Settlement of the Namibian Dispute: The United States Role in Lieu of U.N. Sanctions

Deneice C. Jordan-Walker
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I. INTRODUCTION

The Namibian conflict is best viewed as a dispute primarily between the United Nations and South Africa over the legal propriety of South Africa's presence in Namibia (South West Africa),¹ and the terms under which South Africa will relinquish de facto control of the territory.²

On January 7, 1982, the new U.N. Secretary General, Javier Pérez de Cuéllar, declared resolution of the Namibian conflict a major objective of the United Nations.³ Secretary General DeCueller's statement is an acknowledgement that peaceful settlement of the issue of Namibia's independence is crucial to the reputation and integrity of the United Nations as the leading international organization which strives to prevent war,⁴

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¹ Namibia (South West Africa) is located on the Atlantic coast of Africa and is bordered by South Africa to the south and east. ⁹ ENCYCLOPEDIA BRITANNICA Micropedia 384 (15th ed. 1977). On June 12, 1968, South West Africa was renamed Namibia by the U.N. General Assembly "in accordance with the desires of its people." See G.A. Res. 2372, 2 U.N. GAOR Supp. (No. 16A) at 1, U.N. Doc. A/6716 (1968). Consequently, this note will use "South West Africa" when discussing issues which arose prior to June 12, 1968 and "Namibia" for issues arising after that date. For a similar approach, see I. SAGAY, THE LEGAL ASPECTS OF THE NAMIBIAN DISPUTE at xxx-xxxi (1975).

² On December 17, 1920, South West Africa, a German colony from 1883 to 1919, came under the direct administration of South Africa as a League of Nations Mandate. In 1966, twenty years after the dissolution of the League of Nations, the United Nations revoked South Africa's administration of South West Africa for breach of its administrative obligations. Thereafter, the United Nations assumed legal responsibility for administering South West Africa. The legality of the U.N. position and the illegality of South Africa's presence in Namibia was confirmed by the International Court of Justice in 1971. Nevertheless, the South African government refuses to withdraw from Namibia. See generally, I. SAGAY, supra note 1; S. SLONIM, SOUTH WEST AFRICA AND THE UNITED NATIONS: AN INTERNATIONAL MANDATE IN DISPUTE (1973).

³ N.Y. Times, Jan. 8, 1982, at A5, col. 3.

⁴ The Namibian conflict constitutes a fundamental test of the U.N.'s capability to fulfill its primary purpose of maintaining international peace and security since the conflict could conceivably develop into open warfare between South African troops and Cuban or other Soviet bloc troops. See, e.g., Jackson, Reagan's Policy Rupture, AFRICA REP., Sept.-Oct.
advance human rights, and administer territories to self-government or independence.

The quest for a peaceful and internationally acceptable plan to settle the Namibian dispute also plagues the U.S. led Western negotiating group. The United States' concern with southern Africa stems from its recognition of the region's economic and strategic importance.

This note will propose, as an alternative to U.N. oil and trade sanctions against South Africa, an approach by which the United States can expedite the peaceful resolution of Namibia's independence. Initially, the note explores the development of the "doctrine of mandates," which became the foundation for the League of Nations mandate system, and presents a detailed analysis of the South West Africa Mandate. Subsequent analysis examines the major issues of the Namibian dispute, and considers the probability of U.N. oil sanctions against South Africa, as well as the effectiveness of the 1977 U.N. arms embargo against South


See U.N. Charter preamble, para. 1.

See U.N. Charter arts. 75-76. These articles charge the United Nations to establish an International Trusteeship System for the administration and supervision of certain territories to self-government or independence. Namibia is within the category of territories to which the U.N. Trusteeship System "shall apply" subject to the conclusion of a "trusteeship agreement" between the United Nations and the state(s) directly concerned with the administration of the territory.

The Western negotiating group (also called the Contact Group) is comprised of the five Western members of the U.N. Security Council: the United States, Great Britain, West Germany, and Canada. In 1977, the United States initiated the formation of the Contact Group in response to the declaration of the black African states that "they were preparing in the Security Council to push for mandatory sanctions against South Africa on the basis of South Africa's clear defiance of Security Council Resolution 385." The pertinent part of Resolution 385 provides: "The Security Council ... Demands that South Africa urgently make a solemn declaration accepting the foregoing provisions for the holding of free elections in Namibia under United Nations supervision and control, undertaking to comply with the resolutions and decisions of the United Nations and with the advisory opinion of the International Court of Justice of 21 June 1971 in regard to Namibia, and recognizing the territorial integrity and unity of Namibia as a nation . . . ." The Western Contract Group is the five Western states' alternative to mandatory sanctions against South Africa. See Study Commission, supra note 4, at 363; S.C. Res. 384, (adopted 1885 mtg.) at 8, U.N. Doc. S/INF/32 (1976). South Africa and other southern African nations play an important role in meeting U.S. requirements for critical minerals such as chromepe, cobalt, industrial diamonds, platinum, and vanadium.

Africa. Finally, the note presents several recommendations for additional actions by the United States to assist in the peaceful independence of Namibia.

II. THE NAMIBIAN DISPUTE: WHAT IS IT?

A. Development of the Concept of Mandates: The Pre-League Years

The Namibian dispute cannot be understood without first considering the “doctrine of mandates,” which served as the basis for the League of Nations’ mandate system. The “doctrine of mandates” was developed between 1917 and 1919.9 The Russian Revolution in 1917, followed by United States entry into World War I (WWI) produced a climate that was antagonistic to annexationist schemes,10 and caused the Allied and Associated Powers to lay increasing emphasis on progressive ideals such as nonannexation, democracy, the right to self-determination of peoples, and protection for minority rights.11 This political milieu provided the necessary impetus for the Allied and Associated States to reconsider and reexamine the legal parameters of colonization and annexation. As a result of this reexamination, the “mandates doctrine” was introduced. Its fundamental principles were: International accountability of states administering the former German and Turkish colonies; nonannexation of such territories;12 and the right to self-determination of peoples of such territories. These principles were developed primarily by President Woodrow Wilson and South African Cabinet Minister, General Jan Smuts.13

9 S. SLONIM, supra note 2, at 12, 21. It should be noted, however, that the “doctrine of mandates” was derived from the concepts and principles enunciated in earlier international agreements such as the 1885 Treaty of Berlin and the 1906 Algeciras Act. See, id. at 11.

10 Prior to 1917 (1914 to 1916), the allied states concluded several “secret” treaties to divide the colonial territories severed from Germany and Turkey. See R. BAKER, I WOODROW WILSON AND WORLD SETTLEMENT at chs. III-IV (1922); S. SLONIM, supra note 2, at 12.

11 The Principal Allied and Associated Powers were the states allied against Germany, Austria-Hungary, Bulgaria, and Turkey during World War I. They included France, Great Britain, Russia, the United States and many others.

12 S. SLONIM, supra note 2, at 12.

13 The drafting of the League of Nations Mandate System was done under the direction of President Wilson as chairperson of the League of Nations Commission. General Smuts was also a member of the Commission. See I. SAGAY, supra note 1, at 3, 8. Furthermore, Wilson’s and Smuts’ interpretation of the “doctrine of mandates’ is significant since it was the basis for the League of Nations Mandate System found in Article 22 of the Covenant of the League. For a similar position, see I. SAGAY, supra note 1, at 2, 4, 6.
1. The Principle of International Accountability

President Wilson's Fourteen Points\(^\text{14}\) contributed significantly to the development of the principle of international accountability. Point V set forth the elements of international accountability: 1) States administering the former German and Turkish colonial territories are trustees for those territories and for the society of nations; 2) the rights and interests of the inhabitants of such territories and the interests of the society of nations are the corpus of the trust; 3) the former colonies and the society of nations are the beneficiaries of the trust; 4) the terms of the trust are of international concern and may legitimately be subject to international inquiry; and 5) states acting as trustees may be bound by a code of conduct.\(^\text{15}\)

General Smuts' construction of the legal significance of the principle of international accountability is primarily presented in his pamphlet entitled *The League of Nations: A Practical Suggestion*.\(^\text{16}\) The elements of international accountability under the Smuts' proposal were: 1) the group of states administering the former colonies are the mandatarius, or agent, of the League of Nations, which as mandator or principal possesses ultimate authority to define, control and revoke the power of the state acting as its agent; 2) the states administering such territories are trustees of an international trust consisting of the rights of the population under their administration; and 3) the beneficiaries of the trust have the right to appeal to the League of Nations for redress of any breach of fiduciary obligations by the state administering the territory.\(^\text{17}\)

The foregoing presentation of President Wilson's and General Smuts' conception of the legal attributes of the principle of international accountability reveals that this international legal principle is the progeny of the private law doctrine of trusts and agency. President Wilson's and General Smuts' adoption of these private law institutions to develop the principle of international accountability is not only analytically sound, but it is also a traditional source of international law.\(^\text{18}\) The League of Nations later used the attributes of the principle of international accountability, trusts and agency, to establish its mandate system.

