

## SYMPOSIUM ARTICLES

### USING SOCIOLOGICAL THEORIES OF ISOMORPHISM TO EVALUATE THE POSSIBILITY OF REGIME CHANGE THROUGH TRADE SANCTIONS

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#### 1. INTRODUCTION

Trade sanctions occur when one polity institutes a policy that limits or prohibits trade with another polity to support a policy largely unrelated to trade. Trade sanctions have a long history. Scholars often point to the Megarian Decree, in which Pericles banned all trade between his Athenian Empire and the state of Megara in 432 B.C.E., as one of the earliest uses of trade sanctions.<sup>1</sup> Some argue that Pericles hoped that using economic tools against Megara would prevent war with Sparta; others suggest that Pericles merely wanted to punish the Megarians for their support of Corinth—in either case the trade measure supported another policy.<sup>2</sup> Most scholars agree that Pericles's trade sanction contributed to the outbreak of the Peloponnesian War.<sup>3</sup>

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<sup>1</sup> See Barry E. Carter, *International Economic Sanctions: Improving the Haphazard U.S. Legal Regime*, 75 CAL. L. REV. 1159, 1168 n.18 (1987) (describing the trade limitations imposed by Pericles and their role in starting the Peloponnesian War); Steve Chan & A. Cooper Drury, *Sanctions as Economic Statecraft: An Overview*, in SANCTIONS AS ECONOMIC STATECRAFT: THEORY AND PRACTICE 1, 1 (Steve Chan & A. Cooper Drury eds., 2000) (describing the political motivations and the events arising out of the Megarian Decree).

<sup>2</sup> Chan & Drury, *supra* note 1, at 1.

<sup>3</sup> See, e.g., Thihan Myo Nyun, *Feeling Good or Doing Good: Inefficacy of the U.S. Unilateral Sanctions Against the Military Government of Burma/Myanmar*, 7 WASH. U.

As could be expected of a practice engaged in for millennia, trade sanctions have generated voluminous literature.<sup>4</sup> Many scholars have analyzed sanctions through economic theory or using quantitative explanation.<sup>5</sup> Some have based their analyses on political science.<sup>6</sup> Some, of course, have analyzed trade sanctions as a matter of law.<sup>7</sup> Economics, international relations, and other disciplines have enriched legal analyses of trade sanctions. While law has been happy to borrow from those disciplines, however, it has not yet turned to the tools of institutional sociologists.

This Article takes that step. Institutional sociologists have developed theories that explain the process whereby institutions converge. Institutions, in turn, shape and guide behavior. Thus, changes in institutions will lead to changes in behavior, and convergences in institutions should lead to similar behavior. If a goal of trade sanctions is to force another nation to act in a manner similar to the sanctioning nation and its peers, then this sociological theory of isomorphism could have powerful explanatory and predictive effects.

In order to determine if sociological theories of institutional convergence apply to trade sanctions, this Article first must determine the objectives sought by nations that apply sanctions.<sup>8</sup> There are several goals; to speak of or analyze trade sanctions as a unitary phenomenon is for the most part nonsensical. One type of trade sanction does seek to bring the behavior of target nations into

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GLOBAL STUD. L. REV. 455, 461 (2008) (stating that barring trade between Megara and allies eventually led to the Peloponnesian War); *see also* THUCYDIDES, THE LANDMARK THUCYDIDES: A COMPREHENSIVE GUIDE TO THE PELOPONNESIAN WAR 80 (Robert B. Strassler ed., Richard Crawley trans., Free Press 1996) (stating that the Spartans demanded rescission of the Megarian decree to prevent war).

<sup>4</sup> A useful bibliography can be found at Global Policy Forum, Sanctions Bibliography, <http://www.globalpolicy.org/security/sanction/bibliog.htm> (last visited Feb. 21, 2009).

<sup>5</sup> *See, e.g.*, GARY CLYDE HUFBAUER ET AL., ECONOMIC SANCTIONS RECONSIDERED (3d ed. 2007) (providing a database of economic sanctions and evaluating the relative efficacy of these measures).

<sup>6</sup> *See, e.g.*, DANIEL W. DREZNER, THE SANCTIONS PARADOX: ECONOMIC STATECRAFT AND INTERNATIONAL RELATIONS (1999) (discussing the role of economic coercion in international relations).

<sup>7</sup> *See, e.g.*, MICHAEL P. MALLOY, UNITED STATES ECONOMIC SANCTIONS: THEORY AND PRACTICE 145-204 (2001) (discussing the role of economic sanctions in contemporary U.S. legal practice).

<sup>8</sup> *See infra* Section 2.

line with the behavior of sanctioning nations and their peers,<sup>9</sup> and thus presents the possibility for examination through the lens of theories of isomorphism. A paradigmatic example of this type of sanction is the United States' embargo of the Republic of Cuba; this Article briefly reviews the history of that island.<sup>10</sup> The Article then explains three different but non-exclusive theories of isomorphism: normative isomorphism, mimetic isomorphism, and coercive isomorphism.<sup>11</sup> Application of those theories to the embargo of Cuba explains the failure of that particular trade sanction.<sup>12</sup> Moreover, theories of isomorphism suggest that unilateral sanctions will often fail to cause the desired change in behavior.<sup>13</sup>

## 2. TYPES OF TRADE SANCTIONS

As the debate over the reasons for Pericles's sanctions of Megara illustrates, nations can impose economic sanctions for a variety of reasons. Reasons that a nation might impose economic sanctions include commercial impulses, denial of a discrete good or piece of technology, rule enforcement, and expression of preferences. A country may also impose sanctions as a means of causing another country to change its behavior. Because nations impose different types of sanctions to achieve different goals (or as a response to different impulses), evaluations of "success" or "costs" require careful distinction among these types.

### 2.1. Commercial Impulses

A broad set of commercial impulses explains one type of trade sanction. Of these commercial impulses, protectionism is discussed most often.<sup>14</sup> A ban imposed by Australia, for example, on uncooked salmon from the Pacific Rim of North America was ostensibly imposed in order to prevent the introduction of exotic

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<sup>9</sup> See *infra* Section 2.5.

<sup>10</sup> See *infra* Section 3.

<sup>11</sup> See *infra* Section 4.

<sup>12</sup> See *infra* Section 5.

<sup>13</sup> See *infra* Section 5.4.

<sup>14</sup> E.g., Howard F. Chang, *An Economic Analysis of Trade Measures to Protect the Global Environment*, 83 GEO. L.J. 2131, 2131-32, 2136-45 (1995) (discussing attempts by the United States to protect environmental interests by utilizing legislation that restricted specific types of trade with neighboring countries).

diseases to Australian fish stock.<sup>15</sup> However, because Australia imposed a ban on uncooked salmon but did not impose a similar ban on herring or ornamental fin-fish, both of which presented as much, or even more, of a risk to Australian fish stock, and because the scientific study Australia used to justify its ban did not contain an evaluation of the likelihood of the spread of disease, the World Trade Organization found that the sanction imposed by Australia was actually intended to protect the domestic Australian industry.<sup>16</sup> Similarly, the World Trade Organization found no scientific support for a Japanese ban on apples from the United States ostensibly imposed to protect Japanese apples from larvae of the coddling moth, and found instead that the measure was unreasonably protectionist.<sup>17</sup> One of the earliest rulings within the World Trade Organization found that a ban on reformulated gasoline that did not meet specified quality standards was not in fact an environmental measure but was actually a protectionist action by the United States.<sup>18</sup>

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<sup>15</sup> See Matthew D. Taylor, *The WTO Panel Decision on Australia's Salmon Import Guidelines: Evidence that the SPS Agreement can Effectively Protect Human Health Interests*, 9 PAC. RIM L. & POL'Y J. 473, 473 (2000) (describing an Australian measure, the Quarantine Proclamation 86A, that was enacted to protect diverse recreational fisheries in Australia).

<sup>16</sup> Appellate Body Report, *Australia—Measures Affecting the Importation of Salmon*, ¶ 170, WT/DS18/AB/R (Oct. 20, 1998). Canada complained to the World Trade Organization that the Australian sanction violated Australia's obligations pursuant to its membership in that organization. See Andrew P. Thomson, *Australia—Salmon and Compliance Issues Surrounding the SPS Agreement: Sovereign Acceptance and Measure Adaptation*, 33 LAW & POL'Y INT'L BUS. 717, 725–26 (2002) (describing Canada and Australia's agreements before the World Trade Organization). The World Trade Organization has a process for resolving complaints lodged by members against other members; that process resulted in the finding by the World Trade Organization. For discussions and explanations of the dispute settlement process within the World Trade Organization, see ERNST-ULRICH PETERSMANN, *THE GATT/WTO DISPUTE SETTLEMENT SYSTEM: INTERNATIONAL LAW, INTERNATIONAL ORGANIZATIONS AND DISPUTE SETTLEMENT* 1–57 (1997); Carlos M. Vásquez & John H. Jackson, *Some Reflections on Compliance with WTO Dispute Settlement Decisions*, 33 LAW & POL'Y INT'L BUS. 555, 556–62 (2002).

<sup>17</sup> Panel Report, *Japan—Measures Affecting Agricultural Products*, ¶ 9.1, WT/DS76/R (Oct. 27, 1998); see Raj Bhala & David A. Gantz, *WTO Case Review 2003*, 21 ARIZ. J. INT'L & COMP. L. 317, 422–39 (2004) (discussing the dispute between the United States and Japan); Joseph P. Whitlock, *Japan—Measures Affecting Agricultural Products: Lessons for Future SPS and Agricultural Trade Disputes*, 33 LAW & POL'Y INT'L BUS. 741, 748–54 (2002) (discussing the dispute).

