.
Although economic warfare has traditionally played only a sec-
ondary role, it has become of primary importance in modern

71 Supra note 54, at 1007.
warfare. The result is that, although war is still primarily a confrontation of nations and their armed forces, the civilian population is no longer immune from the hardships and privations of war.

The duty of impartiality must prevent a neutral from supplying belligerents with arms, ammunition, vessels, and military provisions, whether for money or gratuitously. A neutral State which sold arms and ammunition to a belligerent at a profit, or supplied them as a gift, would violate the duty of impartiality.  

In the *Alabama Claims* arbitration, it was determined that Great Britain had violated its duties as a neutral by failing to prevent its nationals from constructing a number of vessels for use by the Confederate Navy in the War Between the States. Certainly, the United States today has violated its status of neutrality by directly supplying Israel with massive military assistance.  

Article 6 of the Hague Convention of 1907 Respecting the Rights and Duties of Neutral Powers in Naval War prohibits "the supply in any manner, directly or indirectly, by a neutral Power to a belligerent, of warships, ammunition or war material of any kind whatever."  

Customary practice suggests that the nation imposing economic sanctions need not even be a belligerent in the hostilities. For example, during the early portion of World War II, the United States, although a declared neutral, imposed an embargo upon the sale of oil and scrap iron and steel to various nations, including Spain, Portugal and Japan.

It is in this context that one must remember that the United States has traditionally been the primary supplier of armaments and munitions to Israel. In fact, only 9 days after the outbreak

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of the Yom Kippur War, the United States had begun to resupply Israel with military equipment. Four days thereafter, President Nixon requested that Congress appropriate more than $2 billion in military assistance to Israel for fiscal year 1974.

It is argued that the Arab oil-exporting nations, as participants in the hostilities of October 1973 in varying degrees, were entitled to take retaliatory measures against such neutral powers as the United States which had supplied Israel with massive quantities of war materials, some of which were reported to have been delivered directly in occupied Arab territories.

International law has historically recognized and provided for the use of economic sanctions by one combatant against another during a time of war. The employment of economic measures against neutrals gained wide currency during the Napoleonic wars, and has today become an accepted part of our vocabulary of "total war." The Arab policy of regulating the supply of crude oil in response to the posture of consuming nations with respect to the Middle East situation was a predictable and perhaps expansive application of this tradition. At present, there is apparently no principle of international law which prohibits an embargo per se in the absence of applicable treaties. Foreign trade has always been viewed as a matter solely within the prerogative of sovereign governments. The general principles contained in the Doctrine on Friendly Relations (to refrain from economic coercion) and in the United Nations Charter (to abstain from acts which threaten the peace) have been universally ignored in the arena of foreign trade.75

3. The Customary Practice of International Organizations

It must be recognized that the Arab oil embargo of 1973-74 was ostensibly a concerted undertaking of an international organization (OAPEC) rather than a coercive measure taken by independent non-aligned States. Furthermore, the utilization of economic means by international organizations to attain political ends (whether legitimate or illegitimate) neither began nor ended with the OAPEC embargo.

The framers recognized in Chapter VII of the U.N. Charter that certain forms of non-military intervention in the affairs of States might constitute a threat to the peace, breach of the peace or an act of aggression, and that pursuant to Article 39, such a

75 See supra note 54, at 1007.
determination could be made by the Security Council. Moreover, Article 41 permits the Security Council, in order to implement its decisions, to utilize various economic coercive measures including the “complete or partial interruption of economic relations . . .”

The Security Council has made widespread use of these coercive tools against both South Africa and Rhodesia by initiating embargoes on various commodities, including petroleum. The General Assembly also has recommended that States observe embargoes on the shipment of petroleum to, for example, the People’s Republic of China and North Korea.

The Organization of American States has instituted boycotts on a variety of products, including petroleum, from the Dominican Republic and Cuba. Similarly, the Organization of African Unity has called for the imposition of embargoes, particularly on the supply of oil, against Israel, Portugal, South Africa and Rhodesia.


The customary international law requirements for the assertion of a claim of lawful self-defense traditionally have been framed in terms of: (a) actual necessity and (b) proportionality in responding coercion.

The Arab view has always been that continued Israeli occupation of Palestinian territory and, in particular, the territories of Egypt, Jordan and Syria, constitutes a violation of the sovereignty of the Arab States in total disregard of Security Council

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79 See Muir, supra note 60, at 191.
80 Shihata, supra note 16, at 620-621.
Resolution 242. In 6 years, Israel had not relinquished control over a single square inch of occupied real estate. In fact, Israel today controls six times more territory than it did in 1948. It, therefore, appeared necessary to the Arab States to force implementation of what they perceived to be the rule of law. The military strength of Israel seemed so formidable that the surrounding Arab States could not forcibly regain control over their respective sovereign territories. The OAPEC nations were without the substantial military means to assist Egypt and Syria in their attack launched in October 1973. Nevertheless, the OAPEC States had at their disposal the enormous economic leverage necessary to bring requisite pressure to bear on the world community and, in particular, the United States which, by its moral and material support, had enabled Israel to retain military control for so long. The embargo’s focus upon the United States exemplified the discriminating application of the embargo against States which had violated their neutrality. Thus, the withholding of a vital commodity to the United States by the OAPEC cartel was made in retaliation for the military commodities and diplomatic support given by the United States to a belligerent in the conflict, Israel. The economic coercion was, therefore, perceived by the Arab States to be proportional to the harm suffered.

D. Conventional International Law

1. The Relevant Multilateral Conventions: GATT & VCOT

Probably the most significant multilateral convention governing international trade is the General Agreement on Tariffs and Trade (GATT), to which all major non-communist nations are parties. In fact, more than 76 nations, including Egypt and

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83 Israeli Foreign Minister Abba Eban has emphasized that Resolution 242 called for the establishment of a permanent peace, including both the withdrawal from territory occupied in 1967 and the establishment of “secure and recognized” boundaries. He asserts that the impasse arose because the Egyptians constantly refused to submit the boundary issue to negotiations. “If we had been mad enough to abandon the Golan Heights and Sharm el Sheikh and all the Sinai and the whole West Bank [of the Jordan River], would not the massive attack launched on October 6 have murdered thousands of our civilians, devastated our population centers and brought us to catastrophe? I tell you, a massacre more hideous than Auschwitz would have been a real prospect and Israel’s survival would be in doubt.” Another Round in the War of Words, Time, Oct. 29, 1973, at 44.

Kuwait, are contracting parties to the convention, and Algeria, Bahrain and Qatar have accepted its *de facto* application.\(^8\)

GATT was designed to insure access to international markets and to bar discriminatory tariffs in foreign commerce.\(^6\) However, the convention also contains language which guarantees access to the exports of other countries. For example, Article XI provides:

> No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures shall be instituted or maintained . . . on the exportations of any product destined for the territory of any other contracting party.

Thus, a member nation is prohibited from imposing export restrictions except in certain circumstances. If restrictions are imposed, it must do so in a manner which gives recognition to historic trade patterns between itself and countries which it has traditionally supplied.\(^7\)

The exceptions contained in Article XX, which permit restrictions relating to domestic programs designed to conserve exhaustible natural resources, nevertheless prohibit such restrictions when "applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail." However, Article XXI permits each contracting party to take "any action which it considers necessary for the protection of its essential security interests . . . taken in time of war or other emergency in international relations."\(^8\)

\(^8\) However, a number of oil-producing States have never subscribed to GATT, including Iran, Iraq, Libya, Saudi Arabia, the Soviet Union and Venezuela. Muir, *The Changing Legal Framework of International Energy Management*, 9 Int'l Law. 605, 612 (1975). Thus, not being parties to the agreement, they are not bound by its terms, except insofar as the convention may reaffirm existing principles of customary international law.

\(^6\) GATT has not, however, always been successful in securing its objectives.

\(^7\) Muir, *supra* note 85.

Article XIII provides that prohibitions or restrictions on exports must be administered without discrimination against third countries.

\(^8\) The exceptions contained in Articles XX and XXI have been characterized by a leading authority as a "dangerous loophole to the obligations of GATT," J. Jackson, *World Trade and the Law of GATT* 748 (1969).

It has been argued that viewing the Arab embargo in light of the exception contained in Article XXI(b)(iii) leads one to the conclusion that: "(1) Arab reliance on this exception in the GATT must fail in view of the actual context and relevant provisions of the U.N. Charter, which must be utilized as a guide to rational, policy-serving interpretation. (2) The Arab oil cuts must be condemned as 'arbitrary' in the sense of the purposes of the GATT and in light of the
Thus, the agreement maintains the freedom of each party to determine the necessity of the action it takes in such extraordinary circumstances. Moreover, Article XXXV provides for an escape from GATT obligations for any two contracting parties which have failed to consummate bilateral tariff negotiations. No such negotiations have been entered into between Kuwait, the sole Arab oil-exporting party, and any other party to the agreement.  

Article 52 of the Vienna Convention of the Law of Treaties (VCOT) provides that "a treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations."  

The Arab oil embargo was directed at noncombatant nations at a time when the armed conflict ostensibly had been terminated. It was not implemented in order to improve materially the Arab's military position, but was instead employed as a means to alter the relative bargaining positions of the parties in whatever political settlement might eventuate through the implementation of Security Council Resolution 242. Thus, a treaty establishing boundaries, refugee rights, and national security might be concluded between the Arab States and Israel. However, the aforementioned provision of the VCOT apparently prohibits use of the oil weapon as a measure of economic coercion in the attainment of political objectives. The difficulty lies in determining whether the economically coercive measures are applied with such intensity as to obviate freedom of choice and constitute duress.  

unilateral character of the Arab decisions. (3) The oil cuts are 'unjustifiable' (even if not arbitrary) in that a joint Arab committee decided upon them in terms of the pro-Arab or anti-Arab posture of other states. (4) The oil cuts are additionally 'unjustifiable' in terms of serving the relevant goals of the international community as contained in the UN Charter." Paust & Blaustein, supra note 21, at 424.  