\(^{14}\) 56 CONG. REC. 680-81 (1918).

\(^{15}\) C. SYMOUR, 4 THE INTIMATE PAPERS OF COLONEL HOUSE 153, 195 (1928).


\(^{17}\) See I. SAGAY, supra note 1, at 4-5.

\(^{18}\) Another traditional source for imposing international obligations and creating international rights is "laws common to all civilized nations." J. BRIERLY, THE LAW OF NATIONS 62-63 (6th ed. 1963).
2. The Principle of Nonannexation

President Wilson and General Smuts characterized the principle of nonannexation as the international duty to refrain from nonconsensual annexation of the former German and Turkish colonies. In his address to Congress on February 11, 1918, President Wilson stated:

There shall be no annexations. . . . Peoples are not to be handed from one sovereignty to another by an international conference or an understanding between rivals and antagonists. National aspirations must be respected, peoples may now be dominated and governed only by their own consent. . . .

This principle of nonannexation or annexation by consent was generally accepted by international consensus, and incorporated in the Covenant of the League of Nations.

3. The Principle of Self-Determination

The essence of the principle of self-determination in 1918 was the right of the inhabitants of non-self-governing territories to consent or to select the authorized representative of the territory. This principle was viewed by Wilson and Smuts as a fundamental right of international law. Wilson’s statement at the Preliminary Peace Conference illustrates this position:

States will be picked out which have already shown that they can exercise a conscience in this matter, and under their tutelage the helpless peoples of the world will come into a new hope. . . . We have many instances of colonies lifted into the sphere of complete self government. This is not the discovery of a principle. It is the universal application of principle.

Subsequently, the principle of self-determination was embodied in the

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19 See S. SLONIM, supra note 2, at 16-17; I. SAGAY, supra note 1, at 2, 4 & 5.
20 56 Cong. Rec. 1937 (1918).
21 Acceptance of an international duty to refrain from nonconsensual annexation of former German and Turkish territories can be implied by the failure of some states to protest the unilateral declarations of nonannexation by President Wilson, and the acquiescence of those states, who did protest Wilson’s declarations, to the nonannexationist scheme of the Covenant of the League of Nations. For a detailed account of the protest and acquiescence of states, see S. SLONIM, supra note 1, at 6-7.
22 Although the Covenant of the League of Nations does not contain an express provision for nonannexation, the scheme of the League’s Mandate System (an international trust) is inherently incompatible with annexation. See, e.g., LEAGUE OF NATIONS COVENANT art. 22, paras. 1-2; Mandate For South West Africa, Dec. 17, 1920.
23 See I. SAGAY, supra note 1, at 2; Cong. Rec., supra note 20.
24 I. SAGAY, supra note 1, at 3.
Covenant of the League of Nations.\textsuperscript{25}

Despite the agreement between President Wilson and General Smuts of the legal attributes of the "mandates doctrine", they sharply disagreed on whether South West Africa should be included as a mandate in the emerging League of Nations. General Smuts specifically excluded South West Africa from his proposal of the League of Nations mandate system,\textsuperscript{26} stating that it was "inhabited by barbarians who not only cannot possibly govern themselves but to whom it would be impracticable to apply any idea of political self determination in the European sense. . . ."\textsuperscript{27}

In contrast, President Wilson envisaged universal application of the three fundamental principles of the mandate doctrine to all former German and Turkish colonies.\textsuperscript{28} In his address to the Trade Union Conference in London on January 5, 1918, he declared that since South West Africa was not inhabited by Europeans, the governing consideration must be that South West Africa be under a temporary administration acceptable to the inhabitants, and whose main purpose would be to prevent exploitation.\textsuperscript{29} In short, Smuts viewed the legal principles of the "mandate doctrine" unadaptable to South West Africa while President Wilson viewed their application practicable and necessary to effectuate South West Africa's rise to self-government. Through the process of negotiations, these two diametrically opposed positions were synthesized into Article 22 of the Covenant of the League of Nations.

4. The Wilson-Smuts Compromise: The Creation of Article 22

Wilson's universalization of the "mandates doctrine" prompted the drafters of Article 22 to make certain distinctions among the mandatory states and the mandated territories.\textsuperscript{30} Likewise, the British drafted a document which preserved General Smuts' interpretation of the "mandate doctrine's" applicability to South West Africa. The British "compromise", the Draft Convention Regarding Mandates, distinguished between territories almost ready for independence (assisted states) and territories

\textsuperscript{25} The Covenant of the League of Nations does not expressly use the term "self-determination". However, the spirit of the principle is preserved by the language of Article 22 of the Covenant. For example, paragraph 1 of Article 22 states that the establishment of the Mandate System is a consequence of the inhabitants of the former German and Turkish colonies "not yet able to stand by themselves. . . ." See also Report of the Permanent Mandates Commission of the League of Nations, League of Nations Doc. C. 359 M. 132 1927 VI (1927), discussed in I. Sagay, supra note 1, at 41-42; I. Sagay, supra note 1, at 40-45.

\textsuperscript{26} See S. Slonim, supra note 2, at 17.

\textsuperscript{27} D. Miller, supra note 16, at 25.

\textsuperscript{28} S. Slonim, supra note 2, at 36.

\textsuperscript{29} I. Sagay, supra note 1, at 2.

\textsuperscript{30} I. Sagay, supra note 1, at 6.
which were to be held by mandatories (vested territories).\textsuperscript{31}

President Wilson rejected the British conception of "vested territories" since it implied that independence was an unlikely goal, and favored \textit{de facto} annexation of territories such as South West Africa.\textsuperscript{32} Instead, he insisted on a formula which would bar annexation of any former German and Turkish colony.\textsuperscript{33} The Hankey-Latham draft, which embodied most of the provisions of what later became Article 22, was introduced and accepted provisionally on January 30, 1919.\textsuperscript{34} On February 8 the compromise document was submitted to the Commission on the League on Nations for insertion in the Covenant as Article 22.\textsuperscript{35}

\textbf{B. The South West Africa Mandate}

Article 22, the principal legal basis of the League of Nations mandate system, established three types of mandates, labelled classes A through C.\textsuperscript{36} South West Africa was designated a Class C mandate, and the League of Nations grant to South Africa of a Class C mandate over South West Africa was confirmed by the League Council on December 17, 1920.\textsuperscript{37}

The South West Africa Mandate defined the scope of South Africa's authority to administer the territory and the legal duties incumbent upon South Africa as the Mandatory State,\textsuperscript{38} paragraph 2 of the preamble states that a mandate over South West Africa was awarded to the Union of South Africa in accordance with Article 22 of the Covenant of the League of Nations.\textsuperscript{39} Therefore, a proper analysis of the rights, duties and obligations arising from the South West Africa Mandate must include an examination of the pertinent provisions of Article 22.