<sup>18</sup> Panel Report, *United States—Standards for Reformulated and Conventional Gasoline*, ¶ 4.8 WT/052/9 (May 20, 1996). The United States—against the explicit advice of its own International Trade Representative—created different,

The law regarding these types of sanctions is relatively clear. The international trade regime, as administered by the World Trade Organization, is built on two strict foundational requirements and one softer requirement.<sup>19</sup> The first strict requirement, the “most favored nation” principal, requires that all participating nations receive equal treatment at the border: nations cannot discriminate among goods on the basis of country of origin.<sup>20</sup> The second strict requirement, the “national treatment” principle, requires that once inside the customs territory of a nation all goods from participating nations shall receive the same treatment as goods that originated domestically.<sup>21</sup> The third, somewhat softer requirement is that all barriers at the border be converted into tariffs, so that as those tariffs are negotiated downward there eventually will be unfettered trade among all of the participants in the international trade regime.<sup>22</sup>

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discriminatory standards for gasoline originating outside of the United States; substantial evidence suggested that Congress worked with domestic producers to create a protectionist sanction. See Philip M. Nichols, *Participation of Nongovernmental Parties in the World Trade Organization: Extension of Standing in World Trade Organization Disputes to Nongovernment Parties*, 17 U. PA. J. INT’L ECON. L. 295, 297 n.14 (1996) (describing the protectionist nature of the measure).

<sup>19</sup> For a discussion of the administration of the international trade regime by the World Trade Organization, see John O. McGinnis & Mark L. Movsesian, Commentary, *The World Trade Constitution*, 114 HARV. L. REV. 511 (2000); G. Richard Shell, *Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization*, 44 DUKE L.J. 829 (1995).

<sup>20</sup> See Peter D. Ehrenhaft, Book Review, 86 AM. J. INT’L L. 230, 231 (1992) (referring to the most favored nation requirement as a “bedrock” of the international trade regime); David Palmeter & Petros C. Mavroidis, *The WTO Legal System: Sources of Law*, 92 AM. J. INT’L L. 398, 407 (1998) (referring to the most favored nation requirement as the “first and most basic provision” of the international trade regime).

<sup>21</sup> See Thomas J. Schoenbaum, *International Trade and Protection of the Environment: The Continuing Search for Reconciliation*, 91 AM. J. INT’L L. 268, 271 (1997) (placing national treatment and most favored nation principle “[a]t the core” of the international trade regime); Miranda Stewart, *Global Trajectories of Tax Reform: The Discourse of Tax Reform in Developing and Transition Countries*, 44 HARV. INT’L L.J. 139, 165 (2003) (describing national treatment as one of the “key principles” of the international trade regime).

<sup>22</sup> See Philip M. Nichols, *GATT Doctrine*, 36 VA. J. INT’L L. 379, 439 (1996) (discussing how the General Agreement intended to promote equal competition by forbidding trade barriers other than tariffs).

A scattering of exceptions perforate these requirements.<sup>23</sup> One exception specifically allows countries to sanction trade for commercial purposes. Through a provision known as the “escape clause,” sanctions may be imposed when unforeseen events lead to an increase in imports that threatens or foreseeably threatens serious injury to a domestic industry.<sup>24</sup> If a country uses the escape clause to sanction goods from another country, then that country may in turn impose increased tariffs equal in value to the sanction on goods from the first country.<sup>25</sup> The escape clause thus provides a balanced measure whereby countries can react to short term changes in the trade environment without renegotiating the entirety of the international trade regime.<sup>26</sup>

The purpose of sanctions imposed to promote the commercial prosperity of a nation dictates the measurement of the “success” of such sanctions. Scholars and policymakers would attempt to find a causal link between the sanction and domestic economic growth, and would then try to measure the amount of growth attributable to the sanction. If the sanctions lead to economic growth, then they would be considered successful.<sup>27</sup>

## 2.2. Denial of a Discrete Piece of Technology or Input

A related type of sanction seeks to deny a discrete piece of technology or input to a specific actor or set of international actors. The United States, for example, “has three export control regulations in place that prohibit the unlicensed ‘export’ or ‘re-

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<sup>23</sup> See Peter D. Ehrenhaft, Book Review, 84 AM. J. INT’L L. 334, 335 (1990) (comparing the exceptions to “a crust of barnacles, weighing it down with provisos and exclusions”).

<sup>24</sup> Steve Charnovitz, *Rethinking WTO Trade Sanctions*, 95 AM. J. INT’L L. 792, 818–19 (2001). Charnovitz notes that “[t]he trading system has always recognized the need for a safety valve to let governments derogate from trade rules.” *Id.* at 818.

<sup>25</sup> See Kyle Bagwell & Robert W. Staiger, *Enforcement, Private Political Pressure, and the General Agreement on Tariffs and Trade/World Trade Organization Escape Clause*, 34 J. LEGAL STUD. 471, 474–75 (2005) (demonstrating that the counter-tariff helps governments exercise restraint in use of the escape clause).

<sup>26</sup> See Joost Pauwelyn, *The Transformation of World Trade*, 104 MICH. L. REV. 1, 55 (2005) (stating that the escape clause provides necessary flexibility to an “immutable” treaty commitment).

<sup>27</sup> Theory suggests, of course, that sanctions would actually diminish overall domestic growth. See Alan O. Sykes, *Comparative Advantage and the Normative Economics of International Trade Policy*, 1 J. INT’L ECON. L. 49, 78–80 (1998) (explaining the economic justification for free trade).

export' of certain U.S. originated technology, equipment, software or information for reasons of national security."<sup>28</sup> One of these, the Atomic Energy Act, prohibits the export of nuclear technology to nations that have conducted unauthorized testing of nuclear weapons.<sup>29</sup> Similarly, Article 17 of the Foreign Trade Laws of the People's Republic of China allows China to "adopt any necessary measures to safeguard" national security "[w]ith regard to the import and export of goods and technologies related to fissile and fusion material or the substances from which such material is derived."<sup>30</sup> In both cases, the purpose of prohibiting trade in nuclear technology is to protect national security.

Just as the international trade regime allows for trade sanctions to protect domestic industry, so too does it allow for protection of national security.<sup>31</sup> The World Trade Organization allows parties to not make required disclosures of information if such disclosures threaten national security.<sup>32</sup> More pertinently to the evaluation of sanctions, it also allows parties to deviate from the foundational requirements of nondiscrimination in order to protect *essential* national security.<sup>33</sup> The boundaries of "essential" national security remain somewhat unclear: the few disputes that have arisen regarding this exception have settled before adjudicators could hear the disputes and issue rulings.<sup>34</sup> The exception does,

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<sup>28</sup> Sonia Baldia, *Intellectual Property in Global Outsourcing: The Art of the Transfer*, 38 GEO. J. INT'L L. 499, 520 n.64 (2007).

<sup>29</sup> See Recent Legislation, *Foreign Relations Law – Nuclear Nonproliferation – Congress Authorizes the President to Waive Restrictions on Nuclear Exports to India*, 120 HARV. L. REV. 2020, 2021 (2007) (discussing the United States-India Peaceful Atomic Energy Cooperation Act of 2006 (USIPAECA) and its impact on the Atomic Energy Act).

<sup>30</sup> Foreign Trade Law, art. 17 (P.R.C.) (2007), translation available at [http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content\\_1383624.htm](http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383624.htm).

<sup>31</sup> See Susan Rose-Ackerman & Benjamin Billa, *Treaties and National Security*, 40 N.Y.U. J. INT'L L. & POL. 437, 451-52 (2008) (discussing national security exceptions in international trade rules).

<sup>32</sup> See Eugene Kontorovich, *The Arab League Boycott and WTO Accession: Can Foreign Policy Excuse Discriminatory Sanctions?*, 4 CHI. J. INT'L L. 283, 290 (2003) (discussing the national security exception).

<sup>33</sup> *Id.*; Hannes L. Schloemann & Stefan Ohlhoff, "Constitutionalization" and Dispute Settlement in the WTO: National Security as an Issue of Competence, 93 AM. J. INT'L L. 424, 437 (1999) (noting the difficulty of defining "essential" national security concerns).

<sup>34</sup> See Dapo Akande & Sope Williams, *International Adjudication on National Security Issues: What Role for the WTO?*, 43 VA. J. INT'L L. 365, 376-77 (2003) (stating that the few disputes arising in the World Trade Organization have not yielded rules because the parties settled before adjudication); C. O'Neal Taylor, *Impossible*

however, articulate specific items or circumstances that fall within the term: fissionable materials, military arms or supplies, and anything during a time of war.<sup>35</sup> Thus, the U.S. and Chinese sanctions would seem to be within the rules of the international trade regime. While less measured and certainly less settled than provisions regarding commercial sanctions, the national security exception similarly creates flexibility in the otherwise inflexible international trade regime.<sup>36</sup>

The measurement of success should be much clearer: the extent to which the sanctioned nations obtain (or do not obtain) the prohibited technology or good. If, for example, one nation prohibits the export of encryption technology to another, then success occurs if that second nation does not obtain the encryption technology.<sup>37</sup> Whether or not the encryption technology obtained by the sanctioned country actually originated in the sanctioning country would be of little concern, since the sole concern of the sanctioning country is to deny access to encryption technology.<sup>38</sup> Unlike the evaluation of the successes and costs of sanctions intended to protect a domestic industry, this evaluation looks outward, at the effects in another country, rather than inward, at

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*Cases: Lessons From the First Decade of WTO Dispute Settlement*, 28 U. PA. J. INT'L ECON. L. 309, 380 (2007) (noting that parties have avoided determination of the boundaries of the exception).

<sup>35</sup> Kontorovich, *supra* note 32, at 290.

<sup>36</sup> Wesley A. Cann, Jr., *Creating Standards and Accountability for the Use of the WTO Security Exception: Reducing the Role of Power-Based Relations and Establishing a New Balance Between Sovereignty and Multilateralism*, 26 YALE J. INT'L L. 413, 417 (2001) ("The security exception represents an indispensable escape mechanism or safety valve without which the General Agreement on Tariffs and Trade would cease to exist. Nations are unwilling to participate in such agreements without the assurance that they have retained the right to protect their sovereignty from external threat."). Andrew Guzman argues that concerns about the abuse of a poorly defined security exception are overblown: "The ability of political constraints to cabin abusive practices is demonstrated by their effectiveness in limiting the use of the least disciplined of WTO exceptions: the national security exception. . . . Simply put, the fact that the exception is not regularly used indicates that it is simply too costly to invoke when the national security justification is not plausible." Andrew T. Guzman, *Food Fears: Health and Safety at the WTO*, 45 VA. J. INT'L L. 1, 36-37 (2004).