Supra note 74.  
The embargo may have been implemented, in part, in order to discourage Israeli annihilation of the isolated Egyptian Third Army. In what must rank as Israel's most brilliant military feat in the nation's short but tempestuous history, an Israeli task force of 20,000 men and 500 tanks crossed the Suez Canal and proceeded to Adabiya and Suez cutting the highway to Cairo. It then successfully isolated and neutralized, both politically and militarily, the Egyptian Third Army of 20,000 men and 400 tanks, which had crossed to the east side of the Suez Canal during the early days of the Yom Kippur War. See Brilliant Moves in a Final Battle, TIME, Nov. 5, 1973, at 44-45. See also Now for the Bitter Battles of Peace, TIME, Nov. 12, 1973, at 57.  
Boorman, supra note 10, at 216.
2. The Relevant Bilateral Treaties: FCN

The maintenance of international trade and commercial relations is one of the primary objectives of treaties of friendship, commerce and navigation (FCN) into which the United States has entered with over 40 nations. These agreements generally accord Most Favored Nation treatment to both exports and imports of the contracting parties. The commitment by one party not to discriminate prohibits a boycott against the other contracting party unless such restriction is applied to like imports from or exports to all other countries.93

Four members of OAPEC (Iraq, Muscat, Oman and Saudi Arabia) have long-standing bilateral FCN treaties with the United States. Each has agreed to accord Most Favored Nation treatment as a measure of reciprocity with the United States. The agreement consummated between the United States and Muscat and Oman in 1958 provides an exception to its application vis-à-vis measures "necessary to fulfill the obligations of a Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests."94 The agreement concluded between the United States and Iraq in 1938 permits exceptions to its application relating to "the adoption or enforcement of measures relating to neutrality or to rights and obligations arising under the Covenant of the League of Nations."95 It is clear from these provisions that Muscat, Oman and Iraq only intend to be bound by the FCN agreements during periods in which trade and commerce are a product of amicable relations between the States concerned, and not under circumstances where the rights of neutrality and belligerency serve to suspend normal trade relations.96 The wording of the FCN agreement between the United States and Saudi Arabia, which was consummated in 1933, suggests that quantitative restrictions upon exports are not prohibited thereby.97

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93 Muir, supra note 60, at 200.
96 Boorman, supra note 10 at 218.
Finally, it has been argued that the combination of Articles 103 and 51 of the U.N. Charter effectively supercedes the application of Most Favored Nation provisions insofar as international peace and security are concerned.  

IV. U.S. RETALIATORY ALTERNATIVES

A. Domestic Conservation and Alternative Energy Sources

When a Gallup Poll asked Americans: "What should the U.S. do if Arabs impose another boycott," the largest group, 35 percent, responded by saying that the United States should attempt to become self-sufficient.  

During the last three decades, the world has consumed more energy than in all of previous history. In the next 15 years, mankind is expected to consume as much energy as it has up to now. It is anticipated that more than 70 percent of these requirements for energy will have to be met by hydrocarbons (specifically, 16 percent by gas and 54 percent by oil). Between 1970 and 1985, total U.S. energy consumption is projected to double from 33 million to 63 million barrels per day. The consumption of petroleum by the European Economic Community in the same period is expected to increase by 93 percent; that of Japan by 156 percent.  

However, dwindling supplies of fossil fuels — petroleum, natural gas and coal — and distribution problems threaten to curb this exponential growth abruptly.  

During the interim period before fossil fuels are depleted, man faces the immediate dangers of contaminating his environment by the intensive utilization of fossil fuels or by the imprudent and premature deployment of new energy sources.  

To many experts, "the energy crisis" was no more complicated than a recognition by the United States that it was approach-
ing the end of its fossil fuel reserves, with little hope of new power sources for the next 15 years.\textsuperscript{103}

In the United States current domestic reserves are only approximately 36.8 billion barrels, including 10 billion barrels in Alaska.\textsuperscript{104} Moreover, new finds are not keeping pace with the rate of extraction so that total reserves have declined since 1972. Consequently, unless adequate substitute sources of energy are developed, the United States will be compelled to import increasing amounts of petroleum.\textsuperscript{105}

The United States is the most profligate energy consumer, consuming one-third of the world's supply. This pattern of consumption has, in part, been attributable to the relatively low prices heretofore paid for energy.\textsuperscript{106} The extent of increased U.S. dependence upon imported petroleum will be largely determined by its ability to conserve energy and increase domestic energy production. Should a greater dependence on imports ensue, a future embargo would have a more severe and devastating effect upon the U.S. economy than did the Arab oil embargo of 1973.\textsuperscript{107}

The 12 OPEC nations produce 54 percent of all the oil in the world, and hold 64 percent of the world's currently proven reserves. The proven oil reserves of exporting Arab nations are:

\textsuperscript{103} One source has listed five primary energy policy objectives:
1. Assuring reliability of energy supply;
2. Achieving the lowest cost to society for energy;
3. Avoiding economic and regional inequities;
4. Safeguarding the quality of the environment; and,
5. Minimizing international problems due to energy.


\textsuperscript{104} The Alaska pipeline will transport in excess of 2 million barrels of oil a day by 1980, or one-third of current U.S. oil imports. Projections indicate that the North Slope of Alaska has potential reserves of as much as 80 billion barrels. Thus, Alaskan production could eventually be between 5 and 6 million barrels a day. \textit{Major Oil-Consuming Countries Meet at Washington to Discuss the Energy Problem}, 70 Dep't State Bull. 201, 212 (1974).

Geologists also estimate that approximately 330 trillion cubic feet of natural gas deposits could supply 5 percent of U.S. annual demand, which is currently 22 trillion cubic feet. However, such energy resources are not expected to be available earlier than 1980. \textit{The Alaska Gas Rush}, Time, Dec. 20, 1975, at 60.


\textsuperscript{106} \textit{Major Oil-Consuming Countries Meet at Washington to Discuss the Energy Problem}, 70 Dep't State Bull. 201, 210 (1974).

Saudi Arabia with 132 billion barrels; Kuwait with 64 billion; Iraq with 31.5 billion; Libya with 25.5 billion; the United Arab Emirates with 25.5 billion; and Qatar with 6.5 billion.\footnote{108}

Currently, the United States must import 37.4 percent of its total consumption of petroleum, or 7 million barrels per day.\footnote{109} The U.S. Department of the Interior predicts that by 1985 domestic oil-production deficits relative to projected demand will range from 8 million barrels per day (41 percent of demand) to as much as 16.2 million barrels per day (65 percent of demand). A recent study undertaken by the Chase Manhattan bank predicts that by 1985 as much as 50 percent of U.S. demand will have to be met by imports, over two-thirds of which (11.6 million barrels per day) will have to be sought from Middle East sources. Although recent discoveries in South America, Canada and Alaska may enable the United States to avoid some dependency on Arab petroleum, by 1985 declining reserve-to-production ratios in Venezuela and increasing demand in South America and Canada may mean that only between 3.44 and 5.70 million barrels per day of U.S. consumption can be drawn from Western Hemisphere sources. This deficit is expected to widen as domestic demand increases and environmental pressure forces enactment of legislation favoring low-polluting fuels.\footnote{110}

To meet the enormous energy demands of the future, three alternatives present themselves: (1) To increase the supply of conventional sources (for example, coal, natural gas, crude oil and hydroelectricity); (2) to develop more expensive substitutes (for example, oil shale, tar sand and nuclear power); and/or (3) to develop exotic energy potentials (for example, solar power, geothermal energy, tidal waves and hydrogen fusion).\footnote{111}

Fossil fuels heretofore have been the primary source of energy in the United States, accounting for 95 percent of total U.S. energy consumption during 1973. Even with the most aggressive growth in nuclear power, fossil fuels will dominate energy supply throughout the rest of the 20th century.

Oil and gas presently represent over three-fourths of total U.S. energy consumption. Natural gas is the cleanest major


\footnote{111} Supra note 100, at 677.
energy source; oil is the most versatile. However, oil and gas may well be our scarcest energy sources over the long term.\(^\text{112}\)

The United States holds prodigious reserves of coal. In fact, one-third of the world's known deposits are located in the United States. As much as 437 billion tons of coal are presently recoverable under existing methods of extraction — a volume equal to a 340-year supply of energy. Annual coal production in the United States rose from 592 million tons in 1973 to an all time high of 640 million tons last year. President Ford called for a doubling of coal output by 1985.

Recent estimates indicate that the United States holds 3.2 trillion tons of coal.\(^\text{114}\) However, ecological opposition to large-scale utilization of our vast deposits of coal might be severe.\(^\text{115}\) Coal is the worst polluter of the energy sources. Its smoke contains sulphur compounds which, when mixed with water vapor in the air, becomes an acid which decomposes stone and metal, not to mention human lungs. Moreover, enormous deposits require surface mining for economically feasible extraction.\(^\text{116}\) Increases in the supply of coal and hydroelectricity are costly, time-consuming and replete with significant technological limitations. Exotic energy source potentials are expected to remain marginal because of enormous technological complexities and high costs.\(^\text{117}\) The


\(^{113}\) King Coal's Return: Wealth and Worry, Time, Mar. 1, 1976, at 45.

\(^{114}\) This nation's proven reserves of oil will satisfy the energy requirements of the United States for 12 years, gas for 12 years, and, amazingly, coal for 500 years. U. S. Proven Energy Reserves, Time, Feb. 9, 1976, at 15.

\(^{115}\) Ecological opposition to expansive utilization of atomic energy resources is also increasing. See Atomic Power — Why the Dream Gets Dimmer By the Day, U. S. News & World Rep., Feb. 16, 1976, at 49.


\(^{117}\) Amuzegar, supra note 100, at 677.

In addition to the conventional sources such as oil, gas and coal, the United States will require the development of new sources of energy including solar, geothermal and nuclear fusion. For an analysis of the availability of capital to finance the development of energy sources, see Joint Hearings on the Capability of U.S. Financial Markets to Capitalize Energy Projects Required for the United States to Move Toward Energy Independence Before Two Subcomm. of the Senate Comm. on Finance, 94th Cong., 1st Sess. (1975). See Alternatives to Oil, Time, Dec. 10, 1973, at 43, and Shift to Shale, Time, Dec. 10, 1973, at 44.

Oil shale is one of the nation's most abundant energy sources, with oil in high-grade shale estimated to be the equivalent of the present levels of U. S. oil consumption for a century. However, the environmental problems in obtaining it with present technology are more difficult and far-reaching than those for coal. Energy Policy Project of the Ford Foundation, A Time to Choose 182 (1974).
rapid expansion of alternative energy sources is restrained, in the short term, by human and environmental considerations.\textsuperscript{118}

Certainly, programs of conservation of domestic petroleum and diminished consumption must be employed.\textsuperscript{119} Tariffs on imported oil may be increased; price controls on domestic oil may be removed; gasoline rationing may be imposed;\textsuperscript{120} tax incentives for domestic production and exploration may be employed.\textsuperscript{121} The Ford Administration attempted to decrease the amount of petroleum imported from abroad by 1 million barrels per day by the end of 1975, and 2 million barrels per day by the end of 1977.\textsuperscript{122}

Nevertheless, one source has indicated that consumption would have to be decreased to such an extent that half of U.S. industry would be without fuel and half of the U.S. work force would be

\textsuperscript{118} Id. at 158.


\textsuperscript{120} Strict motor gasoline rationing suggests itself as a way to accelerate and increase energy savings in the transportation sector. Regulations could also be promulgated to alter the product/yield ratios for domestic refineries in order to maximize heating oil production. B. Cooper, \textit{An Assessment and Analysis of the Emergency Energy Emergency} 16 (1973).

\textsuperscript{121} During the Arab oil embargo, in an attempt to counteract the impending energy crisis, the Administration on November 26, 1973, announced a number of actions designed to curtail the demand for petroleum products. These actions were taken pursuant to the Economic Stabilization Act of 1970, and the Defense Production Act of 1950. They consisted of allocation reduction to various end users. The National Energy Act of 1973 provided additional use restrictions in an effort to conserve existing petroleum supplies. Id. at 11-12.

It was also suggested that the additional measures of (a) strict motor gasoline rationing, and (b) regulations altering the product/yield ratios of domestic refineries in order to maximize heating oil production, should be implemented. Id. at 16.