Paragraphs 1 and 2 of Article 22 depict the key legal attributes of the League of Nations mandate system. The paragraphs state respectively:

1) To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well being and development of such peoples form a sacred trust of civilization and that securities for the

\begin{itemize}
\item \textsuperscript{31} D. Miller, supra note 16, at 106-07; I. Sagay,
\item \textsuperscript{32} I. Sagay, supra note 1, at 6.
\item \textsuperscript{33} I. Sagay, supra note 1, at 7.
\item \textsuperscript{34} I. Sagay, supra note 1, at 7.
\item \textsuperscript{35} D. Miller, supra note 16, at 271-76.
\item \textsuperscript{36} League of Nations Covenant art. 22, paras. 4-6;
\item \textsuperscript{37} Mandate for South West Africa, supra note 22.
\item \textsuperscript{38} S. Slonim, supra note 2, at 40.
\item \textsuperscript{39} Mandate for South West Africa, supra note 22, at preamble, para. 2.
\end{itemize}
performance of this trust should be embodied in this Covenant.
2) The best method of giving practical effect to this principle is that the
tutelage of such peoples should be entrusted to advanced nations . . .
and this tutelage should be exercised by them as mandatories on behalf
of the League.40

Three concepts emerge: a sacred trust; tutelage; and mandatory.41 These

40 LEAGUE OF NATIONS COVENANT art. 22, paras. 1, 2.
41 A trust has been defined in private law as the legal relationships created when: a
person or other body holds or is bound to manage property or other legal rights for or on the
behalf of another or others (cestuis que trust), and for the property or rights are held in
trust for that other or those others (the beneficiaries) and for that purpose or those pur-
poses that are set forth by the settlor or creator of the trust. HALSBURY'S LAWS OF ENGLAND
(4th ed. 1973). For a similar position, see I. SAGAY supra note 1, at 17. In short, a trust is a
property arrangement or relationship among three parties with respect to real or personal
property or other legal rights. The three persons involved in the trust relationship are the
settlor, the trustee and the beneficiary or cestuis que trust. The real or personal property, or
the set of legal rights which is the subject of the trust, is called the corpus of the trust.

The trust relationship is created when the following elements are satisfied: 1) the settlor
or legal title owner of certain property or rights transfers legal title of such property or
rights to another, the trustee, for the benefit of the cestuis que trust; 2) the settlor transfers
legal title of such property or rights to the trustee with the intent to create enforceable
fiduciary obligations upon the trustee with respect to the cestuis que trust; and 3) the trans-
fer is effected by actual, symbolic or constructive delivery of the property or other rights to
the trustee. The legal effect of the trust arrangement is that it creates legal title of the
corpus in the trustee and grants the cestuis que trust (beneficiary) an equitable property
interest.

Another important attribute of the trust arrangement in private law is that the trustee's
management of the trust corpus is subject to the terms prescribed by the settlor. For exam-
ple, the settlor may include express provisions in the trust agreement stating the purpose of
the trust, defining the duration of the trust, and delineating the means of distributing the
trust upon its termination. Furthermore, where no express provision for distribution or du-
ration is included in the trust agreement, the terms of distribution and duration may be
implied from the following: (1) the language of the trust agreement; (2) the reasons for the
trust; and (3) the circumstances attendant to the creation of the trust. If no terms of distri-
bution upon termination of the trust are found, the legal title of the corpus reverts to the
settlor. As shall be shown later in the note, this allowance of implied terms of distribution
and duration was critical to the determination of the rights and duties arising from the
South West Africa Mandate. For a discussion on the principles of Trusts see generally, G.G.

The private law doctrine of tutelage is best described as the legal rights and obligations
arising from the guardian ward relationship. Tutela, a progeny of Roman Private Law, is
that species of guardianship of males that continued until the ward reached puberty. The
guardianship was established because of the special need to protect the property and rights
of the male under puberty. Accordingly, the concomitants to the tutelage are: (1) the guard-
ian's legal obligation to properly and nonnegligently manage the property and rights of the
ward; (2) the guardian's submission to court supervision; (3) the guardian's removal for mis-
conduct or negligence; and (4) the termination of the tutelage when the ward reaches pu-
berty. As previously indicated, the League of Nations used the term tutelage to describe one
of the legal attributes of its mandate system. See W. BUCKLAND, MANUAL OF ROMAN PRIVATE
three concepts are adaptations of Wilson’s and Smuts’ principle of international accountability. The use of trust, tutelage and mandatories, which are all general principles of law recognized by all civilized nations, was deliberate.

1. Rights and Duties of the South West Africa Mandate

On June 28, 1919, Germany transferred all of its legal and equitable rights in the territory of South West Africa to the Allied and Associated States, which thereafter agreed to transfer legal and equitable title of South West Africa to the League of Nations upon the condition that the League include South West Africa in its mandate system pursuant to Article 22 of the League of Nations Covenant. In effect, the League of Nations was given rights analogous to a fee simple in South West Africa subject to a condition precedent. The League satisfied this condition on January 10, 1920, when the Covenant of the League came into force; Article 22, paragraph 6 of the Covenant provided for the establishment of the South West Africa Mandate.

Paragraph 1 of Article 22 authorized the League of Nations to establish a “sacred trust of civilization” for each of the former enemy territories. The corpus of the South West Africa trust was the territory of

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42 See I. Sagay, supra note 1, at 17.
43 Id.
44 Id.
45 League of Nations art. 22, para. 1.
South West Africa and the aggregate rights of the inhabitants of the territory. The League of Nations effectuated the trust when it transferred legal title of the corpus to South Africa for the benefit of the inhabitants of South West Africa, and for the interests of the organized world community. The League of Nations made this transfer with the intent to create fiduciary obligations enforceable in international law. The grant of the "sacred trust" of South West Africa occurred on December 17, 1920 when the League Council confirmed delivery of the South West Africa Mandate to South Africa.

As trustee, South Africa's management of the trust corpus was subject to the terms prescribed by the League of Nations in Article 22 and the South West Africa Mandate. Neither Article 22 nor the South West Africa Mandate clearly defines the purpose, duration, or means of distribution of the trust upon its termination. However, these conditions may be implied from the language of the Covenant, the reasons for the trust, and the circumstances surrounding its creation.

The drafters of Article 22 and the South West Africa Mandate substantially adopted President Wilson's position that the purpose of creating the South West Africa trust was to bar annexation and foster self-determination. The trust was to terminate when the inhabitants of the territory were "able to stand by themselves under the strenuous conditions of the modern world." Accordingly, upon termination of the trust, the inhabitants of South West Africa were to receive all the legal rights conferred upon a sovereign state.

Defining the termination of the trust as when South West Africa is "able to stand by itself" poses two major questions. First, what is the proper body to determine when South West Africa is capable of standing by itself; and second, what criteria should be used by this body to make such a determination. Arguably paragraph 9 of Article 22 of the Covenant answers the first question by establishing the Permanent Mandates Commission.

The function of the Commission was to "receive and examine the annual reports of the Mandatories and to advise the Council on all

46 Id.; Mandate For South West Africa, supra note 22, arts. 2-3, 5.
47 See generally, G.G. Bogert & G.T. Bogert, supra note 41.
48 Contra S. Slonim, supra note 2, at 37.
49 Itsejuwa Sagay expounds a similar view. He states that a form of "termination which took the attention of the League of Nations [was] principally the grant of independence which was generally admitted as the goal of the mandates system. . . ." See I. Sagay, supra note 1, at 39.
50 Paragraph 9 of Article 22 reads:
A permanent Commission shall be constituted to receive and examine the annual reports of the Mandatories, and to advise the Council on all matters relating to the observance of the mandates.

LEAGUE OF NATIONS COVENANT art. 22, para. 9.
matters relating to the observance of the mandates." 51 The Council of the League and the Permanent Mandates Commission were therefore the appropriate bodies to determine when the South West Africa trust would terminate.