<sup>37</sup> See generally Jay P. Kesan & Rajiv C. Shah, *Shaping Code*, 18 HARV. J. L. & TECH. 319, 330-31 (2005) (discussing the U.S. prohibition on export of encryption technology to certain countries).

<sup>38</sup> See Mai-Trâm B. Dinh, Note, *The U.S. Encryption Export Policy: Taking the Byte Out of the Debate*, 7 MINN. J. GLOBAL TRADE 375, 393 (1998) (noting that criminals circumvent the U.S. sanctions on encryption technology).



the effects inside the sanctioning country. To use the same tests and metrics on these two very different types of sanctions would be meaningless.

### 2.3. Rule Enforcement

Similar questions are often asked of another closely related type of sanction: those imposed to enforce an internationally-agreed upon rule. The Convention on International Trade in Endangered Species (CITES) offers a well-known example.<sup>39</sup> The Convention prohibits the export of ivory from elephants, as part of an effort to enforce provisions aimed at restoring the numbers of wild elephants in Africa and Asia.<sup>40</sup> In particular, the Convention authorizes signatories to penalize non-signatories that engage in trade in elephant ivory.<sup>41</sup> This convention is hardly unique; several international conventions regarding environmental or sustainability issues rely on trade sanctions for enforcement.<sup>42</sup>

The international trade regime itself uses trade sanctions within its dispute settlement process.<sup>43</sup> As Steve Charnovitz notes, “the Marrakesh Agreement Establishing the World Trade Organization and its annexes do not actually employ the term ‘trade sanction.’”<sup>44</sup> Charnovitz goes on to point out that

even without the term “sanction,” that is what the WTO can impose. . . . [T]he purpose of the WTO-authorized action is

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<sup>39</sup> Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 27 U.S.T. 1087, available at <http://www.cites.org/eng/disc/text.shtml>.

<sup>40</sup> See Andrew J. Heimert, Note, *How the Elephant Lost His Tusks*, 104 YALE L.J. 1473, 1478-79 (1995) (discussing international legal measures to protect elephant populations after CITES).

<sup>41</sup> See Mario Del Baglivo, *CITES at the Crossroad: New Ivory Sales and Sleeping Giants*, 14 FORDHAM ENVTL. L. REV. 279, 289-90 (2003) (discussing the responsibilities CITES imposes on its signatories with regards to policing illegal ivory trading).

<sup>42</sup> See Jonathan Baert Wiener, *Global Environmental Regulation: Instrument Choice in Legal Context*, 108 YALE L.J. 677, 689 (1999) (noting that several international conventions rely on trade sanctions including CITES, the Convention on Biological Diversity, the United Nations Convention on the Law of the Sea, the International Whaling Convention, and the Straddling Stocks Agreement).

<sup>43</sup> Peggy B. Sherman & Ellwood F. Oakley III, *Pandemics and Panaceas: The World Trade Organization's Efforts to Balance Pharmaceutical Patents and Access to AIDS Drugs*, 41 AM. BUS. L.J. 353, 361 n.35 (2004).

<sup>44</sup> Charnovitz, *supra* note 24, at 792.

to induce compliance, and that is properly called a “sanction.” With the advent of the WTO, the trade policy community has increasingly employed the term “sanction” to describe what [the dispute settlement process] authorizes.<sup>45</sup>

The law concerning these types of sanctions appears woefully underdeveloped.<sup>46</sup> Obviously, the international trade regime recognizes the legality of sanctions imposed or authorized by the international trade regime.<sup>47</sup> The trade rules also include a specific exception for sanctions imposed in compliance with the United Nations.<sup>48</sup> The trade regime does not include any other exceptions. In theory, this should lead to the application of Article 30 of the Vienna Convention: if treaties impose conflicting obligations then signatories are bound to follow the dictates of the later-created treaty.<sup>49</sup> That reading of international law, however, would vitiate dozens of carefully negotiated enforcement provisions in international agreements.<sup>50</sup> However, “it bears noting that to date

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<sup>45</sup> *Id.* at 793.

<sup>46</sup> Unlike the law of the preceding two types of sanctions—for each of which a body of rules exists, even though the meaning and application of those rules still generates argument and scholarly debate—the rules with respect to enforcement of sanctions appear incomplete.

<sup>47</sup> See Rachel Brewster, *Rule-Based Dispute Resolution in International Trade Law*, 92 VA. L. REV. 251, 259 (2006) (“Sanctions are thereby legitimized, while unilateral counter-retaliation is not. . . . By centralizing the authority to use sanctions, the WTO system increases enforcement by making threats of sanctions more credible.”). Of course, the fact that retaliatory sanctions are legal under the trade regime’s rules does not mean that the sanctions actually contribute to the goals of the international trade regime; many scholars point out the inherent conflict between the trading system’s goals and its methods. See, e.g., Charnovitz, *supra* note 24, at 792 (arguing that retaliatory trade sanctions “undermine the trading system”); Judith Goldstein & Lisa L. Martin, *Legalization, Trade Liberalization, and Domestic Politics: A Cautionary Note*, 54 INT’L ORG. 603, 620–21 (2000) (suggesting that trade sanctions do not achieve the trading regime’s goals in some circumstances); Laurence R. Helfer, *Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash Against Human Rights Regimes*, 102 COLUM. L. REV. 1832, 1838 (2002) (“[O]ne of the remedies for noncompliance—retaliatory sanctions—causes the very trade distortions that the WTO was designed to avert.”).

<sup>48</sup> See Kontorovich, *supra* note 32, at 290 (describing the exception).

<sup>49</sup> Sabrina Safrin, Comment, *Treaties in Collision? The Biosafety Protocol and the World Trade Organization Agreements*, 96 AM. J. INT’L L. 606, 612–13 (2002).

<sup>50</sup> See Steve Charnovitz, *Free Trade, Fair Trade, Green Trade: Defogging the Debate*, 27 CORNELL INT’L L.J. 459, 498 (1994) (discussing the “fruitful interplay between unilateral and multilateral action” in such international agreements, and

not a single multilateral environmental agreement or government action taken to implement such an agreement has been found to violate the WTO Agreements.”<sup>51</sup> Clearly, the international community has not yet sufficiently sorted out the law regarding sanctions intended to enforce agreed-upon rules.

The metric of “success” with respect to these types of sanctions should be no different than that of any other measure designed to compel compliance with a rule: the extent to which those from whom compliance is expected do in fact comply. Mario Del Baglivo, for example, suggests that “[m]ost observers credit the CITES Ivory Ban with virtually ending the poaching crisis throughout Africa.”<sup>52</sup> If this is true, then the sanctioning of trade in ivory may be “successful.”

#### 2.4. Expression of Preferences

A fourth set of reasons for trade sanctions could reflect collective attitudes and preferences.<sup>53</sup> Massachusetts’s sanctions on Burma, for example, hardly spring from a protectionist impulse—rather, those sanctions could reflect a collective distaste for the political regime in Burma.<sup>54</sup> Similarly, it is quite possible that the majority of people in the United States could feel so much

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citing the potential dangers in overriding it); A. Dan Tarlock, *Exclusive Sovereignty Versus Sustainable Development of a Shared Resource: The Dilemma of Latin American Rainforest Management*, 32 TEX. INT’L L.J. 37, 63 (1997) (discussing how developed countries can make unilateral use of export bans on unsustainable timber products but will have much more difficulty with import bans).

<sup>51</sup> Safrin, *supra* note 49, at 623–24 (pointing to several “formidable multilateral environmental agreements” that predate the international trade regime but have not been questioned by that regime).

<sup>52</sup> Del Baglivo, *supra* note 41, at 293.

<sup>53</sup> See Karl E. Case, *Musgrave’s Vision of the Public Sector: The Complex Relationship Between Individual, Society and State in Public Good Theory*, 32 J. ECON. & FIN. 348, 353–54 (2008) (explaining theories of collective attitudes and noting the role of law in expressing these attitudes).

<sup>54</sup> See Lucien Dhooge, *The Wrong Way to Mandalay: The Massachusetts Selective Purchasing Act and the Constitution*, 37 AM. BUS. L.J. 387, 410 n.168 (2000) (noting that the Massachusetts legislature felt that Massachusetts had a moral duty not to deal with Burma, and quoting State Senator Marian Walsh as “urg[ing] her colleagues to ‘recognize the responsibility we have to set a tone for civil rights across the globe.’”). The United States Supreme Court struck down Massachusetts’s sanctions on the narrow grounds that existing federal laws sanctioning Burma preempted the action by the state. *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 388 (2000); see also *The Supreme Court: 1999 Term – Leading Cases*, 114 HARV. L. REV. 179, 349, 353–55 (2000) (discussing the case).

revulsion at the atrocities committed in Darfur by the Sudanese government that they simply would not want entities within their jurisdiction to interact with that government.<sup>55</sup>

Markets, and by extension David Ricardo's economic theory justifying international trade,<sup>56</sup> encourage the expression of preferences<sup>57</sup> and it therefore would be somewhat distortive to not allow such expressions.<sup>58</sup> The international trade regime, however, does not accommodate these types of sanctions. Unlike the flexibility displayed with respect to domestic industries and national security, the trade regime displays little flexibility with respect to local expression of preferences.<sup>59</sup>

Notwithstanding the rules against these types of sanctions, they continue to be imposed. Unlike each of the other types of sanctions described in this Section, no outcome generated by these types of sanctions indicates success or failure. The sanction does not attempt to achieve a particular outcome. Rather, the sanction reflects an internal aspect of the collective, an internal preference

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<sup>55</sup> See International Crisis Group, *Poll Shows Americans Support U.S. Role in Darfur*, June 1, 2005, <http://www.crisisgroup.org/home/index.cfm?l=1&id=3492&m=1> (reporting results of a survey that indicate that most people in the United States morally oppose the actions of the Sudanese government in Darfur).