In November of 1973, President Nixon inaugurated Project Independence, which was designed to insure an expansion in domestic energy production so that the United States would no longer be subject to economic disruption, or the threat of disruption, from a sudden curtailment of vital energy supplies. The Project was designed (a) to conserve energy by establishing a new energy ethic designed to reduce demand, (b) to increase production of all forms of energy in the United States, and (c) to meet the energy requirements of the United States at the lowest cost consistent with the protection of both national security and environment. \textit{Major Oil-Consuming Countries Meet at Washington to Discuss the Energy Problem}, 70 DEP'T STATE BULL. 201, 210 (1974).

\textsuperscript{122} \textit{Supra} note 109, at 35. The U. S. goal is to reduce its annual growth rate in energy consumption from the present 4 to 5 percent to 2 or 3 percent by 1980. If this can be accomplished, approximately 7 million barrels of oil per day could be saved.

unemployed before U.S. demand would be diminished to an extent that would compel OPEC to cut prices.\(^{123}\)

The Federal Government has not been lethargic in responding to the energy crisis. Indeed, it has displayed an acute awareness of the complexity of the problem, as well as enormous vitality in an attempt to develop an effective policy designed to find a solution to the energy requirements of this nation. For example, during the Arab oil embargo, Congress provided the President with discretionary powers to implement a temporary program of emergency petroleum allocation to deal with shortages of crude oil, residual fuel oil, and refined petroleum products, or dislocations in their national distribution system.\(^{124}\)

Congress has subsequently responded to the impending energy crisis by creating the Federal Energy Administration (FEA). Its purpose is to assure a coordinated and effective approach to overcoming energy shortages. FEA is specifically designed to: (a) develop effective programs of conservation of scarce energy supplies, (b) insure fair and efficient distribution of such supplies, (c) maintain fair and reasonable consumer prices for such supplies, (d) promote the expansion of readily available energy sources, and (e) assist in the development of policies and plans to meet the energy requirements of the United States.\(^{125}\)

The Energy Research and Development Administration and Nuclear Regulatory Commission were created in 1974 to plan, coordinate, support and manage the research and development of energy sources.\(^{126}\) Congress has recognized that "the urgency of

\(^{123}\) Ignotus, Seizing Arab Oil, HARPER'S, Feb. 1975, at 48.


\(^{126}\) Energy Reorganization Act of 1974, 42 U.S.C. §§ 5801 to 5891 (1974). ERDA absorbed and abolished the preexisting Atomic Energy Commission. See 42 U.S.C. § 5814 (1974). It has been asserted that, despite these efforts undertaken by Federal agencies, the United States continues to import 17 billion barrels of oil per day, 25.5 percent of which comes from the Middle East. See Mirvahabi, supra note 8, at 109. See also Best, Middle East Oil and the U.S. Energy Crisis — Prospects for New Ventures in a Changed Market, 5 L. & Pol'y INT'L Bus. 247 (1973).

Nevertheless, the United States reduced its total energy consumption in 1975 by approximately 2.5 percent since 1974, and 4.8 percent since 1973. U.S.
the Nation's energy challenge will require commitments similar to those undertaken in the Manhattan and Apollo projects,"\(^{127}\) in an attempt to formulate a comprehensive and aggressive research and development program designed to increase the availability of domestic energy reserves (for example, fossil fuels, nuclear fuels, geothermal resources and solar energy).\(^{128}\) More recently, legislation was promulgated extending Presidential powers to impose mandatory rationing in times of emergency, and authorizing a massive stock-piling of petroleum to avert the full impact of any future oil embargo.\(^{129}\) Certainly an emergency stockpile of oil must be set aside at a rate commensurate with the level of imports from insecure sources.

B. Diplomatic and Political Remedies

Despite the enthusiastic and determined efforts of the State Department, diplomacy has failed to bring down the high price of oil. It is unlikely that mere verbal persuasion would induce Arab leaders to end a future embargo of petroleum unless, of course, the Israelis were diplomatically persuaded to grant territorial concessions to the Palestinians. Nevertheless, the determined application of direct and indirect diplomatic pressure would and should be a condition precedent to the use of force.

Several Arab oil-producing States have warned that the United States cannot be assured of obtaining uninterrupted supplies of oil unless it modifies its pro-Israeli foreign policy. Because of the increasing reliance of the United States upon imported oil, many American foreign policy experts believe that this Arab threat is credible. They suggest that the goal of "improving U.S. oil security" justifies reversing present Middle East policy to lend more positive support to Arab interests.\(^{130}\) Moreover, it has been suggested that it might become necessary to withdraw U.S. diplomatic and military support to Israel as the political price for growing quantities of secure oil. Inasmuch as other, less drastic

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options exist, the American people will presumably be unwilling to pay such a drastic price for additional oil.\textsuperscript{131}

The United States could withdraw its military mission from Saudi Arabia; but, no doubt, the French would be delighted to send a military mission as a replacement. The United States could also refuse to sell military material to Arab States, were other sources not readily available.

Some U.S. and European businessmen and politicians have suggested that an effort should be made to have the United Nations declare Arab oil an "international resource," which would be open to all investors under U.N. supervision. Because the composition of the General Assembly is heavily weighted against industrialized nations, such a resolution would never receive a majority of votes.

Another alternative might be a unilateral special arrangement with one or more oil-exporting nations (for example, Saudi Arabia and/or Iran). In return for technical and military assistance and preferential treatment for other exports, the United States might acquire long-term commitments for specified quantities of oil.\textsuperscript{132} The oil-producing States are acutely aware that their economies are based upon a wasting asset, and that unless they acquire an alternate base for their economies within the next few decades, they may lose their single opportunity to achieve economic prosperity and development. It is precisely in the fields of economic planning, science and technology and industrial development, that the consuming nations can provide something to the producing nations which the latter desperately need.\textsuperscript{133}

However, even if such agreements could be reached, they would represent a major departure by the United States from the principle of multilateralism in international economic relations. Other oil-importing nations could be expected to seek similar agreements, conceivably creating severe competition among Western industrialized nations and straining relations among allies. The United States might also find itself deeply committed to the survival of the specific governments with whom the agreements are signed. Moreover, no agreement can guarantee prevention of an embargo if there is an impasse in the Arab-Israeli


\textsuperscript{132} Id.

settlement and the United States continues to support the Israeli position.\textsuperscript{134}

The oil strategy announced by Secretary of State Kissinger in 1974 included: (a) Immediate reduction in oil consumption by the United States and other industrial nations in order to lower the cost of imported petroleum, (b) coordinated measures to develop alternate sources of oil and other fuels over the next decade,\textsuperscript{135} and (c) the joint establishment of a $25 billion loan and guarantee fund by major nations to provide secondary financing for the industrial nations' $40 billion annual oil payment deficit.

In fact, 16 nations, including the United States, have become members of the recently created International Energy Agency (IEA). IEA, the West's counterpart to OAPEC, will cooperate closely with the Organization for Economic Cooperation and Development (OECD). IEA members have already agreed upon a system of sharing oil supplies should a future embargo be instituted.\textsuperscript{136}

On March 20, 1975, the United States agreed in principle

\textsuperscript{134} Supra note 131, at 169.

\textsuperscript{135} Limiting oil importation, and rapidly increasing the expansion of nuclear power, raises another energy-related foreign policy concern — the proliferation of nuclear weapons. The commercial application of nuclear power in the production of electricity is on the verge of rapid expansion throughout the world. In 1973, 67 nuclear power plants were operating outside the United States in 29 different countries. In essence, the problem is that relatively few technological impediments exist to prohibit a government from taking nuclear material from a civilian nuclear program and manufacturing crude nuclear weapons.

A prudent effort to reduce the further proliferation of nuclear weapons and the concomitant threat to the existence of humanity, is for nuclear-exporting nations to achieve agreement in limiting exportation of nuclear reactor and uranium enrichment materials. As a part of such an agreement, the nuclear exporters could then provide Third and Fourth World nations with technical and financial assistance so that they can develop more economical, domestic reserves (for example, solar, hydroelectric, organic wastes and geothermal).

The risk of nuclear annihilation increases in a world where energy requirements escalate at an enormous rate. Thus, the reduction of the nuclear weapons proliferation risk, which increases inexorably with the expansion of nuclear power, should be an urgent priority of U. S. diplomacy. \textsuperscript{Supra note 131, at 171.}

\textsuperscript{136} America's Floundering Oil Policy, \textit{Bus. Week}, Nov. 23, 1974, at 80. See \textit{Agreement on an International Energy Program}, Paris, Nov. 18, 1974, 14 INT'L LEGAL MATS. 1 (1975). Should a shortage of 7 percent affect all of the parties, they are committed to reducing their demand by 7 percent. Should the shortage reach 12 percent, the parties are required to reduce demand by 10 percent and, if deemed necessary, to utilize reserve supplies and share all petroleum in their possession, including imports and domestic supplies. Allocations would be made by the quasi-independent industry advisory body within the International Energy Agency. \textit{Supra note 133, at 612.}
with the other 17 IEA members to the establishment of a common floor price on oil imports. The proposed minimum import price was designed to protect domestic energy investments from becoming noncompetitive should world oil prices drop, and forms a primary part of the Administration's effort to strengthen consumer solidarity in dealing with OPEC.¹³⁷

In order to cope with the short-range dangers of a new embargo and oil-related, balance-of-payments problems, the IEA has created a plan for mutual assistance in the event of an embargo, involving emergency oil supplies, reduced consumption, and oil sharing.¹³⁸

A primary goal of U.S. diplomacy over the past 2 years has been to disunite OPEC. The United States has attempted to weld consuming nations into a bloc which would reduce oil imports and accelerate development of alternative sources of energy,¹³⁹ with the intention of reducing OPEC revenues to a

¹³⁷ The President of the United States currently holds broad powers under the national security provisions (section 232) of the Trade Expansion Act of 1962 to adjust import barriers for the protection of the domestic energy industry. These powers, however, were not intended to be utilized to maintain a price floor for the purpose of stimulating domestic investment. The Ford Administration, therefore, requested authority to establish a floor price in its proposed Energy Independence Act of 1975 (Title IX).

The United States proposed a minimum import price and a program of common investment incentives for high-cost synthetic fuel development and of joint research and development in more exotic fuel technologies, in an effort to accelerate the development of additional domestic energy supplies in IEA countries. The minimum import price was designed to protect investment in the bulk of conventional nuclear and fossil (gas, oil, coal) energy sources from future competition of low-cost foreign oil imports. It was not designed to be high enough to protect costly alternative energy sources (for example, shale oil, coal gasification). The floor price could be maintained by tariff, quota, or variable levy, depending upon the preference of each individual participant.

The Subcommittee on International Economics of the Joint Economic Committee rejected the Administration's proposal, concluding that a minimum price for oil imports is not an appropriate method of protecting domestic investments in conventional energy resources from becoming noncompetitive should world oil prices drop, inasmuch as: (a) Existing investment incentives are sufficient to achieve desired ends; (b) direct subsidization of energy investment would be more economical and equitable than a floor price; (c) the floor price is a clumsy tool for curbing consumption; and (d) the floor price is unnecessary to insure the United States against competitive disadvantage. See Subcomm. on Int'l Econ., Joint Econ. Comm., The State Department's Oil Floor Price Proposal: Should Congress Endorse It? 94th Cong., 2d Sess. (1975).