The second question was also addressed by the Commission. It received annual reports from the trustee State which included a lengthy questionnaire and covered the complete administration of the trust. 52 This method enabled the Commission to determine the relative annual status of every aspect of the trust. 53 Furthermore, the inhabitants of South West Africa, as beneficiaries, had the right to petition the Commission for redress of any breach of the trust relationship. 54

The following conclusions can be made of South Africa's rights and duties as trustee of the South West Africa trust:

1) South Africa, has an enforceable right in international law to administer the territory of South West Africa;

2) South Africa was vested with fiduciary obligations to reasonably administrate the land and personal property of South West Africa, and act in the highest interest of the People of South West Africa when administrating their right to material, moral and social progress;

3) the people of South West Africa, as beneficiaries of the trust, were entitled to petition the Permanent Mandates Commission for redress of any breach of the trust by South Africa;

4) the Council of the League of Nations and the Permanent Mandates Commission were the authorized bodies to determine when the South West Africa trust terminated; and

5) the people of South West Africa were entitled to receive legal title to South West Africa upon termination of the trust. 55

C. The Dispute

The dispute between the United Nations and South Africa regarding the legality of South Africa's presence in Namibia (South West Africa) has its source in the interplay of several key factors: (1) the emergence of Asian and African States as members of the United Nations; (2) the establishment of the United Nations; (3) the dissolution of the League of Nations in 1946; (4) South Africa's open denial of its obligations under

51 Id.
52 S. SLONIM, supra note 2, at 46.
53 S. SLONIM, supra note 2, at 46.
54 The right to petition was not expressly mentioned in the Covenant of the League of Nations or the Mandates. The right was first granted by the Council of the League of Nations on January 31, 1923. See Report of the Permanent Mandates Commission on the Procedure in Respect of Petitions, League of Nations Doc. C.44(I).M.73. 1923.VI.(1923), discussed in S. SLONIM, supra note 2, at 47.
55 Compare I. SAGAY, supra note 1, at 27.
the South West Africa Mandate; and (5) the United Nation's revocation of South Africa's mandate over South West Africa.\(^6\)

The events of World War II triggered the powerful assertion by Asian and African States that international law accorded dependent territories the right to self-determination.\(^5\) The U.N. Charter became the legal basis for this assertion.

The Charter of the United Nations was drafted at San Francisco in 1945. Unlike the Covenant of the League of Nations, the U.N. Charter uses the phrase "self-determination" when defining the purposes of the United Nations and establishing obligations among member states to promote international economic and social cooperation.\(^5\) Article 76 states that a basic objective of the U.N. Trusteeship System, in accordance with the United Nations purposes set forth in Article I of the Charter, is to "promote the political ... advancement of the inhabitants of the trust territories, and their progressive development toward self-government or independence."\(^5\) This clear pledge to the right to self-government or independence not only reflects the great progress made in the United Nations regarding international accountability, but also establishes that the right to self-determination is enforceable in international law.\(^6\)

The United Nations establishment of the International Trusteeship System was followed by the League of Nations adoption of its final resolution regarding the South West Africa Mandate. This resolution, adopted in 1946 during the last session of the League, expressed the intentions of South Africa and all other mandatories to administer the mandated territories in accordance with the existing obligations until other arrangements were agreed upon by the United Nations and the respective Mandatory State.\(^7\)

However, in 1946 South Africa submitted to the General Assembly a lengthy and comprehensive memorandum requesting the incorporation of South West Africa into the Union of South Africa.\(^8\) The United Nations

\(^{6}\) Cf. S. SLONIM, *supra* note 2, at 59.

\(^{5}\) See S. SLONIM, *supra* note 2, at 59.

\(^{8}\) Articles 1(2) and 55 of the U.N. Charter provide respectively:

The Purposes of the United Nations are: To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace. ... With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, ... the United Nations shall promote: ...

\(^{9}\) U.N. CHARTER art. 76, para. b.

\(^{60}\) For a similar proposition, *see* S. SLONIM, *supra* note 2, at 60.


\(^{62}\) The following reasons were set forth by South Africa in support of incorporating
rejected this request on the grounds that the African inhabitants of South West Africa had not achieved sufficient political autonomy to express a considered opinion on incorporation.\textsuperscript{63} However, the General Assembly did invite South Africa to propose a trusteeship agreement for South West Africa.

South Africa refused both this invitation and one issued in 1947.\textsuperscript{64} South Africa, however, did submit a report of its administration of South West Africa\textsuperscript{65} for the year of 1947. The report was considered in detail by the U.N. Trusteeship Council,\textsuperscript{66} which heavily criticized nearly all aspects of South Africa's administration of South West Africa.\textsuperscript{67} This unfavorable report, coupled with the United Nations increasing criticism of South Africa's policy of apartheid, prompted South Africa to make the following

South West Africa:

a) The fundamental principle of the mandates and trusteeship systems is "ultimate self-government and separate statehood"; but the low economic potential of the territory and "the backwardness of the vast majority of the population" render this impossible of achievement impossible;

b) Development of the territory would involve great expense for the Mandatory, which in the nature of things it could not undertake and

c) Uncertainty as to the ultimate future of the territory militated against racial tranquility and optimum development of the territory.

The soundness of these reasons is doubtful at best. With respect to the first reason advanced, "economic potential" is not an element of statehood. A territory meets the elements of statehood in international law when there is: (1) a permanent population, (2) a clearly defined geographical boundary, (3) a government or authorized representative to run the affairs of the state, and (4) a capacity to enter into relations with other states. Obviously, any emerging state will need capital to implement and maintain its governmental machinery, but a projection of economic wealth is not required in determining the capability for self-government and statehood. Further, the characterization of the inhabitants of South West Africa as "backward" is highly subjective and only testifies to the degree which South Africa was effectively performing its legal duty to "promote to the utmost the social progress of the inhabitants of the territory . . ." through the educational process. An illustration of South Africa's diligence in fulfilling this obligation is that in 1939, the South African Government spent 100 to educate white children for every 1 spent on a "native" child. See Minutes of Permanent Mandates Commission of the League of Nations, League of Nations Doc. discussed in I. Sagay, supra note 1, at 120-24. The second and third reasons are equally unfounded. The legal alternative to South Africa bearing the total expense of developing South West Africa was for South Africa to request the United Nations, the League of Nations' successor, to bear a portion of the expense since South West Africa is an "international trust." See D. Miller, supra note 16, at 104. Finally, racial tranquillity is inherently incompatible with the system of apartheid; thus, apartheid and not the "uncertainty as to the ultimate future of the territory" militated against racial tranquillity and optimum development of the territory of South West Africa.

\textsuperscript{63} G.A. Res. 65(I), U.N. Doc. A/64/Add. 1, at 123 (1946).


\textsuperscript{67} Id.; See also I. Sagay, supra note 1, at 48.
unilateral declarations:

The South West Africa Mandate had expired upon the dissolution of the League of Nations;
South Africa’s international obligations under the mandate had terminated with the mandate’s expiration; and
the U.N. Trusteeship Council lacked competence to make binding recommendations on matters of internal administration of South West Africa.68

These declarations posed a major legal problem to the United Nations. If the South West Africa Mandate had lapsed, the territory of South West Africa no longer had international status but was a de facto if not a de jure part of the territory of South Africa.69 Assuming the South West Africa Mandate had not lapsed, the United Nations could not petition South Africa to conclude a trusteeship agreement or submit annual reports of administration, since it lacked competency to exercise the supervisory powers of the dissolved League.70 As a result, in 1950 the U.N. General Assembly adopted its first resolution to submit the issues arising from the dissolution of the League to the International Court of Justice.