<sup>56</sup> See Tomer Broude, *Taking "Trade and Culture" Seriously: Geographic Indications and Cultural Protection in WTO Law*, 26 U. PA. J. INT'L ECON. L. 623, 657 n.104 (2005) (noting David Ricardo's "famed exposition of the principle of comparative advantage").

<sup>57</sup> Dmitri Mehlhorn, *A Requiem for Blockbusting: Law, Economics and Race-Based Real Estate Speculation*, 67 FORDHAM L. REV. 1145, 1192 (1998) ("Markets allow an almost-democratic expression of preferences, including the preferences of society's worst-off. Just as importantly, markets will punish policy-makers who ignore them."). Indeed, an Edgeworth-Bowley box—used to measure the allocation of resources when people trade—explicitly takes preferences into account as one of its axes. See Barbara White, *Coase and the Courts: Economics for the Common Man*, 72 IOWA L. REV. 577, 604–08 (1987) (explaining the Edgeworth-Bowley box's representativeness of the relationship between individual preferences and social efficiency).

<sup>58</sup> See Herbert Hovenkamp, *The Limits of Preference-Based Legal Policy*, 89 NW. U. L. REV. 4, 4 (1994) ("The two most important institutions in our system, democracy and the market, make individual preference decisive in the formation of policy and the allocation of resources. Without acknowledgment of preference, democracy and the market as we know them could not exist.").

<sup>59</sup> See Philip M. Nichols, *Trade Without Values*, 90 NW. U. L. REV. 658, 659 (1996) ("[T]he rigidity of this new dispute settlement system may have a darker aspect: it may become so inflexible as to actually hinder the prospects for free trade.").

given voice through operation of law.<sup>60</sup> The critical measurement, therefore, also looks at the processes inside the collective and asks whether the sanction does in fact legitimately and accurately reflect the preferences of the individuals that compromise that collective.<sup>61</sup>

### 2.5. Sanctions That Seek to Change Behavior

Each of the types of sanctions discussed so far has a different purpose; axiomatically, the success of each would be measured in different ways, and the costs and benefits of each would constitute very different discussions. To simply evaluate trade sanctions writ large would more often than not constitute a meaningless exercise. A fifth type of trade sanction is equally unique, in which the goal is to change the behavior of an individual actor.<sup>62</sup>

These sanctions differ from those intended to enforce an internationally-agreed upon rule in at least two important ways.<sup>63</sup> Such sanctions tend to be unilateral, or imposed by a small group of nations.<sup>64</sup> Moreover, these sanctions are intended to force a broad change in the behavior of target countries rather than

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<sup>60</sup> See, e.g., Alejandra Carvajal, *State and Local "Free Burma" Laws: The Case for Sub-National Trade Sanctions*, 29 L. & POL'Y INT'L BUS. 257, 268 (1998) ("The Massachusetts law is very straightforward in that sense: Massachusetts morally opposes the Burmese regime and therefore will do no business with the regime or its business partners.").

<sup>61</sup> See Kalypso Nicolaïdis & Joyce L. Tong, *Diversity or Cacophony? The Continuing Debate Over New Sources of International Law*, 25 MICH. J. INT'L L. 1349, 1373 (2004) ("If a country can demonstrate the truly democratic character of domestic choices including some degree of inclusiveness of non-domestic constituencies than [sic] these choices must trump requirements of legal consistency."); Ernst-Ulrich Petersmann, *Constitutionalism and International Organizations*, 17 NW. J. INT'L L. & BUS. 398, 411 (1996) ("The general public interest of the citizens cannot even be known by governments without enabling their citizens to freely express their individual preferences in transparent, democratic decision-making processes and open markets.") (emphasis omitted). Nicolaïdis and Tong suggest that "we must applaud when the WTO Appellate Body tells a country how to come to a decision rather than what decisions it is allowed to make." Nicolaïdis & Tong, *supra*, at 1373.

<sup>62</sup> See BARRY E. CARTER, *INTERNATIONAL ECONOMIC SANCTIONS: IMPROVING THE HAPHAZARD U.S. LEGAL REGIME* 12 (1988) (identifying changing behavior of target countries as a purpose of some sanctions).

<sup>63</sup> See *supra* notes 39-52 and accompanying text (describing sanctions intended to enforce agreed upon rules).

<sup>64</sup> See Roger Normand & Christoph Wilcke, *Human Rights, Sanctions, and Terrorist Threats: The United Nations Sanctions Against Iraq*, 11 TRANSNAT'L L. & CONTEMP. PROBS. 299, 319 (2001) ("[H]istorically only powerful nations have applied sanctions to force weaker nations to change.").

compliance with a single rule or regime.<sup>65</sup> The statements of a U.S. legislator supporting unilateral sanctions of this type illustrate the breadth of changes sought:

The purpose of sanctions is to change behavior. The changes we seek, in partnership with the Burmese people, are these: concrete, irreversible steps toward reconciliation and democratization that include the full, unfettered participation of the National League for Democracy and ethnic minorities; ending attacks on ethnic minorities; and the immediate, unconditional release of all prisoners of conscience, including Nobel Peace Prize winner Aung San Suu Kyi. The regime also needs to know that a sham Constitutional process and token prisoner releases will not be regarded by anyone as progress toward these goals.<sup>66</sup>

The United States' sanctions on Cuba are a paradigmatic example of this type of sanction.<sup>67</sup> The sanctions explicitly embrace the purpose of effectuating change in Cuba. The Cuban Democracy Act, the first of the two acts dealing with sanctions on Cuba, flatly states, "It should be the policy of the United States . . . to seek a peaceful transition to democracy and a resumption of economic growth in Cuba through the careful application of sanctions directed at the Castro government and support for the Cuban people."<sup>68</sup>

The later-enacted Cuban Liberty and Democratic Solidarity (Libertad) Act amplifies these goals and introduces the idea that

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<sup>65</sup> See, e.g., Lucien J. Dhooge, *Condemning Khartoum: The Illinois Divestment Act and Foreign Relations*, 43 AM. BUS. L.J. 245, 297 (2006) ("[T]he intent of the Illinois Act is to establish an economic boycott of a single identified country for the purpose of encouraging it to change its policies with respect to its governance of a single province within its national borders."); Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 94 AM. J. INT'L L. 677, 699 (2000) ("The purpose of our sanctions, however, is to spur changes in policy.") (quoting U.S. Secretary of State Madeleine K. Albright, Remarks Before the American-Iranian Council (Mar. 17, 2000), available at <http://secretary.state.gov/www/statements/2000/000317.html>).

<sup>66</sup> Press Release, Senator Mitch McConnell, McConnell, Feinstein Call for Renewed Sanctions against Burmese Junta (June 14, 2007), available at [http://mccconnell.senate.gov/print\\_record.cfm?id=276921](http://mccconnell.senate.gov/print_record.cfm?id=276921) (quoting Senator McConnell).

<sup>67</sup> The U.S. sanctions on Cuba are thoroughly described in Andreas F. Lowenfeld, *Congress and Cuba: The Helms-Burton Act*, 90 AM. J. INT'L L. 419 (1996).

<sup>68</sup> Cuban Democracy Act, 22 U.S.C. § 6002.

Cuba should conduct itself similarly to other countries in the region, stating, “The purposes of this Act are . . . to assist the Cuban people in regaining their freedom and prosperity, as well as in joining the community of democratic countries that are flourishing in the Western Hemisphere.”<sup>69</sup> The U.S. sanctions on Cuba, therefore, are intended as an application of economic force that will cause Cuba to align its behaviors with principles such as democracy in manners similar to the behaviors of neighboring countries.

The legal structure governing such sanctions is confused, to the extent that it exists.<sup>70</sup> A substantial amount of law governs the use of physical force to effectuate broad changes,<sup>71</sup> but the same is not true of trade sanctions. As Michael Malloy points out:

The general impermissibility of the use or threat of armed force has to some degree increased the relative importance of economic sanctions, a form of economic warfare. This is not necessarily a fortuitous development. The less obvious costs of economic sanctions, as compared to those of armed force, may encourage a facile resort to economic sanctions that would have been intolerable in the case of armed force.<sup>72</sup>

Developing a means of thinking about the successes, and costs, of these types of sanctions is the purpose of this Article. To do so, closer attention will be paid to the U.S. sanctions on Cuba. The context for those sanctions begins several centuries in the past.

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<sup>69</sup> Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996, 22 U.S.C. § 6022.

<sup>70</sup> Ironically, the indiscriminate infliction of injury on civilians for purposes of eroding their support of an existing regime or to incite those civilians to demand political change falls within many definitions of terrorism, and is soundly rebuked by most international bodies. *See, e.g.*, S.C. Res. 1566, at 2, U.N. Doc. S/RES/1566 (Oct. 8, 2004) (defining and condemning terrorism).

<sup>71</sup> *See* Duncan B. Hollis, *Why States Need an International Law for Information Operations*, 11 LEWIS & CLARK L. REV. 1023, 1033–38 (2007) (describing laws of war); Major Robert A. Ramey, *Armed Conflict on the Final Frontier: The Law of War in Space*, 48 A.F. L. REV. 1, 39 (2000) (describing limits on the use of force against civilians); *see also* Anne-Marie Slaughter & William Burke-White, *An International Constitutional Moment*, 43 HARV. INT’L L.J., 1, 3 (2002) (“All nations around the world agree on some concept of civilian inviolability.”).

<sup>72</sup> Michael P. Malloy, *Où Est Votre Chapeau? Economic Sanctions and Trade Regulation*, 4 CHI. J. INT’L L. 371, 371–72 (2003) (citation omitted).