¹³⁸ Katz, Department Discusses International Economic Policy, 43 Dep't State Bull. 707, 710 (1975).

¹³⁹ The United States has entered into a number of both bilateral and multilateral agreements with other nations for the collective research and develop-
point which would compel some of its 13 member nations to slash prices, thus dissolving the cartel. But the attempt has been unsuccessful, and the policy is now being quietly abandoned.

The softening U.S. attitude is attributable to several factors. First, predictions that a massive transfer of wealth to the oil-producing States would cripple the industrial world's financial and production systems have proven to be unfounded. Lush export markets have been created in OPEC nations for U.S., Japanese and European goods. Much of the rise in oil prices has already been absorbed by consuming nations. According to a recent study by the Brookings Institute, even with higher oil prices, the growth of disposable income in the developed world will be reduced by only three percent between now and 1980.

Second, the Administration has been unable to rally Europeans and Japanese to its anti-OPEC strategy. These nations are far more dependent upon imported oil than is the United States and are exceedingly reluctant to annoy the producing States. France has even refused to join the IEA, which the United States had hoped would unite consuming nations in a struggle against OPEC pricing policies. Great Britain, which is optimistic about North Sea oil, is hopeful that high crude prices

ment of alternative energy sources and more efficient utilization of existing sources. A U.S. objective in confronting the energy crisis is adequacy of domestic energy supplies — in effect, energy independence.


Faced with the major “supply shock” of Oct. 1973 and the overall reduction in Arab oil production, the immediate reaction of practically every major importing nation was to engage in a competitive scramble for petroleum supplies, coupled with offers to adapt its Middle East policy to satisfy Arab demands. Levy, World Oil Cooperation or International Chaos, 52 For. Int'l Aff. 690, 696 (1974).

For example, the European Economic Community (EEC), whose ultimate goal is eventual political unification, was unable during the Arab oil embargo to retain even a vestige of economic unification with respect to its most essential imported commodity — petroleum. Instead, each of the EEC members initiated an independent diplomatic effort to achieve bilateral agreement with various oil-exporting Arab States and thereby guarantee continued supplies. The panic which swept the EEC may perhaps be attributable to two factors. First, Europe is more heavily dependent upon imported oil than are most regions of the world; in fact, of the enormous quantities of petroleum imported by European nations, 73 percent is imported from Middle East sources. Second, inasmuch as The Netherlands, an EEC member, was singled out by OAPEC for particularly stringent treatment, its neighboring States may have decided that disassociation therefrom might inhibit the wrath of Arab scorn which would have otherwise arisen by a process of osmosis.
will continue. Non-OPEC producers such as Mexico and Canada have also benefited from the enormous cost of oil.

Third, OPEC has proved remarkably resilient because its members are well aware that their power to control prices lies in their ability to maintain a united front. Thus, cartel members have been able to restrain traditional animosities.\[141\]

Instead of confrontation, the United States is now seeking to influence OPEC through accommodation with Saudi Arabia — the cartel's most influential member and largest producer of petroleum. The Saudis' ardent anti-communism, their support of Egyptian President Anwar Sadat against more radical Arab leaders, and their relatively moderate position on oil pricing make them particularly acceptable to U.S. policymakers.\[142\]

In the fall of 1975, the strategy proved to be successful, when the Saudis held the OPEC price increase to 10 percent, although some cartel members wanted much more. However, whether OPEC will continue to present even a façade of moderation remains open to question. Iranian Interior Minister Jamshid Amouzegar noted recently that with the expected worldwide economic recovery, new oil price increases "will become possible again by mid-1976."\[143\]

Perhaps the most effective political strategy that the United States could adopt is also the most constructive — continuing its efforts as a broker to guarantee a peaceful settlement between the Arabs and Israelis.

C. Economic Reprisals

Arab governments have concentrated the bulk of their investment capital in the short-term Eurocurrency market. Of the $60 billion accumulated by OPEC in 1974, only 1.7 percent or approximately $1 billion was placed in U.S. stocks and other assets, approximately 6.7 percent or $4 billion was invested in U.S. bank deposits, and 10 percent or $6 billion was placed in

\[141\] Iran and Iraq have settled a long standing border dispute, and radical Algeria agreed with Saudi Arabia's moderate pricing policies when the Saudis presented Algeria with a generous loan. Living with OPEC, Time, Jan. 19, 1976, at 54.

\[142\] Despite its enormous wealth, Saudi Arabia is still essentially a feudal State badly in need of agricultural and industrial development. Within the past year, the United States has signed agreements to provide Saudi Arabia with military and technical assistance, including electrification projects and agricultural development programs. Id.

\[143\] Id.
U.S. government securities. The largest amount, 35 percent or $21 billion, was invested in the Eurocurrency market, and an additional 12.5 percent or $7.5 billion was invested in U.K. deposits and government securities. The remaining capital was loaned to the International Monetary Fund and the World Bank, and to other developed and developing nations.\textsuperscript{144} During 1974, $11 billion of both short- and long-term investments were placed by OPEC nations in the United States, and less than $1 billion of this total represented foreign direct investment.\textsuperscript{145} During the first 10 months of 1975, OPEC members invested $5.2 billion in the United States.\textsuperscript{146} Most of this capital has been placed in short-term and highly liquid portfolio investments, although some petrocapital, including a $10 million investment in an Atlanta hotel and shopping complex, and the purchase of an entire island off the coast of South Carolina, has been placed in long-term direct investments.\textsuperscript{147}

The traditional economic policy of the United States has been to minimize barriers for investment and to encourage the unrestrained international movement of goods and capital. Thus, for example, the United States was instrumental in the development of the Code of Liberalization of Capital Movement by the members of the Organization for Economic Cooperation and Development (OECD). Moreover, the United States is presently engaged in the formulation within the OECD of consultative agreements regarding departures from national treatment of foreign investors or the institution of incentives or disincentives for foreign investment. Additionally, the U.S. commitment to non-restrictive treatment of foreign investment is embodied in an

\textsuperscript{144} Hearings on 5.425 Before the Subcomm. on Securities of the Senate Comm. on Banking, Housing, and Urban Affairs, 94th Cong., 1st Sess. 83-84 (1975).

\textsuperscript{145} Id. at 35.

\textsuperscript{146} Finance Trends, U.S. NEWS & WORLD REP., Dec. 22, 1974, at 74. The U. S. Treasury Department estimates that OPEC nations will have surplus "investable" revenues of approximately $45 billion during 1976. This compares with $41.6 billion for 1975 and $59.3 billion for 1974. The United States is expected to receive about 15 to 16 percent of the $41.8 billion which OPEC nations invest abroad this year. OPEC Oil Profits Expected To Go For Increased Imports, Wash. Post, Jan. 19, 1976, at D-11, col. 7.

extensive network of friendship, commerce and navigation treaties.\textsuperscript{148}

The policy of the United States is to admit and treat foreign capital investments on a basis of equality or parity with domestic capital. Restrictions at the Federal level apply to specific categories of enterprises having national security significance, or involving the exploitation of certain natural resources, or in which particular fiduciary relationships are involved.\textsuperscript{149}

Existing federal statutes and regulations are generally receptive to foreign investment, prohibiting acquisitions in only a few industries and under a few circumstances.\textsuperscript{150} Congress has restricted foreign ownership of enterprises which are engaged in certain exempted activities, such as domestic radio communications,\textsuperscript{151} coastal or inland shipping,\textsuperscript{152} and the production of atomic energy.\textsuperscript{153} Federal legislation also requires that firms engaged in air transportation,\textsuperscript{154} mining on Federal lands,\textsuperscript{155} and the development of hydroelectric power on navigable streams\textsuperscript{156} be organized and chartered under United States law, but has not prohibited foreign control of such companies. Neither foreign nor domestic investors are required to seek governmental permission to engage in U.S. business transactions, except in those fields of special regulation and supervision, such as insurance, public utilities and banking.\textsuperscript{157}

With the massive transfer of wealth from Western industrialized nations to petroleum exporting countries, and, in turn, the investment by the latter of petrocapital into the former, a protectionist paranoia emerged in the United States. To a number of Western financiers, the huge cash surpluses accumulated by Arab oil-producing States is analogous to a Khanjar (Arab dagger) poised at the jugular of international monetary stability. By


\textsuperscript{149} Supra note 144, at 84–85.

\textsuperscript{150} For a detailed evaluation of such legislation, see Elmer & Johnson, Legal Obstacles to Foreign Acquisitions of U.S. Corporations, 30 Bus. Law. 681, 683 (1975).


\textsuperscript{157} Supra note 144, at 85.
shifting their funds from one currency to another, the oil sheiks could precipitate an unending round of monetary crises.158

The United States could conceivably attempt to freeze Arab oil investments in this nation. Approximately half of the capital Saudia Arabia and Kuwait have deposited is held by U.S. banks. But much of that is held by European branches of American financial institutions — and European States may be unwilling to permit their branches of U.S. banks to freeze Arab funds. Moreover, unless the expropriation of Arab capital were accomplished almost instantaneously, the Arabs could sell their threatened dollars for gold or other currencies, destroying the strength of the dollar which has only recently begun to recover from two devaluations and a long seige of selling.

Numerous legislative proposals have been introduced on the floors of Congress which have been designed to prohibit, curb or regulate foreign investment (both direct and portfolio) in the United States. For example, Senator Harrison Williams, Jr., (D-N.J.) introduced the Foreign Investment Act of 1975 which proposed to amend the Securities Exchange Act of 1934 so as to require notification by foreign investors of proposed acquisitions of equity securities of U.S. companies, and to authorize the President to prohibit such acquisitions as he deemed appropriate for purposes of national security, foreign policy or domestic economy.159 Probably the most extreme legislative proposal was the Dent-Gaydos bill, which would have amended the Securities Exchange Act of 1934 “to restrict persons who are not citizens of the United States from acquiring more than 35 per centum of the voting securities or more than 5 per centum of the voting securities of any issuer whose securities are registered under such Act.”160

It is fortunate that such extreme measures were rejected. Prohibitions or severe restrictions upon foreign investment in the United States might well make the dollar less attractive relative to other currencies, and thus contribute to its decline in value. A nationalistic approach to foreign investment could also provoke similar retaliation against U.S. investment abroad which involves a far greater commitment of capital than does foreign investment.