1. Decisions of the International Court of Justice

a. The Issue of the Survival of the South West Africa

In the 1950 Status of South West Africa case, the International Court of Justice (ICJ) rejected South Africa’s expiration argument.71 South Africa argued that since the mandate or agency relationship requires at least two parties, one of whom must be the principal (the League of Nations), it is legally impossible for a mandate to continue to survive after the demise of the principal.72 In rejecting this argument, the Court first pointed out that its duty was not to apply the private law rules of mandatum “lock, stock, and ready made,”73 but rather, to “regard any features or terminology which are reminiscent of the rules and institutions of private law as an indication of policy and principles. . . .”74 The Court, in essence, rejected the application of the private law rule that the mandate expires upon the death of the mandator or principal. The Court found this argument inconsistent with the dispositive character of the mandate system, and violative of the mandate system’s objective to

68 Union Government’s Views Submitted on S-W Africa, 8 U.N. BULL. 536-37 (1950); I. SAGAY, supra note 1, at 48.
69 I. SAGAY, supra note 1, at 48.
70 I. SAGAY, supra note 1, at 48-49.
72 Id. at 277.
73 Id. at 148.
74 Id.
hold the mandated territories as a "sacred trust of civilization" until they achieve self government or independence. Furthermore, had the mandate lapsed, South Africa's authority to administer the territory, which is based on the mandate, would also have lapsed.\(^7\)

A third analysis set forth by the Court was that the mandate conferred upon South West Africa certain real rights giving it international status.\(^8\) This status supplied the element of permanence which allowed the South West Africa Mandate to survive the dissolution of the League.\(^7\) The International Court of Justice later confirmed its 1950 decision in the South West Africa Judgment of 1962 and the Namibia case in 1971.\(^8\)

b. The Issue of the United Nations Right to Exercise the Supervisory Functions of the League

When the Court declared that the South West Africa Mandate had survived the dissolution of the League of Nations, it also affirmed South Africa's obligations under the Mandate. They included: 1) the duty to submit to international supervision; 2) the duty to submit annual reports of administration of the mandate; and 3) the duty to transmit petitions from the people of South West Africa.\(^7\) In view of the survival of the Mandate, and South Africa's obligations thereunder, the Court reasoned that international supervision of the Mandate was an indispensable condition for effective performance of the "sacred trust of civilization."\(^8\) The Court then concluded that

> [the] General Assembly of the United Nations is legally qualified to exercise the supervisory functions previously exercised by the League of Nations with regard to the administration (South West Africa) and the Union of South Africa is under an obligation to submit to the supervision and control of the General Assembly and to render annual reports to it.\(^9\)

Nevertheless, South Africa maintained its position, and its non-cooperative stance was followed by the General Assembly's adoption of

\(^7\) Id. at 133.
\(^8\) Id. at 156-57.
\(^9\) Id.


\(^8\) See Status of S.W.A. case, supra note 71, at 133, 136-37; LEAGUE OF NATIONS COVENANT art. 22, paras. 7, 8, 9; Report of the Permanent Mandates Commission, supra note 54; I. SAGAY, supra note 1, at 59.

\(^9\) I. SAGAY, supra note 1, at 60.

\(^7\) Status of S.W.A. case, supra note 71, at 137. The Court confirmed its view in the South West Africa Judgment of 1962. South West Africa cases, supra note 78, at 333-34.
Resolution 2145 which declared the following:

1) the South West Africa Mandate exercised by the government of the Union of South Africa is terminated;
2) South Africa has no other right to administer South West Africa;
3) South West Africa is henceforth under the direct responsibility of the United Nations; and
4) South West Africa will retain its international status until it achieves independence.\(^{62}\)

When South Africa denied the General Assembly’s competence to revoke its mandate over South West Africa.\(^{63}\) The stage was set for the ICJ disposition of the Namibia case in 1971.

c. Legal Consequences of South Africa’s Continued Presence in Namibia

On March 20, 1969, the U.N. Security Council adopted Resolution 264 which formally recognized the General Assembly’s revocation of the South West Africa Mandate.\(^{64}\) This resolution was significant because it reinforced the legality of the General Assembly resolution which revoked the mandate.\(^{65}\) When South Africa failed to comply with Resolution 264 and the subsequent resolution regarding South Africa’s illegal presence in Namibia, the Security Council requested an advisory opinion of the International Court of Justice on the legal consequences of the continued presence of South Africa in Namibia.\(^{66}\) In its advisory opinion of June 21, 1971, the Court held that South Africa’s presence in Namibia was illegal. South Africa was therefore under an international obligation to withdraw immediately. The Court also held that all states were under an international obligation to recognize the illegality of South Africa’s presence in Namibia and to act accordingly.\(^{67}\) Nonetheless, South Africa maintained

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\(^{64}\) Security Council Resolution 264 also pronounced “that the continued presence of South Africa in Namibia is illegal” and called upon South Africa to immediately withdraw from Namibia. See, S.C. Res. 264 (adopted 1464\(\)th mtg.) at 1, U.N. Doc. S/INF/24.1 Rev.1 (1969).

\(^{65}\) For a similar proposition, see S. SLONIM, supra note 2, at 326; See also the Namibia case where the Court held that the U.N. General Assembly “lacking the necessary powers to ensure the withdrawal of South Africa from the Territory, . . . enlisted the cooperation of the Security Council.” Namibia (South West Africa) case, supra note 109, at 51.


\(^{67}\) South West Africa case, supra note 78, at 54-56. The Court set forth four general
its position that General Assembly Resolution 2145 and any Security Council resolutions based upon 2145 were invalid. Accordingly, it rejected the Court’s determination.\textsuperscript{68}

South Africa’s persistent refusal to accept the decisions of the International Court of Justice and to comply with the resolutions of the Security Council left the United Nations with two alternatives: Security Council implementation of Chapter VII Article 41 devices\textsuperscript{68} or direct negotiations with the government of South Africa. The Security Council did not invoke Chapter VII, Article 41, sanctions against South Africa and thus, the United Nations began direct negotiations with South Africa in March, 1972.\textsuperscript{60}

2. Period of Negotiations: 1972 to 1982

a. The Waldheim-Escher Era

The United Nations began the first phase of negotiations with the government of South Africa on March 6, 1972.\textsuperscript{91} At that time, the South African Government confirmed that its policy was one of self-determination and independence.\textsuperscript{92} A second important development of this first phase of U.N.-South Africa negotiations was the participation of the non-white Namibians to the negotiations.\textsuperscript{93}

\begin{itemize}
\item Id.
\item On June 21, 1971, (the day of the Court’s decision), South African Prime Minister Vorsted stated that the Court’s opinion was “entirely untenable” and represented “the result of political maneuvering instead of objective jurisprudence.” See N.Y. Times, June 22, 1971, at 3, col 5; 31 U.N. SCOR Supp. (Jan.-Mar. 1976) at 39, U.N. Doc. S/11948.
\item Article 41 of Chapter VII of the U.N. Charter provides that:
\begin{itemize}
\item The Security Council may decide [if it determines the existence of any threat to the peace, breach of the peace, or act of aggression] what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.
\end{itemize}
\item U.N. CHARTS R art. 41.
\item Id. at 65.
\item Id.
\item The non-white Namibian group consisted of the following: Chief Clemens Kapuuo (the paramount chief of the Hereros), representatives of the National Convention of Non Whites, the South West Africa Peoples Organization (SWAPO, the freedom fighters), the National Unity Democratic Organization, the South West Africa National Union, the Voice of the People, the Rehoboth Volkspartei, the Rehoboth Eister Vereniging and the Federal Coloured Peoples’ Party. See id. at 66, 67; I. SAGAY, supra note 1, at 344. The non white Namibians informed Secretary General Waldheim that “they looked upon the United Nations to fulfill it resolutions by obtaining the withdrawal of South Africa’s presence from the
The second phase of negotiations began on October 8, 1972, when Special Representative Alfred M. Escher made his visit to South Africa and Namibia. Negotiations floundered, however, because South African Prime Minister Vorster refused to elaborate on the critical question of South Africa's interpretation of its obligations under its declared policy of self-determination, and independence for Namibia and of its formulation of practical steps to be taken towards Namibia's independence. Vorster did state, however, that regional experience in self-government was a South African prerequisite to Namibia's self-determination and independence. Consequently, this phase of the U.N.-South Africa negotiations left the two key issues unanswered. As a result, the Security Council voted unanimously to cease all further discussion with South Africa on the self-determination and independence of Namibia.