## 3. CUBA

Humans have occupied the Cuban island for approximately 4,500 years.<sup>73</sup> In around 300 A.D., the Taíno tribe arrived in Cuba, supplanting those tribes that already lived on the island.<sup>74</sup> When Cristóbal Colón arrived from Spain in 1492, the Taíno greeted him to the island, which he subsequently claimed for Spain.<sup>75</sup>

For the next four hundred years Spain administered Cuba as a colony.<sup>76</sup> By 1548, only about five hundred Taíno survived (from a population estimated at around one million when Colón arrived).<sup>77</sup> African slaves arrived in the 1550s, and slavery persisted until 1886.<sup>78</sup> Slavery brought hundreds of thousands of persons to Cuba. By 1846, thirty-six percent of the population was enslaved and freed descendants of slaves constituted another seventeen percent—together more than half of the population of Cuba.<sup>79</sup> Slaves had limited rights, and people of color faced numerous restrictions on personal and commercial activities.<sup>80</sup>

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<sup>73</sup> JOSE M. GUARCH DELMONTE, ENSAYO DE RECONSTRUCCIÓN ETNO-HISTÓRICA DEL TAÍNO DE CUBA 14 (1973).

<sup>74</sup> See FRANCINE JACOBS, THE TAINOS: THE PEOPLE WHO WELCOMED COLUMBUS 18–19 (1992) (describing the genesis of Taino society in Cuba).

<sup>75</sup> Elizabeth de Lima-Dantas, *Historical Setting*, in CUBA, A COUNTRY STUDY 1, 6–7 (James D. Randolph ed., 1987); see also DeAnna Marie Rivera, Note, *Taino Sacred Sites: An International Comparative Analysis for a Domestic Solution*, 20 ARIZ. J. INT'L & COMP. L. 443, 446 (2003) (describing the meeting of Colón and the Taíno).

<sup>76</sup> See RICHARD GOTT, CUBA: A NEW HISTORY (2005); CLIFFORD L. STATEN, THE HISTORY OF CUBA (2003) (discussing the history of Spanish occupation of Cuba).

<sup>77</sup> JACOBS, *supra* note 74, at 58, 91. In the mid-1500s a Taíno chief named Guamá and his wife Habaguanex led a guerrilla war against the Spaniards, but the Spaniards won and essentially annihilated the Taíno peoples.

<sup>78</sup> See Alejandro de la Fuente, *Slave Law and Claims-Making in Cuba: The Tannenbaum Debate Revisited*, 22 LAW & HIST. REV. 339, 353–68 (2004) (discussing the history of slavery in Cuba); see generally LAIRD W. BERGAD, THE COMPARATIVE HISTORIES OF SLAVERY IN BRAZIL, CUBA, AND THE UNITED STATES (2007).

<sup>79</sup> Ada Ferrer, *Cuba, 1898: Rethinking Race, Nation, and Empire*, 73 RADICAL HIST. REV. 22, 23 (1999). More slaves were forced into Cuba than were forced into the entirety of the United States. See Robert J. Cottrol, *The Long Lingered Shadow: Law, Liberalism, and Cultures of Racial Hierarchy and Identity in the Americas*, 76 TUL. L. REV. 11, 26 (2001) (reporting that Cuba absorbed nearly 140% of the number of Africans forced into the United States between 1790 and 1867). See also Jenny S. Martinez, *Antislavery Courts and the Dawn of International Human Rights Law*, 117 YALE L.J. 550, 602–10 (2008) (discussing the slave trade into Cuba).

<sup>80</sup> Ferrer, *supra* note 79, at 23; de la Fuente, *supra* note 78, at 356 (outlining the rights and restrictions of people of color).



Spain perceived Cuba's role within its empire as a producer of tobacco, and later, sugar.<sup>81</sup> Spain jealously guarded this trade, in part through the operation of trading monopolies and in part through severe restriction on the ability of persons in Cuba to trade outside of Cuba. The monopolies operated until the early 1800s, at which time the Creole population<sup>82</sup> was given limited rights to trade, along with limited representation in Spain in accordance with the Spanish Constitution of 1812 (a weak constitution that was later revoked).<sup>83</sup> Even after some loosening of trade restrictions, native-born Cubans generally did not exert substantial political control over the island.

The relationship between Cuba and the United States was somewhat complicated.<sup>84</sup> As other former colonies achieved independence, the United States warned European nations away from interfering, asserting that these new nations fell within the United States' sphere of influence.<sup>85</sup> With specific reference to Cuba, Secretary of State John Quincy Adams wrote that the islands of Cuba and Puerto Rico are "natural appendages to the North American continent; and one of them, Cuba, almost in sight of our shores . . . has become an object of transcendent importance to the

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<sup>81</sup> See de Lima-Dantas, *supra* note 75, at 10 (describing Cuba's economic role in Spain's empire).

<sup>82</sup> "Creole" referred to persons of Spanish ancestry born on the island of Cuba. K. Scott Kohanowski, *Book Annotations*, 32 N.Y.U. J. INT'L L. & POL. 829, 837 (2000).

<sup>83</sup> Christina Burnett points out that the Creole representatives from various colonies were outnumbered by the Peninsulares from Spain and thus could not give full effect to their needs. Christina Duffy Burnett, "They say I am not an American . . .": *The Noncitizen National and the Law of American Empire*, 48 VA. J. INT'L L. 659, 684 (2008).

<sup>84</sup> See William O. Walker III, *Cuba and the Roots of U.S. Foreign Relations*, 20 DIPLOMATIC HIST. 125, 125 (1996) (suggesting that it is impossible to understand the history and development of U.S. foreign policy without studying the United States' relationship with Cuba).

<sup>85</sup> This policy, created largely by Thomas Jefferson, John Quincy Adams, and James Monroe, is known as the Monroe Doctrine. See Michael Wallace Gordon, *Thinking About Cuba: Post-Castro Cuba Began a Decade Ago*, 15 FLA. J. INT'L L. 311, 313 (2003) (discussing the United States' rejection of European influence in the Western hemisphere and its interest in the annexation of Cuba); Jeffrey J. Malanson, *The Congressional Debate over U.S. Participation in the Congress of Panama, 1825-1826: Washington's Farewell Address, Monroe's Doctrine, and the Fundamental Principles of U.S. Foreign Policy*, 30 DIPLOMATIC HIST. 813, 816-17 (2006) (discussing the basic principles of the Monroe Doctrine).

political and commercial interests of our Union. . . . There are laws of political as well as physical gravitation . . . ."<sup>86</sup>

When Mexico and Venezuela moved to support Cuban efforts to achieve independence, however, subsequent Secretary of State Henry Clay quietly let them know that the United States would thwart any effort to pry Cuba free from Spain because of concerns that a slave-free Cuba would affect the institution of slavery in the southern United States.<sup>87</sup>

In 1834 Spain appointed General Miguel Tacón as its Captain-General of Cuba, with dictatorial powers. Tacón's rule marked the beginning of a sixty year period marked by repression, revocation of civil rights, and denial of representation. Nonetheless, during this period Cubans organized themselves, both within Cuba and in exile communities, in struggles for independence. During this period the United States also made several overtures to Spain to purchase the island.

In 1868 Carlos Manuel de Céspedes proclaimed the independence of Cuba in the *Grito de Yara*. War broke out shortly thereafter. De Céspedes and other leaders of the revolution were men of wealth who fought for the rights of hacienda owners, whereas the ranks of their armies were filled with the poor, who fought largely for the end of slavery and a change in the way of life in Cuba. As the historian Philip Foner points out: "Inevitably, a conflict emerged between these two types of objectives."<sup>88</sup> For the next couple of decades independence fighters and the Spanish fought deadly but inconclusive battles. Throughout this period the United States remained neutral.

The end of U.S. neutrality brought an end to hostilities, and to Spanish rule of Cuba. The Spanish-American war, fought on many seas and for many reasons, concluded with a new master for Cuba in the form of the U.S. military or provisional governors. Although the Cuban Liberation Army fought alongside the United States forces in the war against Spain, and although Spain formally ceded

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<sup>86</sup> See Merze Tate, *The Australasian Monroe Doctrine*, 76 POL. SCI. Q. 264, 270 (1961) (citing Letter from John Quincy Adams, Secretary of State to Hugh Nelson, U.S. Minister to Spain, (Apr. 28, 1823), 32 Congress, 1 session, 121, at 6-7).

<sup>87</sup> See GILLIAN GUNN, CUBA IN TRANSITION: OPTIONS FOR U.S. POLICY 4 (1993) (describing the U.S. reaction to Cuba's bid for independence).

<sup>88</sup> PHILIP S. FONER, A HISTORY OF CUBA AND ITS RELATIONS WITH THE UNITED STATES Vol. II 1845-1895, at 189 (1963).

control to the Cuban assembly, the United States governed Cuba for almost a decade.

The end of U.S. rule brought little clarity to the governance of Cuba, nor did it necessarily result in the fruition of the visions of the common people who had fought for independence from Spain. The outgoing American Governor strongly favored election of the first President, who in turn was despised and driven out of office by opposition parties. Cuba experienced a steady turnover of governments over the next fifty years, ending with the seizure of power in 1952 by Fulgencio Batista, who had already served one term as President. "Between 1902 and 1959 Cuba floundered politically, since it had no experience with democracy. . . . [T]he political turmoil was at times severe . . . ." <sup>89</sup>

The United States' relationship with Cuba during this period was not entirely benign. The United States exercised military control over Cuba twice more. Far more insidious was the introduction of organized crime. Criminal organizations from the United States fostered connections with Cuba "beginning with the export of illegal liquor to the United States during prohibition and expanding into prostitution, gambling, and drugs."<sup>90</sup> Batista assiduously cultivated relationships with organized crime from the United States, turning Havana into a "Latin Las Vegas."<sup>91</sup>

Legitimate businesses also invested in Cuba. By the 1950s, the United States accounted for more than half of all Cuban exports and imports, and a majority of foreign investment as well. Nonetheless, although "the Cuban economy experienced tremendous growth during this period . . . the benefits derived from this economic growth were not equally distributed among the island's population, thus creating the perfect arena for the 'Castro Revolution' in 1959."<sup>92</sup> Remarks attributed to President Kennedy summarize the United State's relationship with Cuba:

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<sup>89</sup> Gloria Sandrino-Glasser, *Los Confundidos: De-Conflating Latinos/as' Race and Ethnicity*, 19 CHICANO-LATINO L. REV. 69, 86 (1998).

<sup>90</sup> Joseph C. Sweeney, *Guantanamo and U.S. Law*, 30 FORDHAM INT'L L.J. 673, 688 (2007).