158 Arab Caution, Time, Dec. 24, 1974, at 78.
in the United States. Finally, a need exists to encourage an inflow of foreign capital, not only to balance the outflow of dollars spent for petroleum imports, but also to provide funds for U.S. domestic capital markets.161

When polled, the second largest group of Americans having an opinion, 24 percent, believed that the United States should retaliate with economic sanctions if Arab nations impose another oil boycott.162 The United States could charge sharply higher prices for all goods and services (including the massive quantities of military hardware purchased by Arab States) sold to oil producers. Alternatively, the United States could impose an economic boycott against Persian Gulf States, refusing to sell armaments, industrial equipment, food and other commodities to Arab nations.163 The financial institutions of industrial nations could refuse to accept OPEC deposits unless they are long term, evenly distributed, and at low interest — or possibly under any circumstances. Conceivably, the transfer of real assets could be prohibited, and OPEC money could thus be forced to remain paper money.164

Such methods would, however, prove totally ineffective unless the United States could persuade its European allies to participate. A concerted Western boycott on manufactured products would injure the Arabs, but Western economies more desperately require oil than the pre-industrial Arab States require modern manufactures. With respect to the utilization of food as an economic weapon in retaliation to the OAPEC embargo of petroleum, former Secretary of Agriculture Earl Butz indicated:


164 Supra note 123, at 48.
The Arab oil embargo of 1973-74 was imposed on the United States and on Europe for the obvious purpose of eroding support for Israel. To some extent it did achieve that purpose.

At that time it was suggested that we shut off our shipments of food to the Arab nations in retaliation. But while we ship food to the Arabs, they are not that dependent on us. If we had shut off food to them at that time, they would have easily replaced our shipments from other sources.\(^6\)

A U.S. refusal to sell armaments to Saudi Arabia will be meaningless if France and Sweden are willing to sell. The refusal of New York bankers to accept short-term deposits of petrodollars will be futile if Swiss bankers readily accept such deposits. Would not South Africa sell its gold to Arabs willing to invest dollars, marks and yen? Could the Japanese, who are totally dependent upon imported oil, refuse Arab demands, however outrageous, without facing economic disaster? Would not Communist nations be willing to sell their wares to the Arabs? Even in participating States, would not black market transfers of goods and services be enormous?

Professors McDougal and Feliciano have indicated that:

Reprisals may be defined as violent measures which would otherwise be unlawful, invoked as a response to and a sanction against the prior unlawful violence of the enemy. The world public order recognizes the legality of reprisals as a last desperate measure to secure law-conforming behavior. The original effort of such order is to prevent change by violent means; when that effort fails, recourse is had to the laws of war to minimize unnecessary destruction of values; when observance of the law of war breaks down, the only immediate recourse of the injured is to reprisals in the hope that the enemy will recognize the desirability of returning to observance of that law.\(^6\)

A number of legal scholars do not believe that reprisals fall within the ambit of legitimate self-defense under Article 51 of the U.N. Charter.\(^6\) However, there are authorities who take a contrary position. For example, Yoran Dinstein has asserted:

International law is created and determined by the practice of States — not by lawyers, regardless of their erudition and expertise, or by the misguided resolutions of nonlegislative
bodies. Efforts to institute textbook tenets of international law, confusing the *lex lata* with the *lex ferenda* and widely ignored by States, only serve to perpetuate the layman's belief that the international legal system is a chimerical notion.

Even in terms of sheer rationality, since war, the ultimate weapon, is generally accepted as a legitimate form of self-defense (in response to an armed attack), it is incomprehensible that the use of a lesser weapon, a part rather than the whole, should be regarded as objectionable. If war is a permissible form of self-defense under Article 51 of the Charter, *a fortiori* measures short of war, or more specifically, reprisals, are also permissible.168

Just as a legitimate claim of self-defense may justify unilateral measures involving the use of force which would otherwise be illegal under Article 2(4) of the U.N. Charter, a State may justify unilateral economic measures which might otherwise be illegal if it can demonstrate that such measures are taken in self-defense. Certainly, the requirements of self-defense must be proved. The State would have to demonstrate that it was reacting to a wrongful action of another State, posing an immediate danger to its independence or security in a situation affording no alternative means of protection, and that the reaction was proportionate to the harm threatened.169

In contrast to self-defense, reprisals are punitive in character—they seek to impose reparation for the harm done, or to compel a satisfactory settlement of the dispute created by the initial illegal act, or to compel the delinquent State to abide by law in the future. Because such action is taken after the event and when the harm has already been inflicted, reprisals cannot be characterized as a means of protection.170 Because States will usually justify their activity as lawful *per se* or justifiable self-defense, economic measures which are openly admitted to be retaliatory are rare.171 The legal control of economic reprisals must be accomplished in terms of the accepted preconditions for reprisals, which are:

1. A prior international delinquency against the claimant State. (This would exclude reprisals against economic measures not in themselves unlawful).
2. Redress by other means must be either exhausted or unavailable.
3. The economic measures taken must be limited to the necessities of the case and proportionate to the wrong done.\textsuperscript{172}

\textbf{D. Surreptitious Internal Involvement}

No international covenant prohibits clandestine intelligence operations, and today over 40 nations are actively engaged in surreptitious activities.\textsuperscript{173} Former CIA Director William Colby has emphasized the ability of covert operations to solve a problem at an early stage before it develops into a severe international crisis.\textsuperscript{174} Nevertheless, various forms of U.S. intelligence operations may have been effectively precluded by a combination of Congressional investigations and press leaks. Such investigatory activity may ultimately result in the promulgation of severe legislative restrictions upon many of the clandestine activities of U.S. intelligence agencies. There is no question but that an American instigation of a \textit{coup d'etat} would be a highly illegal interference in the internal affairs of a foreign State. Nevertheless, considering the possibilities for nuclear war arising out of a Super Power confrontation, it might be argued that a covert operation designed to bring a leader to power in an Arab State who would be willing to end a future oil embargo would be the lesser of the two evils.

\textbf{E. Military Intervention: The Last Resort}

1. \textit{Invasion and Occupation}

One retaliatory alternative available to the United States, should the Arabs again impose an embargo upon the exportation of petroleum, would be the military invasion and occupation of Arab oilfields. The United States could easily defeat Arab armies and, although the Arabs could probably sabotage the wells, the technology of oil production in the desert is so simple that the United States could induce a resumption in production in a minimal amount of time. Such an option would, however, appear abhorrent to a nation dedicated to principles of world peace. Moreover, a risk of war with the Soviet Union and the inherent

\textsuperscript{172} Id. at 9-10.

\textsuperscript{173} McCone, \textit{Why We Need the CIA}, Wash. Star, Jan. 20, 1976, at A-16, col. 3.

\textsuperscript{174} Compare \textit{It's Maddening and Frustrating}, Time, Jan. 19, 1976, at 16; \textit{with Can George Bush Save the CIA?} U. S. \textsc{News} \& \textsc{World Rep.}, Feb. 9, 1976, at 19.
vulnerability of oil fields to guerrilla sabotage are omnipresent obstacles in the military path.

President Ford, in a speech before the World Energy Conference held in Detroit, asserted:

Throughout history, nations have gone to war over natural advantages such as water or food, or convenient passages on land and sea. But in the nuclear age, when any local conflict may escalate to global catastrophe, war brings unacceptable risks for all mankind . . .

We recognize the desires of the producers to earn a fair share or a fair price for their oil as a means of helping to develop their own economies. But exorbitant prices can only distort the world economy, run the risk of a worldwide depression and threaten the breakdown of world order and world safety.175

A number of Washington officials have suggested that the United States could eventually be forced to choose between economic ruin and armed intervention.176 Should the energy crisis evolve into an international disaster, the possibility of a U.S. military seizure of Arab oilfields cannot be discounted. Already, one of the nation's leading "think tanks" has initiated a comprehensive study of America's military options in responding to the oil crisis.177


176 Nationally syndicated columnist Jack Anderson reported on November 8 that, on the basis of information from "important policy makers . . . a grim new mood is developing in Washington that military intervention may be necessary to bring down the price of oil and save the West from economic ruin." A top-level policy maker recently asserted, "We are determined to avoid provocative threats. But we want the Arabs to understand that we are not ruling out the use of American military power if the situation requires it." Another observer commented, "The Arabs must be made to realize that 800 million people in America, Europe and Japan are not going to permit their industrial societies to be destroyed by 80 million Arabs." Will U.S. Seize Mideast Oil?, U.S. News & World Rep., Dec. 2, 1974, at 18.

177 Id. A U.S. defense consultant has laid down an entire blueprint for the invasion of Saudi Arabia, in an article recently published in Harper's magazine. Briefly, the plan includes a first wave Marine division, with one or two battalions amphibious-landed and the rest unloaded from aboard ship, and an airlift wave of the 82nd Airborne Division, whose C-5 and C-141 jet transports would be briefly staged and refueled in Israel, flown across Saudi Arabia to Dhahran and escorted by air-refueled Phantom fighters, which would also be based on Israeli fields or aboard carriers in the Arabian sea. One or two paratroop battalions would jump to seize the Dhahran airfield, and once the airfield was secured, the rest of the troops would land. Soon after the Marines landed, a second Army division would arrive, the First Cavalry, by air, and staged by way of Israel, except for the tanks, which would be unloaded from
Secretary of State Henry Kissinger, when asked if the United States was contemplating military action, responded, "We should have learned from Vietnam that it is easier to get into a war than to get out of it. I am not saying that there's no circumstance where we would not use force. But it is one thing to use it in the case of a dispute over price; it's another where there is some actual strangulation of the industrialized world."\(^{178}\)

Professional analysts see two contingencies as having the potential to bring about a U.S. military seizure of Arab oil fields:

1. A failure to achieve a solution to the devastating economic consequence of the enormous increase in oil prices during the past year; or
2. A new Arab embargo on petroleum exports, which could push the West's sluggish economies into a depression accompanied by widespread hardship,
   (a) as a result of another Mideast war between Arab and Israeli forces; or
   (b) as an attempt to induce Israeli territorial concessions.\(^{179}\)

Nevertheless, military intervention is viewed as a last resort\(^{180}\) to be employed only if economic and diplomatic measures fail to bring down the price of oil or end a new Arab embargo.

One of the primary considerations for elected officials in a democracy is domestic public opinion. Only 10 percent of Americans surveyed in a recent Gallup Poll believed that the United States should resort to military intervention should the Arabs impose another oil boycott.\(^{181}\) The moral conscience of the American people in recent decades has been marked by opposition to the acquisition of territory by force. Territory under American control has been surrendered on several occasions in favor of the principle of self-determination (for example, Cuba, the Phillipines, fast land ships and fast freighters. Finally, the expedition would be reinforced with the combat echelons of a second Marine division. "Except for staging and refueling points in Israel — itself almost 1,000 miles away (Hatserim to Dhahran) — there would be no friendly bases within easy reach. The Israelis owe a great deal to the United States, and it is inconceivable that they would deny airfield facilities, even if the operation entailed serious risks for them." Ignotus, Seizing Arab Oil, HARPER'S, Feb. 1975, at 44.

\(^{178}\) Kissinger on Oil, Food, and Trade, BUS. WEEK, Jan. 13, 1975, at 69.


\(^{180}\) Secretary of State Kissinger has mentioned the use of force as a last step in the event of a "grave emergency" over petroleum. See N.Y. Times, Jan. 3, 1975, at 2, col. 1.