D. The Western Contact Group

The United Nations failure to secure South Africa's withdrawal from Namibia and to effectuate Namibia's independence, led to the creation of the Western Contact Group in 1977 by the United States. The Group's function is best characterized as a hybrid of mediation where interested, rather than disinterested, States participate in negotiations between disputing States. Because the attribute of disinterest is essential to the mediator's effectiveness in proposing an acceptable and unbiased solution to the dispute, the Group's mediatorial performance has been impeded. Nevertheless, it has secured South Africa's acceptance of Resolution 435, United Nations presence in Namibia during a pre-independence transition period, and a set of constitutional guidelines for pre-independence elections.

The goals of the five-nation Western Contact Group are to maintain
negotiations with South Africa and other interested African States, and to develop a plan acceptable to all the parties in dispute. The Contact Group has acknowledged that it must maintain its impartiality and its credibility at an equilibrium between the parties in dispute in order to achieve these objectives. The difficulty of this delicate task is compounded since each member of the Contact Group has a moderate to substantial economic interest in South Africa. Thus, while it has successfully fulfilled the "urgent requirement" of re-establishing "a level of credibility and influence in the South African Government," the Contact Group has lost much of its credibility among the African parties to the dispute.

The reasons advanced for the African parties' sharp distrust of the Contact Group's impartiality toward South Africa are numerous. One recurring reason for the distrust is the continued substantial investment in South Africa, particularly by the United States. For example, South West African People's Organization (SWAPO) and the other interested African States have expressed doubts about the Contact Group's proposed constitutional guidelines. Consequently, even if the Contact Group can reassure the African parties that the guidelines are essentially fair, the latest target date for an independent Namibia, early 1983 may slip out of reach.

102 Namibia, 81 DEPT. OF STATE BULL. 86 (1981).

104 After the United Kingdom, the United States is the largest foreign investor in South Africa. Furthermore, U.S. direct investment in the most rapidly growing sectors of the South African economy—manufacturing, mining, and petroleum—has steadily increased. For example, U.S. direct investment in South Africa had a 535% increase between 1950 and 1970; and in 1980, the United States was South Africa's number one trading partner for the third consecutive year. Further, oil in South Africa is imported, refined and marketed by six transnational firms, three of which are U.S. nationals—Mobil, Caltex and Exxon. These three U.S. firms control approximately 40% of South Africa's petroleum products market; in 1977, Mobil had $333 million invested in South Africa and Caltex was involved in a $134 million expansion that was designated to increase South Africa's refining capacity by 11%. L. Mackler, Pattern for Profit in Southern Africa 41 (1972); B. Rogers, White Wealth and Black Poverty: American Investments in Southern Africa 141 (1976). This direct U.S. investment valued at $2 billion a year and trade of $3.4 billion a year has created distrust among the black African states. Bishop Desmond Tutu, general secretary of the South African Council of Churches, exemplified black Africa's perception of foreign investment in South Africa when he declared that foreign investors who advocate the "progressive force" theory (i.e., the theory the continued investment in the South African economy will eventually raise the black African to full equality) are "lying [and]... must know that they are investing to buttress one of the most vicious systems since Nazism." The Guardian (London), Mar. 31, 1981; Cf. Study Commission, supra note 4, at 394.

105 N.Y. Times, supra note 4.
106 N.Y. Times, supra note 4.
Should the Contact Group fail to propose an unbiased solution to the dispute, the imposition of extensive U.N. economic sanctions against South Africa may be the only remaining alternative, short of regional war.

III. IMPOSITION OF U.N. ECONOMIC SANCTIONS AGAINST SOUTH AFRICA: IS IT PROBABLE OR EFFECTIVE?

Peaceful settlement of Namibia's independence is critical to the reputation of the United Nations. In keeping with its role of maintaining international peace and security,\textsuperscript{107} the United Nations uses two principal approaches to deal with specific disputes: 1) implementation of Chapter VI, Article 33 methods of peaceful settlement of disputes or 2) implementation of Chapter VII Article 41 sanctions.\textsuperscript{108} U.N. efforts to settle the Namibian dispute under the first approach have been futile; the South African Government has rejected the decisions of the I.C.J., and direct negotiations between the United Nations and South Africa have left the two major issues unresolved. South Africa's illegal presence in Namibia continues despite the United Nations employment of Chapter VI Article 33 devices. Arguably, the only remaining alternative is the implementation of Article 41 sanctions against South Africa.

A. Probability of U.N. Economic Sanctions Against South Africa

In 1964 the United Nations established the Expert Committee of the Security Council to consider the feasibility of implementing U.N. sanctions against South Africa.\textsuperscript{109} The Committee concluded that Security Council imposition of Article 41 sanctions against South Africa was indeed feasible.\textsuperscript{110} The Committee's feasibility report proved to be accurate since the U.N. Security Council imposed its first mandatory arms em-

\textsuperscript{107} U.N. Secretary General Javier Perez de Cuellar the prospect of war in the region of Namibia. He stated, "The present impasse is dangerous not only for the situation in Namibia itself, but also for the prospects of a peaceful . . . future for the region. . . ." N.Y. Times, \textit{supra} note 3.

\textsuperscript{108} Article 33 of the U.N. Charter provides that:
The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, . . . or other peaceful means of their own choice. . . .
The U.N. has attempted negotiations and judicial proceedings as a means of peacefully settling the dispute, and the other methods are not as appropriate since the United Nations is a party to the dispute. \textit{See also}, note 89.


\textsuperscript{110} \textit{Id}. 
NAMIBIAN DISPUTE

bargo against South Africa in 1977.\textsuperscript{111} Despite this action, a long and divisive debate continues in the United Nations regarding mandatory oil and trade sanctions against the Union of South Africa. Nigerian President Shehu Shagari contends that “the Western powers are using their veto to block the oil embargo which is the only way—I say the only way” to secure South Africa’s withdrawal from Namibia.\textsuperscript{112} President Shagari’s contention adequately identifies the “power” governing the likelihood of Security Council imposition of mandatory oil and trade sanctions against South Africa. This governing power is the “veto power or the right of the five permanent members of the Security Council to prevent the adoption of a proposed course of action.”\textsuperscript{113} Accordingly, an examination of the “veto power” is a necessary prerequisite to a conclusion on the feasibility of mandatory oil and trade sanctions against South Africa.

The five permanent members of the Security Council are the United States, Britain, France, the Union of Soviet Socialist Republics and the

\begin{itemize}
\item The Guardian (London), Mar. 21, 1981, at 17, col. 2. In 1979, the General Assembly adopted Resolution which requested the Security Council “to consider urgently a mandatory embargo on the supply of petroleum and petroleum products to South Africa under Chapter VII of the Charter of the United States.” G.A. Res. 34193, 46 U.N. GAOR Supp. (No. 25) at 32, U.N. Doc. A/34/46 (1979). The Resolution proposed that the Security Council require member states to comply with the following:
\begin{enumerate}
\item To enact legislation to prohibit:
\begin{enumerate}
\item The sale or supply of petroleum and petroleum products to any person or body in South Africa, or to any other person or body for the purpose of eventual supply to South Africa;
\item Any activities by their nationals or in their territories which promote or are calculated to promote the sale or supply of petroleum or petroleum products to South Africa;
\item The shipment in vessels or aircraft of their registration, or under charter to their nationals, of any petroleum or petroleum products to South Africa;
\item The supply of any services, including \textit{inter alia} technical advice, spare parts and capital, to the oil companies in South Africa;
\item The provision of facilities in their ports or airports to vessels or aircraft carrying petroleum or petroleum products to South Africa;
\item Any investments in, or provision of technical or other assistance to, the petroleum industry in South Africa;
\end{enumerate}
\item To include in all contracts for the sale of petroleum and petroleum products provisions prohibiting direct or indirect resale to South Africa;
\item To take effective legislative and other appropriate measures to prevent petroleum companies and shipping companies, as well as banks and other financial institutions, from giving any assistance to the South African regime in circumventing the oil embargo, including the seizure of vessels which violate the embargo and their cargoes;
\end{enumerate}
\textsuperscript{111} The phrase “veto power” is not in the U.N. Charter. See S. Chen, \textit{The Theory and Practice of International Organization} 54 (1973).
People's Republic of China.\textsuperscript{114} Chapter V, Article 27, of the U.N. Charter provides that all non-procedural decisions of the Security Council must be "made by an affirmative vote of nine members including the concurring votes of the permanent members. . . ."\textsuperscript{115} In effect, Article 27 grants any one of the "Big Five" the power to block a resolution regarding substantive matters.\textsuperscript{116} A permanent member can thus prevent the adoption of a resolution by either casting a negative vote or persuading at least seven other members to join it in abstention.\textsuperscript{117} This second method of defeating a resolution, the "hidden veto",\textsuperscript{118} was used to block the adoption of a Security Council resolution mandating oil and trade embargos against South Africa.\textsuperscript{119}