<sup>91</sup> Luz Estella Nagle, *The Challenges of Fighting Global Organized Crime in Latin America*, 26 FORDHAM INT'L L.J. 1649, 1659-60 (2003); see also ETHAN A. NADELMANN, COPS ACROSS BORDERS: THE INTERNATIONALIZATION OF U.S. CRIMINAL LAW ENFORCEMENT 272 (1993) ("In return for cash payments to the Cuban dictator, the American criminals were provided with lucrative casino concessions as well as substantial freedom in the conduct of their other criminal activities.").

<sup>92</sup> Sandrino-Glasser, *supra* note 89, at 86-7.

I believe there is no country in the world, including all of the African regions . . . where economic colonization, humiliation and exploitation were worse than Cuba, in part owing to my country's policies during the Batista regime. . . . I will go even further: to some extent it is as though Batista was the incarnation of a number of sins on the part of the United States.<sup>93</sup>

On January 1, 1959, Cuban revolutionaries lead by Che Guevara and Fidel Castro seized control of Cuba. Over the next three years the Cuban government nationalized most foreign investment, including the hotels, casinos, oil refineries, nickel mines, and sugar processing plants that had been controlled by U.S. entities. In 1960 President Eisenhower imposed the first economic embargo on Cuba, which retaliated by severing ties with the United States.<sup>94</sup> Cuba proclaimed itself communist shortly thereafter and strengthened ties with the Soviet Union.<sup>95</sup>

The period since the revolution has been one of Cuba's most stable in the last century and a half. That stability has not, however, been marked by political openness and democracy. To the contrary, Cuba represses political dissent, severely limits the press, and monitors activities of its citizens.<sup>96</sup>

To summarize the Cuban experience, Cuba's history essentially begins with the Spanish occupation of the island, and most of its history is a history of foreign domination. Cubans have very little experience with democracy, or with economic opportunity.<sup>97</sup>

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<sup>93</sup> MARK FALCOFF, CUBA THE MORNING AFTER: CONFRONTING CASTRO'S LEGACY 8 (2003).

<sup>94</sup> See David Mowry, *Lifting the Embargo Against Cuba Using Vietnam as a Model: A Policy Paper for Modernity*, 25 BROOK. J. INT'L L. 229, 235-36 (1999) (describing the first economic embargo against Cuba).

<sup>95</sup> *Id.* at 236 ("Cuba would have almost surely met with economic and social ruin if the former Soviet Union had not provided billions in annual aid.").

<sup>96</sup> See FREEDOM HOUSE, COUNTRY REPORT: CUBA (2008), <http://www.freedomhouse.org/template.cfm?page=22&year=2008&country=7378> (describing the limits imposed upon Cuban citizens by its government).

<sup>97</sup> See THOMAS D. BOSWELL & JAMES R. CURTIS, THE CUBAN-AMERICAN EXPERIENCE: CULTURE, IMAGES, AND PERSPECTIVES 16 (1984) ("The long period of Spanish domination played a major role in forming Cuban culture. The language, religion, economic institutions, and social structure of Spain were transferred to the island. Spanish law and policy kept the government highly centralized and, along with trade, in the hands of Spaniards. Virtually no industry developed. Sugar and, to a lesser extent, tobacco became the major cash crops. Society was highly stratified, with relatively few rich families and a large mass of poor people,

Cuba's relationship with the United States has not necessarily been beneficial for most Cubans. Cubans today do not always have unfettered access to information from outside Cuba. And Cuba suffers drastic sanctions intended to change the behavior of the Cuban government.<sup>98</sup>

#### 4. UNDERSTANDING CHANGE

The sanctions attempt to effectuate a change in behavior. A great number of schools of social sciences agree that institutions shape behavior.<sup>99</sup> The word "institution" is used to describe a variety of social artifacts;<sup>100</sup> this Article uses the word in the same manner as do institutional economists such as Douglass North,<sup>101</sup> development theorists such as Barbara Thomas-Slayter,<sup>102</sup> or

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many of whom lived as peasants in a predominantly rural environment. In short, it was not a life of equal opportunities for all individuals.").

<sup>98</sup> See JOE R. FEAGIN & CLAIRECE BOOHER FEAGIN, *RACIAL AND ETHNIC RELATIONS* 360 (5th ed. 1996) ("Exaggerated views of the Cuban revolution's threat to U.S. business and political interests, suspicions that Castro was a Communist, and Castro's declarations that he would not tolerate manipulation of Cuba by the U.S. government led to open U.S. hostility toward Cuba, a break in diplomatic relations between the two countries, and a U.S. policy of welcoming refugees from Cuba's 'Communist oppression' to the 'free world.'").

<sup>99</sup> See, e.g., John Groenewegen, Frans Kerstholt & Ad Nagelkerke, *On Integrating New and Old Institutionalism: Douglass North Building Bridges*, 29 J. ECON. ISSUES 467, 467 (1995) ("Definitions of institution refer to a framework of behavior: institutions direct, channel, or guide behavior."); Anne-Marie Slaughter, Andrew S. Tulumello & Stepan Wood, *International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship*, 92 AM. J. INT'L L. 367, 372 (1998) (describing institutionalism in international relations theory).

<sup>100</sup> Joel Trachtman, an institutional economist, understands that use of the term "institution" can encompass formal organizations and rules as well as informal, non-legal organizations. Joel P. Trachtman, *The Theory of the Firm and the Theory of the International Economic Organization: Toward Comparative Institutional Analysis*, 17 NW. J. INT'L L. & BUS. 470, 473 n.18 (1997). In legal scholarship, the word "institution" often refers simply to a large organization. See, e.g., Jacob E. Gersen & Eric A. Posner, *Timing Rules and Legal Institutions*, 121 HARV. L. REV. 543, 588 (2007) (discussing the structuring of political institutions).

<sup>101</sup> See Groenewegen, Kerstholt & Nagelkerke, *supra* note 99, at 471-72 (discussing North and his work).

<sup>102</sup> See Barbara P. Thomas-Slayter, *Structural Change, Power Politics, and Community Organizations in Africa: Challenging the Patterns, Puzzles and Paradoxes*, 22 WORLD DEV. 1479, 1480 (1994) ("Institutions are the core of our social systems, determining how people interact with one another, and constituting the rules by which people conduct their lives.").

sociologists such as Paul DiMaggio.<sup>103</sup> In trying to synthesize the subtleties of the different flavors of these schools of thought, David Dequech states that “one may broadly define *institutions* as socially shared patterns of behavior and/or thought.”<sup>104</sup> These “previously established sets of guidelines within which a given group of people relate to one another . . . form the patterned expectations of behavior for members of that group.”<sup>105</sup> Thus, institutions include both the interoperative platform that makes human interaction possible<sup>106</sup> and “the rules of the games” played upon that platform.<sup>107</sup> Institutions allow people to create and enforce relationships.

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<sup>103</sup> See Klaus Nielsen, *Institutionalist Approaches in the Social Sciences: Typology, Dialogue, and Future Challenges*, 35 J. ECON. ISSUES 505, 507–08 (2001) (discussing DiMaggio’s use of the term “institutionalism”).

<sup>104</sup> David Dequech, *Institutions and Norms in Institutional Economics and Sociology*, 40 J. ECON. ISSUES 473, 473 (2006). Others, not seeking to synthesize schools of thought, agree with this definition. See, e.g., Paul D. Bush, *The Theory of Institutional Change*, in 1 EVOLUTIONARY ECONOMICS: FOUNDATIONS OF INSTITUTIONAL THOUGHT 125, 126 (Marc J. Tool ed., 1988) (“[A]n ‘institution’ may be defined as a set of socially prescribed patterns of correlated behavior.”); Stephen D. Krasner, *Structural Cause and Regime Consequences: Regimes as Intervening Variables*, in INTERNATIONAL REGIMES 1, 1 (Stephen D. Krasner ed., 1983) (“[R]egimes are defined as principles, norms, rules and decision-making procedures around which actor expectations converge in a given area.”).

<sup>105</sup> Thomas-Slayter, *supra* note 102, at 1480.

<sup>106</sup> See Paul DiMaggio, *Culture and Economy*, in THE HANDBOOK OF ECONOMIC SOCIOLOGY 27, 37 (Neil J. Smelser & Richard Swedberg eds., 1994) (defining institutions “as cognitive formations (categories, typifications, scripts) entailing constitutive understandings upon which action is predicated”). As simple examples, social artifacts such as alphabets, language, salutations—all of which exist as shared understandings and expectations—constitute institutions.

<sup>107</sup> See DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE 3–4 (1990) (“Institutions include any form of constraint that human beings devise to shape human interaction. . . . Institutional constraints include both what individuals are prohibited from doing and, sometimes, under what conditions some individuals are permitted to undertake certain activities.”); see also Yngve Ramstad, “Reasonable Value” Versus “Instrumental Value:” *Competing Paradigms in Institutional Economics*, 23 J. ECON. ISSUES 761, 763 (1989) (describing institutions as “the ‘rule structure’ within which individuals must confine their activity subject to sanctions”). Some scholars found tension between the two types of definitions. Pavel Pelikan suggests that “[t]he roots of this difference are in the old conceptual dilemma encountered by several economists who have searched for an operationally clear definition of institutions, which can roughly be stated as follows: should institutions be defined as constraints, comparable to ‘the rules of a game,’ or as routines, meaning ‘specific ways of playing a game?’” Pavel Pelikan, *Bringing Institutions Into Evolutionary Economics: Another View with Links to Changes in Physical and Social Technologies*, 13 J. EVOLUTIONARY ECON. 237, 238 (2003).