\(^{181}\) Supra note 162.
West Germany, Austria, Italy and Japan). American war weariness, a by-product of U.S. involvement in Indo-China, might also account for the high percentage of Americans opposing military intervention. "If Vietnam was full of trees and brave men, and the national interest was almost invisible, here there are no trees, very few men, and a clear objective. There could be serious risks in the operation, but at least there would be no sense of futility with 200 billion barrels of oil underfoot — oil that would restore jobs to the unemployed and supply the wherewithal for a gradual program of substitution."182 Starving, unemployed Americans might support whatever measures necessary to reverse economic “strangulation.” Nevertheless, a mood of isolationism appears to be sweeping the United States. Congress has placed severe restraints upon the ability of the Executive to commit American troops abroad in a foreign military conflict.183 In the wake of the disaster of Vietnam, Americans no longer feel determined to restrain the spread of communism. Congressional action with respect to Angola indicates that not only will this nation refuse to send its young men to fight in a foreign war, but it will also refuse to lend even relatively miniscule financial support to those who themselves desire the means with which to resist Soviet-Cuban interventionist neo-colonialism. Congress has permitted the relative military strength of the United States to deteriorate;184 and President Carter called for the withdrawal

182 Supra note 123, at 51.


of American troops from South Korea during his campaign. The United States is quite a different nation than it was prior to its defeat in Indo-China.

Initial world public opinion would, to say the least, indicate vehement opposition to a U.S. military seizure of Arab oil fields. The Soviet Union might use it as an excuse to seize West Berlin, or Finland, or beyond. However, industrialists and labor in Japan and Europe would be delighted that their factories are running again. The Fourth World, whose economic progress has been crippled by the incredibly inflated price of petroleum, and whose millions will starve because of the diminished production of fertilizers, might eventually be delighted to receive oil at pre-1973 prices or lower.

Finally, from a purely military standpoint, some strategic planners indicate that an operation to seize Arab oil fields poses no insurmountable obstacles for United States armed forces, particularly since the United States has established a naval presence in the Indian Ocean with the construction of naval facilities on the British island of Diego Garcia. An assessment recently published by the Stockholm International Peace Research Institute arrives at this conclusion: "Obviously, a powerful country such as the United States would have little difficulty in conquering most the countries in the Middle East. Successful military control over the Arabian-Persian Gulf area could probably be achieved in hours, or even minutes. The problem would be in sustaining such an operation and managing its repercussions."

Three nations are pinpointed by military experts as potential targets for an armed action: Libya, Kuwait and Saudi Arabia. However, some authorities maintain that the current oil production of Libya and Kuwait is inadequate to cope with an international economic crisis of the scope that could trigger military action. Daily output in Kuwait is approximately 2 million barrels and in Libya 1.4 million. That would be sufficient to meet U.S. import demands, but would not supply the minimum import requirements of Western Europe. Saudi Arabia, with daily output of over 8 million barrels, is the only nation that could produce enough petroleum to meet the essential needs of both Europe and America. Military planners indicate that three divi-


"Jimmy Carter: Not Just Peanuts, TIME, Mar. 8, 1976, at 20."
sions would be sufficient to seize the oil fields in any of these three countries. 186

Setting aside all moral considerations, such a course of action would undoubtedly carry with it a cataclysmic risk. Military action might well induce a direct U.S.-Soviet confrontation and thereby ignite a third World War. The Soviet Union could deploy a naval flotilla off the Saudi Arabian coast, or move minesweepers into the Straits of Hormuz, or land troops in Iraq. However, at least one high-level U.S. policy maker has discounted the risk of Soviet intervention, arguing that the Soviets would recognize that the American military intervention in Arab oil States involved vital U.S. interests and only marginal Russian interests. Therefore, he argues the Soviets would stand aside — just as we did in Czechoslovakia where we recognized that Soviet national interests were at stake.

Nevertheless, it may well be true that, in a nuclear age, the survival of man depends upon adherence to existing principles of international law.

2. Legal Limitations on the Use of Force

During the 18th and 19th centuries, and the first two decades of the 20th, a State could resort to war for any reason it deemed proper, and international law was not thereby violated. 187 However, in 1928, recourse to war for the solution of international disputes was condemned in the Kellog-Briand Pact, and war was renounced as an instrument of national policy. 188 Since then, condemnation of the settlement of controversies between States by other than pacific means has been reaffirmed by the community of nations on a number of occasions. 189

Clearly, the weight of current international law, as expressed in numerous U.N. resolutions, prohibits the occupation and ac-


187 During the time of Grotius, a distinction was drawn between "just" and "unjust" wars. W. Bishop, Jr., International Law 913 (1962).


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acquisition of the territory of another State by force,\textsuperscript{190} war\textsuperscript{191} or military conquest.\textsuperscript{192} Moreover, existing principles of international law prohibit the use of force in the relations between States. Article 2(4) of the Charter of the United Nations solemnly declares:

All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other matter inconsistent with the purpose of the United Nations.

This principle of international law was recently reaffirmed in paragraph 1 of the Declaration on Friendly Relations.\textsuperscript{193} A number of other principles contained in the Declaration would also be violated by a U.S. military seizure of Arab oil fields. For example, paragraph 4 prohibits the "... use of force to violate the existing international boundaries of another State." Paragraph 6 proclaims the duty "to refrain from acts of reprisal involving the use of force."\textsuperscript{194} Also, the military occupation and acquisition by force of the territory of another State is prohibited by paragraph 10.\textsuperscript{195} However, paragraph 13 clearly indicates that the right of lawful self-defense as contained in the U.N. Charter is in no way inhibited by the Declaration on Friendly


\textsuperscript{191} See 22 U.N. SCOR, Res. 242, at 8 (1967).


\textsuperscript{194} Thus, retaliation against injuries which do not permit the exercise of the right of self-defense is prohibited. Reprisals were also condemned by a Resolution of the Security Council of April 9, 1964, as incompatible with the purposes of the United Nations. Rusk, \textit{supra} note 193, at 26.

Relations. Therefore, unless the United States could lawfully assert the right of self-defense, U.S. military intervention against Arab oil producers would clearly be prohibited by the above principles of international law.

3. National Self-Defense Under Article 51

Normal difficulties in delineating legitimate responses to coercion have been compounded by the regime of nonviolence contemplated by the framers of the United Nations Charter. Under the Charter, the primary responsibility for peace-keeping has been vested in the Security Council, with limited utilization of defensive force reserved for the State which suffers an assault.196

Under the U.N. Charter, recourse to force is permitted in only two instances: (a) Within the framework of the collective security system created by the United Nations, and (b) in self-defense in response to an armed attack, in accordance with Article 51 of the Charter, which provides that: “Nothing in the present Charter shall impair the inherent right of individual and collective self-defense if an armed attack occurs against a Member . . .”

Admittedly there is a strong school of thought adhering to the view that Article 51 explicitly condones only one type of legitimate self-defense (that is, the repulsion of an armed attack) without negating other types preexisting under customary international law (that is, resistance to aggression in its several manifestations).197

The phrase “if an armed attack occurs” is open to two interpretations. It may be argued that the proviso is a restraint on the traditional right of self-defense so that the right is presently available to only those U.N. members who are the objects of an actual armed attack.198 Professor Kunz, for example, argues that the

197 The controversial phrase is, of course, “if an armed attack occurs.” One need only recall the agony imposed upon those who attempted to defend President Kennedy’s interdiction of the shipment of missiles to Cuba to grasp some sense of the complexities involved. See Mallison, Jr., Limited Naval Blockade or Quarantine-Interdiction: National and Collective Defense Claims Valid Under International Law, 31 Geo. Wash. L. Rev. 335 (1965); Oliver, International Law and the Quarantine of Cuba, 57 Am. J. Int’l L. 373 (1963); Campbell, The Cuban Crisis and the U.N. Charter: An Analysis of the United States Position, 16 Stan. L. Rev. 160 (1963).
199 See D. Bowett id., at 187.
right of self-defense under Article 51 of the U.N. Charter does not exist against any form of aggression which does not constitute an "armed attack":

As in municipal law, self-defense under Article 51 is not a procedure to enforce the law, is not designed to punish the aggressor or to obtain indemnities, is not an enforcement action by the United Nations, but serves primarily to repel an illegal armed attack. But, contrary to municipal law, it may not stop here: it seems to give the State or States exercising the right of individual or collective self-defense the right to resort to a justified war, to carry this war to victory, to impose a peace treaty upon the vanquished aggressor, always presupposing that the Security Council has failed and continues to fail of taking the measures necessary to maintain international peace and security. The right of self-defense is, in such cases, a right to resort to war. . . . It seems also that the conditions of necessity, reasonableness, and a certain proportionality, which the municipal law prescribes for the exercise of the right of self-defense, are lacking in Article 51.

Self-defense in municipal law presupposes an illegal attack; this is certainly true also in international law.

"Armed attack" as the only condition of the right of self-defense under Article 51 may, in conceivable circumstances, mean to [sic] little. For this right does not exist against any form of aggression which does not constitute "armed attack." . . . The threat of aggression does not justify self-defense under Article 51.200

Professor Kelsen also argues that Article 51 restricts the right of self-defense to the case of an "armed attack" actually made by one State against another. He asserts, "Self-defense . . . is self-help against the illegal use of force, not against other violations of the law."201 These authorities contend that the combined effect of Article 2(4) and Article 51 is to restrict the right of self-defense to cases falling precisely within the wording of Article 51 — making that Article the exclusive source of authority of legitimate recourse to war, so that any "threat or use of force" not within its terms is a violation of Article 2(4).202 Under this interpretation, the combination of Article 2(4) and 51 would render all use of force illegal except in the exercise of self-defense "if an armed attack occurs."203 Thus, Article 51 would be


203 See supra note 40, at 265.
construed as a restriction on the traditional right of self-defense, so that the right could not be exercised in the case of a violation of a Member’s legally protected interests except with those Members who are the object of an actual armed attack.204

Indeed, some scholars assert that Article 51 demands an even higher degree of necessity than does customary international law for the characterization of coercion as permissible self-defense, in that it limits justifying necessity to an “armed attack” as distinguished from applications of nonmilitary types of intense coercion. One scholar, Dr. Niščić, specifically asserts that economic aggression does not warrant armed action on the basis of Article 51.205 Certainly, because the employment of the Arab oil weapon in an embargo of petroleum, and the resultant “strangulation” of Western economies would not constitute an “armed attack”, Article 51 would be inapplicable. Moreover, a resort to force against various forms of indirect aggression (including economic aggression) could not be derived from Article 51 if the requirement of proportionality is observed.206 However, a narrow reading of Article 51 would seem to constitute an underestimation of the potentialities of contemporary techniques of nonmilitary coercion.207

However, this interpretation complies neither with the letter nor the spirit of the Charter, and consequently has been rejected by most authorities.208 The weight of authority appears to interpret Article 51 as precluding preventive countermeasures which may have been legitimate under customary international law.209 These scholars assert that the source of the right of self-defense is not the U.N. Charter, but is an independent and inherent right rooted in general international law; and the purpose of Article 51 was to remove all possible doubts as to its survival after promulgation of the Charter.210 They argue that U.N. members continue to possess those sovereign and inherent rights which

204 Supra note 30, at 187.
205 Supra note 31, at 233.
206 Supra note 40, at 279.
207 Supra note 31, at 238.
208 Although the English and Spanish texts use “armed attack” and ataque armado respectively, the equally authentic French text utilizes the clearer term agression militaire.
209 See Kunz, supra note 100, at 887-888; Dinstein, supra note 168, at 468; H. Kelsen, THE LAW OF THE UNITED NATIONS 797-798 (1950).
210 See A. Tussing, supra note 196, at 391.
general international law accords to them, except and insofar as they have been assumed under the Charter. Thus, each member retains the inherent right of self-defense subject only to such limitations as are contained in the Charter. Because it is well recognized under traditional international law that an armed attack is not the only form of aggression which so imperils a State’s rights so that it may be compelled to resort to the exercise of a right of self-defense, a military response to intense economic coercion may well be permissible under customary international law.