One theory frequently advanced to justify the exercise of the "veto power" is the "chain of events" theory, which is based on the assumption that a determination by the Security Council that a particular dispute or situation constitutes a "threat to the peace, breach of the peace, or act of aggression" will generate enforcement action.\textsuperscript{120} While this assumption is logical, the conclusion that it is necessary to exercise the "veto power" or the "hidden veto" to prevent the use of enforcement measures is both unsound and inconsistent with the principles of the United Nations. One such principle is that each member of the Security Council has a legal duty to make a good faith and reasonable determination of what constitutes "a threat to the peace, breach of the peace, or act of aggression", and to implement appropriate measures to remove the threat in the interest of international peace and security.\textsuperscript{121}

A more theoretically honest ground for exercising the "veto power"

\begin{footnotesize}
\begin{enumerate}
\item[\textsuperscript{114}] U.N. CHARTER art. 23, para. 1.
\item[\textsuperscript{115}] U.N. CHARTER art. 27, para. 3.
\item[\textsuperscript{116}] See S. Chen, supra note 146, at 54.
\item[\textsuperscript{117}] S. Chen, supra note 113, at 54, 55.
\item[\textsuperscript{118}] S. Chen, supra note 113, at 55.
\item[\textsuperscript{119}] There are arguable two reasons why the United States does not support the implementation of a mandatory oil and trade embargo against South Africa: (1) such "harsh" sanctions would seriously disrupt and undo the present "level of credibility and influence (the United States has) in the South African Government; and correspondingly, the achievements of the Western Contract Group would be seriously undermined; and (2) such sanctions would be catastrophic to the 350 plus U.S. transnational corporations with subsidiaries in South Africa and over 6,000 doing business in South Africa; (b) the over 50\% U.S. direct investment by Ford, General Motors, Mobil and Caltex; and (c) the $4.2 billion U.S. trade with South Africa. See Study Commission, supra note 4, at 135. The catastrophic effect of a mandatory oil and trade embargo on U.S. transnational corporations, and thus the U.S. economy is compounded by the fact that South Africa has no known commercial oil deposits and two of its key sectors transport and agriculture are heavily dependent on oil products. Thus, South Africa heavily relies on oil imports. See Study Commission, supra note 4, at 140.
\item[\textsuperscript{120}] S. Chen, supra note 113, at 57.
\item[\textsuperscript{121}] See U.N. CHARTER arts. 24, 39, 40.
\end{enumerate}
\end{footnotesize}
or the "hidden veto" is that the dispute or situation is neither a threat to nor a breach of the peace. Or alternatively, there are less drastic alternatives to the proposed enforcement measure since the extremely disruptive effect of the proposed enforcement on the competing interests outweighs the effectiveness of the proposed action.

The Namibian crisis is clearly a "threat to the peace". Therefore, in order to justify any exercise of the "veto power" or the "hidden veto" it should be required to show that: (1) there are competing interests (2) the proposed enforcement measure of mandatory oil and trade sanctions will have an extremely disruptive effect on these valid international interests; and (3) that there are less drastic alternatives to the proposed enforcement measure. Applying these three criteria to the Namibian dispute, the following conclusions can be made: The competing interests involved in the imposition of mandatory oil and trade sanctions against South Africa are the equitable right of the Namibian people to U.N. enforcement of their right to self-determination and independence, and the legal right of a sovereign independent state "to provide for its (economic) prosperity; the imposition of the proposed oil embargo and trade disinvestment would have a drastic, if not fatal, effect on the internal economies of the United States, Great Britain, and other major investors in South Africa as well as the economic order of the world community; and there are less drastic alternatives to the imposition of mandatory oil and trade disinvestment (such as implementing measures to improve compliance with the 1977 arms embargo; adopting resolutions that call upon member and non-member states to cease future investment in the Union of South Africa; and calling upon member and non-member states to support the negotiating efforts of such private groups as the Western Contact Group). Given the above conclusions and the preceding discussion, it is likely that the "veto power" or the "hidden veto" will continue to block mandatory oil and trade sanctions against South Africa.

B. Effectiveness of U.N. Sanctions Against South Africa

The effectiveness of any U.N. sanction can only be accurately measured by the power of the sanction to remove the "threat to peace, breach of the peace or act of aggression" that required the imposition of the sanction, and to maintain or restore international peace and security. Accordingly, the 1977 U.N. mandatory arms embargo against South Africa

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122 S.C. Res. 418, supra note 111.
123 This equitable right of the Namibian people is derived from the fact that they are the beneficiaries under the South West Africa Mandate. The United Nations assumed the position of trustee by adopting Resolution 2145. See note 82 supra. See also Convention on Rights and Duties of States, 1933, 49 Stat. 3097, T.S. No. 881.
124 See note 119 and accompanying text supra.
has been effective only to the extent it has secured South Africa's withdrawal from Namibia, and has maintained international peace and security in the region. The embargo's effectiveness in achieving the aforementioned objectives has, however, been minuscule. South Africa still occupies Namibia in defiance of the International Court of Justice ruling and in defiance of the U.N. Security Council's resolution declaring its presence in Namibia illegal.25 Therefore, an exploration of why the 1977 U.N. mandatory arms embargo against South Africa has been almost totally ineffectual and what steps, if any, can be taken to increase its effectiveness is critical.

There are several factors which contribute to the ineffectiveness of U.N. mandatory economic sanctions. They are: timing or unreasonable Delay of the Imposition of Sanctions, the non-self-executing Nature of Sanctions, poor implementation of sanctions, and Internal Strengths of the State under Sanction.126

1. Timing or Unreasonable Delay of the Imposition of Sanction

The U.N. Security Council imposed the 1977 mandatory arms embargo six years after the United Nations first took cognizance of the crisis in Namibia.127 From the time the South African Government openly and unilaterally denounced the decision of the International Court of Justice in the Namibia case (1971), it was clear that South Africa intended to persist in its breach of its international obligation to withdraw from Namibia. Inevitably, the U.N. Security Council would find South Africa's position a threat to and a breach of the peace, and therefore a probable target for military sanctions under Chapter V, Article 41.128 Thus, from the outset, the South African Government had six years to prepare itself for any forthcoming Article 41 measure levied against it. This advantage, compounded by the lengthy process of implementing the arms embargo and by the lengthy delay of the ultimate effect of the arms embargo,129 has allowed the South African Government time to accelerate its develop-

126 N.Y. Times, supra note 4; see note 107 and accompanying text supra.
127 Note, Economic Sanctions: An Effective Alternative To Military Coercion?, 6 BROOKLYN J. INT'L L. 312-15 (Summer 1980). The structure and approach of the succeeding analysis is derived from the preceding Note. Id.
128 Six years is comparable to the time it took the Security Council to "initiate a full complement of mandatory economic sanctions against Rhodesia over 6 years after the United Nations first took cognizance of the situation in Rhodesia." Note, supra note 161, at 312. Since the 1977 mandatory arms embargo is not a "full complement of mandatory economic sanctions" against South Africa, it is reasonable to conclude that an even greater length of time will lapse before a "full array of comprehensive mandatory sanctions" will be levied against South Africa.
129 Compare Note, supra 126, at 312.
130 For a similar advantage in Rhodesia see Note, supra note 126, at 312.
ment and to diversify its arms production to attain self-sufficiency. For example, South Africa in anticipation of Article 41 sanctions, achieved a high degree of self-sufficiency in the manufacture of missile types, mine clearing devices, ammunition types, bomb fuses, propellants and chemical weapons to minimize its dependence of foreign sources, and to establish a secondary arms market. The U.N. Security Council has "squandered precious time."