Law is an institution. Law inarguably acts as a shared set of expectations that allow persons to form and enforce relationships.<sup>108</sup> Contract law, in particular, enables the creation of predictable and enforceable relationships and establishes rules of the game for a variety of privately created relationships.<sup>109</sup>

Understanding law as an institution has more than a theoretical effect. Ann and Robert Seidman describe a legislative drafting project in the People's Republic of China. The drafters sought to effect real social change through law, and in order to do so they sought a theoretical framework that could guide them in drafting laws.<sup>110</sup> Prevalent theories of law, such as pluralism and public choice theory, offer only descriptions.<sup>111</sup> The Seidmans describe how theory failed the drafters of law:

Substantively, drafters had to devise legislative programs to resolve perceived social problems. To do that without a theory to guide the search for solutions, drafters everywhere too often ran around like rats in a maze, looking for an exit by butting their heads at random spots in the wall. Frequently, almost as if law served as a magic charm, their bills merely defined desired future states of affairs in normative terms, leaving the administrators to figure out how to get there. When the administrators failed, the drafters simply imposed increasingly draconian criminal penalties.<sup>112</sup>

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<sup>108</sup> See Kenneth W. Abbott, *Modern International Relations Theory: A Prospectus for International Lawyers*, 14 YALE J. INT'L L. 335, 339-40 (1989) (emphasizing that law is an institution); Stephen R. Perry, *The Moral Foundations of Tort Law*, 77 IOWA L. REV. 449, 476 (1992) (stating that law is an institution); Thomas-Slayter, *supra* note 102, at 1480 ("Thus, legal codes, land tenure systems, or marital arrangements can all be regarded as institutions.").

<sup>109</sup> See Larry A. DiMatteo, *The History of Natural Law Theory: Transforming Embedded Influences into a Fuller Understanding of Modern Contract Law*, 60 U. PITT. L. REV. 839, 869 (1999) ("[C]ontract law, like other institutions of society, provide[s] an ethical corrective not central to the individualism of liberal political theory. It is through institutions that society ethically orders itself."); Janet T. Landa, *Bounded Rationality of Homo Classificus: The Law and Bioeconomics of Social Norms as Classification*, 80 CHI.-KENT L. REV. 1167, 1174 (2005) ("Contract law is an example of a formal institution . . .").

<sup>110</sup> Ann Seidman & Robert B. Seidman, *Drafting Legislation for Development: Lessons from a Chinese Project*, 44 AM. J. COMP. L. 1, 19 (1996).

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 22.

Recognizing law as an institution and understanding the role that institutions serve in facilitating relationships led to a framework that provided meaningful guidance to these drafters of laws:

That theory rested on an institutionalist hypothesis: Institutions constitute society's building blocks; law constitutes government's chief instrument for creating and changing institutions. The Project's legislative theory therefore had to guide drafters in using law as an instrument for changing the repetitive patterns of social behaviours that comprised existing dysfunctional institutions.<sup>113</sup>

Seidman and Seidman note that understanding the necessity of institutions to facilitate interaction is particularly important when attempting to inform new behaviors in emerging economies.<sup>114</sup>

They also point out that "[n]o market operates in vacuo."<sup>115</sup> Commercial activity consists of relationships, of human interaction.<sup>116</sup> Therefore, "[e]ach [market] operates in the context of myriad institutions—governmental, private and in between. That is to say, knowledge of how those institutions work must lie at the very core of economic analysis and economic and legal policy-making."<sup>117</sup>

#### 4.1. *How Institutions Change*

The United States specifically states as a goal of its sanctions on Cuba a desire to bring Cuba's behavior in line with that of other

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<sup>113</sup> *Id.* Other legal scholars have pointed out the practical applications that accrue from understanding the role of institutions. Roderick Hills, for example, suggests that antidiscrimination laws signal to society which forums are appropriate for resolving "controversies about the propriety of stigma." Roderick M. Hills, Jr., *You Say You Want a Revolution? The Case Against the Transformation of Culture Through Antidiscrimination Laws*, 95 MICH. L. REV. 1588, 1615-16 (1997).

<sup>114</sup> Seidman & Seidman, *supra* note 110, at 33.

<sup>115</sup> *Id.*

<sup>116</sup> See Joseph P. Cannon & William D. Perreault, Jr., *Buyer-Seller Relationships in Business Markets*, 36 J. MARKETING RES. 439, 440-44 (1999) (describing various theories and indicators of relationships in business, including legal bonds such as contracts).

<sup>117</sup> Seidman & Seidman, *supra* note 110, at 33.



democratic nations in the region.<sup>118</sup> In general, these types of trade sanctions seek to align behaviors. Institutional theory suggests that alignment of behavior requires an alignment of institutions. The “success” of these sanctions, therefore, depends largely on the extent to which institutions in the offending country change and function more like those in complying countries. Sociologists describe the process whereby institutions change to resemble one another as a process of isomorphism.<sup>119</sup>

Sociologists discuss three broad categories of factors that bring institutions into alignment with one another: normative isomorphism, mimetic isomorphism, and coercive isomorphism.<sup>120</sup> These processes need not be exclusive, but identifying each contributes to the rigor with which convergence in institutions can be analyzed.

#### 4.1.1. Normative Isomorphism

Normative isomorphism describes the convergence of institutions that occurs under circumstances such as professionalization of a service or practice.<sup>121</sup> Mark Mizruchi and Lisa Fein describe “normative isomorphism as a result of professionalization, involving two processes. First, members of professions receive similar training (such as that received by physicians, attorneys, and university professors), which socializes them into similar worldviews. Second, members of professions interact through professional and trade associations, which further

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<sup>118</sup> See *supra* notes 68–69 and accompanying text (discussing sanctions on Cuba).

<sup>119</sup> See Christopher Marquis, Mary Ann Glynn & Gerald F. Davis, *Community as Isomorphism and Corporate Social Action*, 32 *ACAD. MGMT. REV.* 925, 926 (2007) (describing isomorphism as “the resemblance of a focal corporation’s social practices to those of other corporations within its geographic community”).

<sup>120</sup> See Paul J. DiMaggio & Walter W. Powell, *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields*, 48 *AM. SOC. REV.* 147, 150–53 (1983) (describing engines of isomorphic change); Mark S. Mizruchi & Lisa C. Fein, *The Social Construction of Organizational Knowledge: A Study of the Uses of Coercive, Mimetic, and Normative Isomorphism*, 44 *ADMIN. SCI. Q.* 653, 653 (1999) (acknowledging and applying the DiMaggio & Powell analysis).

<sup>121</sup> See Kenneth A. Bamberger & Deirdre K. Mulligan, *Privacy Decisionmaking in Administrative Agencies*, 75 *U. CHI. L. REV.* 75, 101 n.108 (2008) (“The professionalization of a field often yields what has been termed ‘normative isomorphism,’ the standardizing effect that professional training, education, and networks exert on organizational behavior.”).

diffuses ideas among them.”<sup>122</sup> Professionalization is representative rather than exhaustive of the means by which normative isomorphism may occur. Whenever the people who influence the design and use of institutions learn to think in similar ways and share formational experiences, one can predict some degree of convergence in the structure of institutions.<sup>123</sup>

Although jurisprudential scholars generally use neither the analytics nor the language of sociologists, the process of normative isomorphism probably accounts for a great deal of law. With respect to trade, Robert Hudec describes the importance of the regular “seminars” held between U.S. and British economists and policymakers in laying a foundation for what would later become the international trade regime.<sup>124</sup> Joseph Coppock, who helped to create the international regime, speaks of the collaboration in terms that fit within the process of normative isomorphism:

I might say here that all of us working in this international economic realm had a very clear conception of what we were about. And this derived from our living through the thirties, our study of the experience of the twenties and the thirties, as well as from our professional training. One thing that was embodied in the Lend-Lease Act of March '41, that there not be a big carryover, big holdover of international debts because of the bad experience after World War I, was very important. So the negotiations out of the lend-lease obligations at the end of the war was an aspect of that.<sup>125</sup>

The process described by Coppock has accelerated over time. Through a variety of mechanisms, some of which could be

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<sup>122</sup> Mizruchi & Fein, *supra* note 120, at 657.

<sup>123</sup> See Robert Dingwall & Kerry Kidd, *After the Fall . . . : Capitulating to the Routine in Professional Work*, 108 PENN ST. L. REV. 67, 73 (2003) (“The spread of higher education and credentialing has led to increasing homogeneity among those who form the elite cadres of organizations. These common experiences, together with the networks created by subsequent training, specialty associations, participation in public service bodies, and the like, encourage organizational leaders to think and act in similar ways.”).

<sup>124</sup> See ROBERT E. HUDEC, *THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY* 5-12 (2d ed. 1990) (describing economic cooperation between Great Britain and the United States).

<sup>125</sup> Harry S. Truman Library & Museum, Oral History Interview with Joseph D. Coppock by Richard D. McKinzie, at 49 (1974), available at <http://www.trumanlibrary.org/oralhist/coppockj.htm>.

described as normative, the international commercial regime is undergoing a transformation that could metaphorically be described as professionalization. As Pistor notes, “[t]he vehicle for building the legal architecture for global markets is the harmonization of law around the globe by way of developing legal standards.”<sup>126</sup>

#### 4.1.2. *Mimetic Isomorphism*

Mimetic isomorphism describes a convergence of institutions due to copying or imitation.<sup>127</sup> Entities sometimes turn to imitation during conditions of uncertainty.<sup>128</sup> Because they cannot turn to experiences of their own for direction, they adopt a strategy of mimicking the choices that others have made.<sup>129</sup> Interestingly, actors seem to feel that they can enhance the legitimacy of new institutions by replicating existing institutions.<sup>130</sup>

The sources for mimicry vary.<sup>131</sup> Perceived “success” of extant institutions can lead to imitation.<sup>132</sup> For the purposes of this Article, however, the most interesting factor contributing to imitation is repeated and frequent interaction.<sup>133</sup> Trade sanctions, by their nature, limit interaction.

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<sup>126</sup> Katharina Pistor, *The Standardization of Law and Its Effect on Developing Economies*, 50 AM. J. COMP. L. 97, 97 (2002).

<sup>127</sup> See Elizabeth H. Gorman, *Explaining the Spread of Law Firm In-House Counsel Positions: A Response to Professor Chambliss*, 84 N.C. L. REV. 1577, 1583 (2006) (describing mimetic isomorphism).