The U.N. Charter expressly permits the use of force in only two instances: (1) Individual or collective self-defense, and (2) implementation of a decision by a competent international organization. The Charter was originally interpreted as a somewhat absolutist document, prescribing the elimination of aggressive force. Those scholars who assert that the U.N. Charter prohibits all forms of self-defense other than Article 51 self-defense would be entirely justified to prohibit the use of force if the United Nations or collective security organs had either established the collective machinery to oppose aggression; or could and would respond quickly on an ad hoc basis. But, for the most part, this machinery does not exist. War between nations did not end when the U.N. Charter was signed in San Francisco. Despite the hopes of its founders, the United Nations, as an organ of collective international security, has been impotent (with the exception of certain fortuitous circumstances surrounding U.N. military involvement in Korea). Moreover, to reject the right of self-defense in contexts not involving overt violence, under certain circumstances, may require the target State to assume a suicidal posture.

The “legislative history” of the U.N. Charter appears to favor the position held by the latter group of scholars. The travaux preparatoires, to which one may legitimately resort in the case of ambiguity, suggests only that Article 51 should safeguard the existing

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212 Supra note 30, at 185.
213 Supra note 40, at 272.
214 Supra note 30, at 193.
215 Id. at 192.
217 Id. at 57.
218 Supra note 31, at 202-03.
right of self-defense and not restrict it. The preparatory work on
the Charter clearly indicates that Article 51 was not drafted
for the purpose of deliberately narrowing the permissibility of
self-defense under customary international law against an un-
lawful attack where the required degree of necessity exists.
Moreover, in the process of formulating the prohibition of uni-
lateral coercion contained in Article 2(4), the drafters indicated
that the traditional permissibility of self-defense was not intended
to be abridged or attenuated but, to the contrary, preserved and
maintained. Further, under principles of traditional interna-
tional law, restrictions on the inherent rights of a sovereign
State are not lightly to be presumed.

Therefore, assuming that the U.N. Charter does not limit
the preexisting inherent right of self-defense held by sovereign
nations, it is appropriate now to examine the permissibility of a
military response to intense economic coercion under principles
of customary international law.

4. The Customary International Law of Self-Defense

As a principle of international law, the right of self-defense
has never been seriously disputed. This privilege was
deemed so fundamental that a reservation of the right of legiti-
mate defense was made a condition precedent to the signing of
the Kellog-Briand Pact. Moreover, it is clear that under
customary international law the right of self-defense was not
limited to cases of an actual armed attack.

The prerequisites of customary international law for the lawful
assertion of a claim of self-defense are most commonly sum-
marized by the terms “necessity” and “proportionality.” Often
these restrictions have been cast in such rigid phraseology
so as to make the privilege unassertable. The traditional formu-
alation of the principle is found in the oft-quoted words of Secre-
tary of State Webster in the Caroline case of 1842. There he
said, “While it is admitted that exceptions growing out of the

\[\text{Footer Notes}\]

219 Supra note 30, at 188.
220 Supra note 31, at 235.
221 Supra note 30, at 188.
222 Weightman, Self-Defense in International Law, 37 VA. L. REV. 1095, 1114
(1951).
223 Supra note 40, at 235; see supra note 53, at 1108.
224 Supra note 199, at 188.
225 Supra note 31, at 217.
great law of self-defense do exist, those exceptions should be confined to cases in which the necessity of that self-defense is instant, overwhelming, and leaving no choice of means, and no moment for deliberation.”

A more widely accepted definition of the principle of proportionality was articulated by de Brouckère in 1927, who said, “Legitimate defense implies the adoption of measures proportionate to the seriousness of the attack and justified by the imminence of the danger.”

Under both formulations, it would appear that a resort to military force might be disproportionate to harm suffered from economic aggression, and might therefore be illegal. Directly after World War II, the question of the legality of the use of force in self-defense in response to economic injury was placed before the International Military Tribunal for the Far East. The Tribunal rejected the contention that Japanese military operations against The Netherlands, Great Britain, France, and the United States were justifiable as within the privilege of self-defense because those nations took economic measures against Japan, and that as a result, she was forced to go to war to preserve the welfare and prosperity of her nationals.

Thus, the requirement of proportionality will generally prohibit the lawful use of force in response to economic aggression. This need not be so inevitably; one may recall the statement made by the United Kingdom with respect to Article 4 of the Draft Declaration on the Rights and Duties of States to the effect that exceptions to the duty of nonintervention may exist where a State is “pursuing a course which leads to the economic strangulation of another State.” However, situations in which self-defense would justify the employment of forceful means against a wrongful action not involving the use of force would certainly be rare, and the defending State would be put to the most stringent standard of proof as to the necessity of the case, the lack of alternative means of protection, and the proportionate nature of the reaction.

Nevertheless, the interest which a State may have in the preservation of its national economy and its essential economic interests may be equally as compelling as its interest in safe-

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227 Supra note 31, at 261.
228 Supra note 40, at 253.
229 Supra note 30, at 110.
guarding its territory, its political independence, or its people.\textsuperscript{230} Thus, if as a result of a prolonged embargo of petroleum by Arab nations, most of the world’s factories grind to a halt without fuel, and mass unemployment and starvation results, such devastation would be at least as economically catastrophic as if industrial complexes had been bombed.

Customary international law has always required a high degree of necessity to support the lawfulness of a response of force. One index of the required condition of necessity is the degree of opportunity of effective recourse to nonviolent modes of adjustment and response. Certainly, a prerequisite to the use of force against Arab oil producers would be the exhaustion of non-violent alternatives. Secretary of State Henry Kissinger emphasized, “... the use of force would be considered only in the greatest emergency.”\textsuperscript{231}

As has been indicated, the legal obstacles to a U.S. military seizure of Arab oil fields are numerous, complex and possibly fatal. One must first determine whether the fact that economic coercion has not been generally accepted as within the definition of aggression is of significance in giving rise to the right of self-defense. Secondly, one must ponder the issue of whether the prohibitions against the use of force in response to economic aggression implied in Articles 2(4) and 51 of the U.N. Charter prohibit the use of force against intense economic coercion under customary international law. Once these two obstacles have been surmounted, one must determine whether the use of force under circumstances in which the U.S. economy is faced with “strangulation” would be permissible under existing principles of international law.

The use of force in self-defense is permissible for the purpose of protecting the security of a State and its essential rights — in particular the rights of territorial integrity and political independence — upon which that security depends. Customary international law imposes the three following conditions upon the lawful assertion of the use of force in self-defense:

1. The target State must be guilty of a prior international delinquency against the claimant State.
2. An attempt by the claimant State to obtain redress or protection by other means must be known to have been made, and failed, or to be inappropriate or impossible in the circumstances.

\textsuperscript{230} Id. at 106.

\textsuperscript{231} Supra note 178.
3. The claimant's use of force must be limited to the necessities of the case and proportionate to the wrong done by the target State.232

The case for the necessity of the use of force would be more convincing if asserted by Japan or Western Europe, whose industrialized economies are overwhelmingly dependent upon imported petroleum, than if made by the United States, which imports only between 30 and 40 percent of its oil consumption. However, within the next decade, U.S. dependency upon imported crude will increase significantly, as will its satisfaction of the legal requirement of necessity.

It is extremely doubtful, however, that a military response to economic coercion would be deemed proportionate to the harm done and therefore acceptable under existing principles of international law. But before 1973, the world had never been faced with a situation in which a handful of nations could thrust the world into a depression by withholding a single commodity.

One final issue which should be mentioned is the legality of the acquisition of territory in self-defense. Force employed in self-defense, although lawful, must be proportionate to the threat of immediate danger; where the threat has been averted the plea of self-defense is no longer available. Thus, a State cannot thereby acquire title to the resources and territory of the attacker by conquest in lawful self-defense.233

Realistically, one must face the possibility that if the United States finds itself between a rock and a hard place, it may not be deterred by the impermissibility of military intervention under existing principles of international law. As Senator Scott (R-Pa.) said recently, "If in this country automobiles ground to a halt and people couldn't get to work, if the temperature in people's homes dropped to 50 degrees, if the wheels of industry ground to a halt, and we couldn't employ people, I can't imagine this country not doing whatever it needed to do, either economic or military [sic] to permit itself to survive, and we wouldn't be worth a damn as a nation if we didn't."234 Commenting on the Cuban missile crisis, former Secretary of State Acheson said, "The power, position and prestige of the United States had been challenged by an-

232 Supra note 170, at 3.
other State; and law simply does not deal with such questions of ultimate power. . . . I cannot believe that there are principles of law that say we must accept destruction of our way of life. . . . The survival of States is not a matter of law.”

V. THE LONG-TERM IMPLICATIONS

The international energy arena appears to be dominated by five factors: (a) The cartel of oil exporting countries, (b) the political volatility of Southwest Asia, (c) the precarious nature of the world monetary system, (d) the ominous repercussions of the energy crisis upon poor countries, and (e) the global nature of certain environmental problems.

A. Emerging Petropolitics

It has been suggested that ecopolitics is replacing geopolitics as the prime mover in the affairs of nations. With the industrial nations of the world actively competing for the same petroleum resources, and with the exporting nations employing oil to amass unprecedented wealth and political power, petropolitics is beginning to dominate both ecopolitics and geopolitics.

American recognition of the essentiality of energy resources is long overdue.

There is no more certain way of destroying any economy — except the most primitive — than by depriving it of energy. Industrial society depends entirely on a steady, secure supply of ample energy for its maintenance and growth. Aspirations for higher standards of living, achievement of social goals, and economic as well as military security — all depend on the availability of needed energy reserves.