2. Non Self-Executing Sanction and Implementation

Although the arms embargo levied by the Security Council was mandatory, it was not self-executing. Thus, the actual legal obligation that arises depends upon the enactment of municipal legislation by each Member state. This means that there is piecemeal implementation of the arms embargo. Further, the enforcement of the municipal legislation is often ineffective and a poor deterrent to past and potential violators.

Violations of the governing municipal legislation by transnational corporations have proven a perennial impediment to effective implementation of the arms embargo. The 1977 embargo called upon states "to review . . . all existing contractual arrangements with, and licenses granted to, South Africa relating to the manufacture and maintenance of arms, ammunition of all types and military equipment and vehicles, with a view to terminating them." Nevertheless, U.S. corporations, for example, have provided artillery shells, GC 45 howitzer, and other arms in flagrant violation of the U.S. State Department and the U.N embargo. Thus, licenses and coproduction agreements continue to limit embargo effectiveness.

130 Compare Note, supra note 126, at 312-13; Study Commission, supra note 4, at 248.
131 Study Commission, supra note 4, at 248-49.
132 Note, supra note 126, at 312.
134 Id.
135 Compare the "sporadic and unenthusiastic" implementation of S.C. mandatory sanctions against Rhodesia. Note, supra note 126, at 313.
136 Note, supra note 126, at 314.
137 S.C. Res. 418, supra note 144.
138 Jackson, supra note 4, at 10; British, German, Italian, French and Israeli transnational companies have also been reported has engaging in post arms embargo sales of jet engines and avionics, marine diesel engines, components and spares for aircraft and missile components and electronic technology respectively. Study Commission, supra note 4, at 249.
139 Although there is no available figure on the number of preembargo licenses and coproduction agreements, it is estimated that there is at least several hundred. Moreover, there is no evidence that a substantial number of these agreements have been unilaterally severed by the supplying party in accordance with the mandatory arms embargo since in
3. South Africa's Internal Strengths

Despite the 1977 arms embargo, South Africa remains one of the strongest military powers in Africa. As an example, in August 1977 and September 1979, there were reports that South Africa was planning or actually performed nuclear weapons testing. ¹⁴⁰

South Africa also has strong commercial "partners".¹⁴¹ For example, the United States is South Africa's major supplier of mainframe computers such that 45% of the market over the past three years has grown from $100 million to $254 million in 1980.¹⁴² The available data¹⁴³ suggests that the effectiveness of the 1977 mandatory arms embargo can be increased if it is enforced by Member and Non-Member states, and if South Africa is militarily and economically weakened.¹⁴⁴

IV. Overview

A. U.N. Economic Sanctions

The preceding analysis reveals that the U.N. 1977 mandatory arms embargo has been ineffective in coercing South Africa's compliance with the decision of the International Court of Justice in the Namibia case. Further, the key measures necessary to increase the effectiveness of the arms embargo are not being universally enforced by Member and Non-Member states. It was also shown that the U.N. Security Council will probably not adopt mandatory oil or trade divestment restraints as economic sanctions against South Africa. The United Nations only recourse, the 1977 mandatory arms embargo, is at most "buying time" to prevent the Namibian freedom fighters (SWAPO) and interested African states from resorting to full scale military aggression. But time is running out.

B. Recommendations: The U.S. Role in the Quasi-Meditorial Contact Group

Given the present inadequacies of the U.N. mandatory arms em-
bargo, one alternative vehicle to expedite peaceful independence for Namibia is the Western Contact Group. The negotiations between the Contact Group and the African parties to the dispute have fluctuated because of the African parties' acute distrust of the United States commitment to Namibian self-government. The United States is in a position to determine the success of the Contact Group. Whether the United States can persuade the African parties that, irrespective of its commercial relations with the Union of South Africa, it is unbiased, is a key issue. In view of the delicate task the United States has endeavored to accomplish, the following recommendations are advanced: 1) Clarify the U.S. Government's fundamental and continuing opposition apartheid by confirming Security Council Resolution 134, which resolves that the policy of apartheid constitutes a serious disturbance of international peace. This is critical because U.S. investment in South Africa, including that of American corporations, is strongly viewed by the African parties as an accomplice to the system of apartheid; 2) Assist in the economic development of the other African states in southern Africa in order to reduce the imbalance in U.S. economic relations with South Africa and to confirm the United States commitment to "international cooperation in solving international problems of an economic and social character." The United States will thereby appear less partial to Black Africa; 3) Encourage other states particularly other members of the quasi-mediatorial Contact Group, to adopt similar policies since the credibility of the Contact group is doubted by the African parties for many of the same reasons; 4) Provide the African parties with sound legal grounds for exercising the "veto power" or the "hidden veto"; and 5) Adopt legislation to increase surveillance of the arms embargo and to encourage U.S. corporations to support Black ec-

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145 See Study Commission supra note 4, at 444; U.N. Charter art. 1, para. 3. Zimbabwe is a prime example of a southern African state where investment is not only feasible, but potentially lucrative. It has been stated that "the expanding opportunities in exportation and import substitution brought about by the international recognition of Zimbabwe in the areas of foreign aid and trade relations have been and should continue to be vigorously pursued." Note, Minimum Wage Legislation in Developing Countries Zimbabwe: A Case in Point, 13 Case W. Res. J. Int'l L. 402 (1981). Moreover, Business Week predicted that Zimbabwe's GNP, which grew by 6% in 1980, would continue to expand, and that Salisbury is the region's logical business hub. Business Week, Feb. 16, 1981, at 46.

146 U.S. regulations for implementing the 1977 mandatory arms embargo do not prohibit sales to South Africa of arms and weapons-related technology originating in other countries. Thus, subsidiaries of U.S. transnational corporations that are incorporated in a foreign state may sell embargoed items to the South African government if not prohibited by the law of the state of incorporation or principal place of business. Although the United States must respect the sovereign right of a state to regulate the conduct of corporations incorporated or nationalized by its laws and operating within its boundaries, it should also recognize that the legal and economic interests involved in the Namibian dispute warrant effective implementation of the arms embargo by extending U.S. law to regulate the actions
onomic and social development through investment and loans.\textsuperscript{147}

V. CONCLUSION

The struggle between the United Nations and South Africa regarding Namibia’s self-determination and independence has continued for more than a quarter of a century. Namibia is now “able to stand by itself”, and thus the time has arrive for the “sacred trust of civilization” to terminate. By assuming direct responsibility for the Namibia, the United Nations is obligated under international law to procure the right of Namibia to self-determination and independence. Despite U.N. efforts to enforce Namibia’s rights, however, the Government of South Africa continues to occupy Namibia in violation of international law.

The only remaining means to effectuate Namibia’s right to independence peacefully is the Western Contact Group. Presently, however, that body is struggling to achieve its function of presenting a plan that is acceptably impartial to the African parties. The United States plays an important role in determining whether this problem is remedied. If the Contact Group fails to achieve its goal, it is probable that there will be military confrontation between the African parties and South Africa. Such a war would seriously disrupt any U.S. economic interest in the region and cast doubt on the United Nations ability to maintain international peace and security. In view of this real possibility, the United States should strengthen its role as a quasi-mediator in the Namibian crisis.

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\item[\textsuperscript{147}] Cf. Study Commission, \textit{supra} note 4, at 454.
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