The American energy appetite is the world’s most profligate. Consumption of energy in the United States doubled between 1950 and 1960, and will double again by 1985. With only 6 percent of the world’s population, the United States consumes approximately

235 Supra note 187, at 929.
ly one-third of the world's energy and over one-half of all the gasoline produced.

The most outstanding feature of the U.S. energy consumption pattern is the nation's reliance on oil. Approximately 45 percent of the energy consumed in the United States comes from oil, and 32 percent from natural gas, largely a byproduct of oil production. Of the remainder, 18 percent comes from coal, 4 percent from hydroelectric power, and only .5 percent from nuclear plants.239

During the winter of 1973-74, petroleum became scarce in the United States because domestic production has declined since 1970, and the international market, already dominated by the influence of the OPEC cartel, became devastated by the Arab cut-offs resulting from the Mideast war.240 Nevertheless, the effects of the embargo were constrained by (a) the availability of domestic reserves, (b) the importation of oil from non-OAPEC sources, and (c) the inability of Arab nations effectively to control the destination of ocean vessels laden with petroleum. With the nationalization and acquisition of wellhead producing and refining facilities heretofore held by the controlling oil corporations (which, predominantly, were domiciled in the United States), the ability of the involved States to effectively impose a destination embargo upon oil has been significantly augmented. Moreover, with the realization of the enormous economic and political potential of petroleum manipulation, the Arab States are becoming more acutely aware of the alternative economic weaponry at their disposal, and, perhaps, more sophisticated in its utilization. For example, one source has compiled a list of intriguing types of economic coercive measures which could readily be employed by oil-exporting nations to achieve their desired ends. The negative weapons include:

1. Withholding part or all of the oil supply from all or selected customers through (a) nationalization or threat of takeover of oil and/or other foreign investments, and (b) temporary embargoes on exports;
2. Using its "embargo" power to demand and receive increasingly higher prices for crude oil — naturally to the extent that consumer resistance, the development of substitutes, and retaliatory measures by the oil-importing countries (e.g.,

import quotas, foreign investment restrictions, denial of aid, and other retaliation) may permit;

3. Regulating domestic operation by foreign oil companies through such requirements as greater local participation in production and/or distribution; further changes in internal "value-added" taxes on oil production and marketing; and increased local purchases, restricted company imports, etc.;

4. Switching huge export earnings from some foreign currencies and countries to others depending on type of cooperation and attitude, or denying foreign investment in "hostile" countries;

5. Making discriminatory price concessions, or engaging in unfavorable price discrimination vis-à-vis selected customers, or dumping other export products in "unfriendly" countries;

6. Retaliating against industrialized creditors by the repudiation or rescheduling of foreign debts; and

7. Shifting alliances and coalitions in trade, investment and military agreements between cooperative and non-cooperative nations (including threats of withdrawing from membership of regional pacts or closing military bases).\(^{241}\)

On the other hand, the means of affirmative reinforcement available to oil-producing States include:

1. Giving special concessions to foreign private investors for the purposes of exploiting domestic national resources which are outside the scope of existing contracts;

2. Promising cooperation in the reform of international monetary, fiscal and trade systems; and

3. Investing in joint ventures for the development of energy sources and/or other investment projects with cooperative and accommodating partners.\(^{242}\)

What is the ability of the oil-producing nations to maintain their enormous economic and political influence in the world community?

The question may be unanswerable, because the world has had no experience either with high oil prices or with a cartel of financially solvent governments who control a nonagricultural, nonrenewable commodity for which there is no short-run substitute.

The most immediate foreign policy problem vis-à-vis oil importation which the United States will face during the next decade will consist of attempting to reduce its vulnerability to politically motivated oil cutoffs, particularly should the fundamental Arab-Israeli conflict remain unresolved. By 1985, U.S. importation

\(^{241}\) Amuzegar, *supra* note 8, at 227-228.

\(^{242}\) Id.
from Arab nations may well increase to 6 million barrels of oil per day.

Nations which are dependent upon world markets for agricultural products and industrial raw materials are vulnerable to various forms of coercive economic activity, including embargoes. Curiously, Fourth World agrarian States, although more susceptible to military coercion, may be substantially less vulnerable to economic coercion than are industrialized States. Nevertheless, the Fourth World may find it increasingly difficult to absorb substantially higher costs of imported commodities which have heretofore and will henceforth arise owing to artificial economic manipulative measures taken by the world’s cartels in an effort to increase the wealth of their members.

B. The Massive Shift of Wealth to Arab Nations

The world oil market, an artery of American, Western European and Japanese prosperity, has undergone an extraordinary metamorphosis in only 4 years. During that period, the oil-exporting nations (representing only a fraction of the world’s population, income and military might) acquired an almost unlimited control of world oil prices. During the first 4 years of 1970, the price of oil rose approximately 515 percent.

The world has experienced more than a mere temporary aberration in supply and demand; it has witnessed instead a fundamental shift in the power relationships between the world’s industrialized nations (for example, the United States) and the primary petroleum exporting nations (for example, Saudi Arabia, Iran and Kuwait). Its implications will have far-reaching effects upon American diplomacy.

The two massive increases in the cost of oil during 1973 were the culmination of a dramatic shift of bargaining power from the oil-consuming to the oil-producing nations. In the West, this revolution was viewed, quite naturally, as a disaster; and in the OPEC States it was perceived to be a triumphant conclusion of a 20-year struggle for a fair return on a diminishing natural resource.243

With the per barrel price of oil escalating from $2.10 in late 1973, to a cost which presently exceeds $10.00, petroleum producing nations have accumulated enormous cash reserves. The cost of imported oil to the United States alone increased from $7.7

243 M. Field, A Hundred Million Dollars a Day 17 (1975).
billion in 1973 to $24.0 billion in 1974.\textsuperscript{244} Robert S. McNamara, President of the World Bank, has estimated that OPEC nations have already accumulated a surplus of $60 billion in investment capital, and may eventually hold as much as $750 billion.\textsuperscript{245} Prior to the recent oil price increases, former Commerce Secretary Peter Peterson estimated that Arab oil producers could hold dollar surpluses of $300 billion by 1980 — a sum equal to 20 times the value of General Motors. If such transfers of wealth continue, it is estimated that 70 percent of the world's monetary reserves might eventually be held by Arab oil producers. By 1985, oil-producing nations may well have accumulated cash reserves of $1.2 trillion. The Economist of London has calculated that members of the Organization of Petroleum Exporting Countries are acquiring capital at the rate of $115,000 a second — fast enough to purchase the Bank of America in 6 days, IBM in 143 days, and all of the companies listed on the world's major stock exchanges in 15.5 years.\textsuperscript{246} The Economist described the financial crisis in the gravest terms, stating: "A landslide of historic proportions is rumbling downhill toward most of the oil-consuming industrialized world, in the shape of the immense balance-of-payments surplus acquired by the producers of oil — a landslide capable of breaking the financial system and the economies of several major countries."\textsuperscript{247} In an industrialized world dependent upon petroleum for economic stability, the Arab oil embargo and OPEC's sharp increase in oil prices has created a financial crisis of unparalleled gravity. The threat posed to industrialized nations was described in these words by Arthur Burns, Chairman of the Federal Reserve Board: "No economic event in a long generation, excluding only wartime upheavals, has so seriously disrupted our economy as the manipulation of oil prices and sup-

\textsuperscript{244} Pay More, Get Less: Oil-Gas Outlook, U.S. News & World Rep., Jan. 27, 1975, at 25. Moreover, the current price of approximately $11.50 per barrel is expected to rise despite the inflationary and balance-of-payments crises created, see Why the Price of Mideast Oil Is Likely to Go Up Again, U.S. News & World Rep., Jan. 12, 1976, at 51. More recent increases in the price of oil have been far more moderate. Saudi Arabia and the United Arab Emirates agreed to increase petroleum prices by only 5 percent, despite the decision of the remaining 11 OPEC nations to increase prices by 15 percent. See The Saudis Break Ranks, Newsweek, Dec. 27, 1976, at 27.


\textsuperscript{247} Supra note 179.
plies over the past year. . . A great cloud of uncertainty now surrounds the economic future of nations around the world." 248 Secretary of State Kissinger expressed the concern of this nation by emphasizing that we are "confronted with an unprecedented challenge to our prosperity and to the entire structure of international cooperation.

. . . The impact of the energy crisis raises fundamental questions about the future of developing countries, the prospects for economic growth for all nations, and the hopes for global stability . . ." 249

Indeed, the world's poorest nations have suffered most from the quintupling of oil prices since the fall of 1973. The aggregate balance-of-payments deficit of non-OPEC developing nations ballooned from $11.3 billion in 1973 to approximately $42 billion last year. A primary reason for this deficit is that these nations are now paying $13 billion more per year for oil than they paid in 1973. Developing nations may well require approximately $20 billion annually in capital assistance throughout the rest of the 1970's. 250

C. Cartelization in the Third World

Cartels have never been known for their longevity. Historically, either the participants unilaterally made lower price agreements with purchasers in order to secure a larger share of the market, or new suppliers, attracted by high prices, entered the market and undercut the cartel's power of monopolization.

The durability of the OPEC cartel should not however, be underestimated. No new significant suppliers of oil are visible on the horizon. Meanwhile, Western Europe continues to be de-


249 Major Oil-Consuming Countries Meet at Washington to Discuss the Energy Problem, 70 Dep't. State Bull. 201 (1974).

250 OPEC oil ministers, meeting in Paris, recently agreed to establish an $800 million fund for 1 year to make long-term, interest-free loans to less-developed nations — OPEC's first gesture as a group to assist poor nations which are afflicted with enormous oil bills. Oil-exporting nations have refused to provide their poorest customers with a price reduction, preferring to assist through direct grants and loans and investment in agencies such as the World Bank. Yet, almost two-thirds of direct OPEC assistance during 1974 and 1975 was given to Egypt and Syria. Indeed, less than 10 percent of OPEC direct assistance is given to non-Moslem nations, and 18 of the 42 countries designated by the United Nations as "most seriously affected" by high oil prices have received no aid at all from OPEC members. Ungenerous OPEC, Time, Feb. 9, 1976, at 76.
dependent upon the Middle East for 70 percent of its oil, and Japan imports 40 percent of its consumption from the region. Additionally, Middle Eastern leaders are convinced that it is economically prudent to prolong the life of their nonrenewable resources by reducing production. The initiative for the formation of cartels and other price-increasing arrangements has traditionally arisen in developing States which feel that they have not received equitable economic treatment in the past. It is almost universally recognized that henceforth a plethora of efforts will be undertaken by primary producing countries to maximize their own returns on their sales of primary resources through whatever means are deemed adequate to achieve these ends. Cartels among developing States have already developed for bananas, bauxite, coffee, copper, iron ore, mercury, phosphates and tin; and the United States is today dependent upon imports for 50 percent or more of its total requirements of bauxite, chromite, cobalt, manganese, nickel, platinum, tin and zinc. The vulnerability of the United States to economic coercive measures (including embargoes) undertaken by such cartels is apparent.

Cartelization among Third World States exporting natural resources vital to the economies of importing nations can be expected to grow. With its growth, the price increases of essential raw materials will have inflationary repercussions upon an already weakened world monetary system. Organized blocs of exporting States, although militarily impotent, will learn that they can nevertheless wage a significant amount of economic coercive warfare against importing States to achieve whatever political or economic ends from their customers that they desire. In particular, the effectiveness of their employment of economic means in the acquisition of wealth by increasing artificially the cost of their resources can be expected to grow as they become more experienced and proficient in the manipulation of their col-

251 Supra note 236, at 16.


255 Their success, of course, will depend upon the degree to which the importing state is addicted to the involved commodity.
lective economic tools. Only the self-sufficient States, or those States themselves exporting a substantial volume of raw materials or manufactured goods, can avoid the incremental effects of a balance-of-payments deficit. The cost increases will not be limited in their effect to the industrialized States. Indeed, importing nations of the Fourth World may well suffer relatively more intense degrees of economic deprivation than industrialized nations, which appear more capable of successfully withstanding the shock of increased prices.