<sup>128</sup> See, e.g., Donald C. Langevoort, *Overcoming Resistance to Diversity in the Executive Suite: Grease, Grit, and the Corporate Promotion Tournament*, 61 WASH. & LEE L. REV. 1615, 1641 (2004) (discussing mimetic isomorphism of professional networks responding to ambiguous legal requirements).

<sup>129</sup> Brad Tuttle & Jesse Dillard, *Beyond Competition: Institutional Isomorphism in U.S. Accounting Research*, 21 ACCT. HORIZONS 387, 392–93 (2007).

<sup>130</sup> See Ilídio Barreto & Charles Baden-Fuller, *To Conform or To Perform? Mimetic Behaviour, Legitimacy-Based Groups and Performance Consequences*, 43 J. MGMT. STUD. 1559, 1561 (2006) (describing attempts of organizations to legitimize new institutions through mimetic isomorphism).

<sup>131</sup> See Martin Lodge & Kai Wegrich, *Control Over Government: Institutional Isomorphism and Governance Dynamics in German Public Administration*, 33 POL’Y STUD. J. 213, 217 (2005) (“Mimicry draws on a variety of sources . . .”).

<sup>132</sup> See D. Daniel Sokol, *Order Without (Enforceable) Law: Why Countries Enter Into Non-Enforceable Competition Policy Chapters in Free Trade Agreements*, 83 CHI.-KENT L. REV. 231, 280 (2008) (“Those organizations mimicked are ones viewed as more successful or legitimate.”).

<sup>133</sup> See Pamela R. Haunschild & Anne S. Miner, *Modes of Interorganizational Imitation: The Effects of Outcome Salience and Uncertainty*, 42 ADMIN. SCI. Q. 472, 474–75 (1997) (discussing frequency-based imitation); Sokol, *supra* note 132, at 281

Empirical research indicates that imitation of successful institutions can actually lead to success for the imitator. In a study of business organizations in emerging economies, for example, Lance Eliot Brouthers, Edward O'Donnell and John Hadjimarcou found that firms that had relationships with companies in Europe, Japan and the United States and that imitated strategies of those companies performed better than companies within their countries that did not (or could not) imitate those strategies.<sup>134</sup> In a wider context, mimetic isomorphism observably contributes to the dissemination of best business practices.<sup>135</sup>

Law is replete with incidents of mimetic isomorphism. Kenneth Bamberger and Deirdre Mulligan suggest, for example, that mimetic isomorphism may account for the convergences that they observe in the rules created by corporate privacy officers.<sup>136</sup> Daniel Sokol suggests that competition (antitrust) law has converged globally as nations have imitated competition provisions found in trade agreements with the United States or Europe.<sup>137</sup> Ryan Goodman and Derek Jinks state that laws dealing with issues as varied as the environment, education, and war have converged through the process of imitation.<sup>138</sup> Imitation influences law.

#### 4.1.3. *Coercive Isomorphism*

Coercive isomorphism describes convergence in institutions as a response to incentives.<sup>139</sup> Incentives may be positive (something

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(describing mimetic isomorphism "based on repeat iterations" in the context of antitrust compliance).

<sup>134</sup> Lance Eliot Brouthers, Edward O'Donnell & John Hadjimarcou, *Generic Product Strategies for Emerging Market Exports into Triad Nation Markets: A Mimetic Isomorphism Approach*, 42 J. MGMT. STUD. 225, 241-42 (2005).

<sup>135</sup> See Cristie L. Ford, *New Governance, Compliance, and Principles-Based Securities Regulation*, 45 AM. BUS. L.J. 1, 52 n.164 (2008) (emphasizing the importance of mimetic isomorphism to the dissemination of best business practices).

<sup>136</sup> Bamberger & Mulligan, *supra* note 121, at 102 n.109.

<sup>137</sup> Sokol, *supra* note 132, at 280.

<sup>138</sup> Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621, 648 (2004) ("As many commentators point out, the extent of isomorphism across states is remarkable . . .").

<sup>139</sup> See Mizruchi & Fein, *supra* note 120, at 657 ("Coercive isomorphism is driven by two forces: Pressures from other organizations on which a focal

that the actor would like to acquire)<sup>140</sup> or negative (something that the actor would like to avoid).<sup>141</sup> Entities align their institutions because they are told to do so—by governments, by society, by customers, or by any group on which those entities depend.<sup>142</sup>

The European Union (“EU”) offers a very clear example of the process of coercive isomorphism. Membership in the EU offers substantial benefits to potential members, including free access to a very large market, inclusion in the Common Agricultural Policy, infrastructure assistance, and a unified currency.<sup>143</sup> Membership also confers on countries a measurable degree of prestige and legitimacy: “For many people in these nations, joining the EU was a proud moment, symbolic of their democratic and economic accomplishments and their reentry into the community of their free European siblings.”<sup>144</sup> Acceding to the EU, however, requires an almost complete alignment of existing legal institutions with those of the EU.<sup>145</sup> The laws and regulations of an applicant must

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organization is dependent and an organization’s pressure to conform to the cultural expectations of the larger society.”).

<sup>140</sup> See, e.g., Isin Guler et al., *Global Competition, Institutions, and the Diffusion of Organizational Practices: The International Spread of ISO 9000 Quality Certificates*, 47 ADMIN. SCI. Q. 207, 212 (2002) (“[D]ependent organizations are likely to adopt patterns of behavior sanctioned by the organizations that control critical resources.”).

<sup>141</sup> See, e.g., Tuttle & Dillard, *supra* note 129, at 393 (“If the influencing group has sufficient power, change may be mandated.”).

<sup>142</sup> See James J. Fishman, *Improving Charitable Accountability*, 62 MD. L. REV. 218, 242–55 (2003) (discussing the coercive isomorphism effects resulting from the imposition of social norms on nonprofit fiduciary behavior).

<sup>143</sup> Natalie Shimmel, *Welcome to Europe, But Please Stay Out: Freedom of Movement and the May 2004 Expansion of the European Union*, 24 BERKELEY J. INT’L L. 760, 763 (2006); see also Andrew Moravcsik & Milada Anna Vachudova, *National Interests, State Power, and EU Enlargement* 3 (Ctr. for European Studies, Working Paper No. 97, 2003), available at [http://www.ces.fas.harvard.edu/publications/docs/pdfs/Moravcsik\\_Vachudova.pdf](http://www.ces.fas.harvard.edu/publications/docs/pdfs/Moravcsik_Vachudova.pdf) (“East European states take part in the laborious accession process because EU membership brings tremendous economic and geopolitical benefits—particularly as compared to the uncertain and potentially catastrophic costs of being left behind as others move forward.”).

<sup>144</sup> Shimmel, *supra* note 143, at 763.

<sup>145</sup> See John P. Flaherty & Maureen E. Lally-Green, *The European Union: Where Is It Now?*, 34 DUQ. L. REV. 923, 951–52 (1996) (noting that acceding members may not “question or substantially modify the institutional structure, scope, policies or rules of . . . the Union”); Richard H. Steinberg, *Who Is Sovereign?*, 40 STAN. J. INT’L L. 329, 332 (2004) (“[C]ountries acceding to the European Union must embrace the *acquis communautaire*: To acquire the benefits of membership and avoid the costs of exclusion, they must make the domestic policy and institutional changes

comply in their entirety to the *acquis communautaire* of the EU—the corpus of directives, rules, regulations, and interpretations created by the EU over its lifetime.<sup>146</sup>

The possibility of acceding to the EU has transformed the former Soviet countries of Central and Eastern Europe; those seeking to join the EU have “recreate[d] themselves in the EU’s image.”<sup>147</sup> Indeed, “the outcome of research conducted so far on the deployment and effectiveness of EU conditionality in the pre-accession process strongly indicates that a credible membership perspective has been a *necessary* condition for effective impact on domestic change.”<sup>148</sup> The former Soviet countries are not the only nations that have substantially realigned institutions. Prior to accession to the EU, military dictatorships ruled Greece, Portugal, and Spain; “they were strongly encouraged to become democracies by the enticement of EU membership.”<sup>149</sup> Even strongly democratic countries, such as Ireland, substantially changed laws so as to align them with the EU’s requirements.<sup>150</sup> Even countries with accession hopes as controversial as Russia’s and Turkey’s

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demanding by Brussels.”); see also Roger J. Goebel, *Joining the European Union: The Accession Procedure for the Central European and Mediterranean States*, 1 LOY. INT’L L. REV. 15, 21–53 (2003) (describing and explaining in detail each step of the accession process).

<sup>146</sup> Shimmel, *supra* note 143, at 774; see generally Antje Wiener, *The Embedded Acquis Communautaire: Transmission Belt and Prism of New Governance*, 4 EUR. L.J. 294 (1998) (describing *acquis communautaire*).

<sup>147</sup> Helen E. Hartnell, *Subregional Coalescence in European Regional Integration*, 16 WIS. INT’L L.J. 115, 127 (1997).

<sup>148</sup> Amichai Magen, *The Shadow of Enlargement: Can the European Neighbourhood Policy Achieve Compliance?*, 12 COLUM. J. EUR. L. 383, 411 (2006) (emphasis added). Magen emphasizes that research indicates that “a credible prospect of EU accession coupled with low domestic costs of adaptation have both been necessary as well as sufficient conditions for compliance.” *Id.* at 411–12.

<sup>149</sup> Stuart E. Eizenstat, *U.S. Relations with the European Union and the Changing Europe*, 9 EMORY INT’L L. REV. 1, 12 (1995); see Desmond Dinan, *Fifty Years of European Integration: A Remarkable Achievement*, 31 FORDHAM INT’L L.J. 1118, 1139 (2008) (“The impossibility of enjoying the economic benefits of EU membership without being democratic and respecting fundamental rights strengthened progressive forces in Greece, Portugal, and Spain, as those countries emerged from dictatorial rule in the mid-1970s, and subsequently in Eastern Europe following the end of the Cold War and the collapse of the Soviet Union.”).

<sup>150</sup> See Bryan Mercurio, *Abortion in Ireland: An Analysis of the Legal Transformation Resulting from Membership in the European Union*, 11 TUL. J. INT’L & COMP. L. 141, 179 (2003) (“Ireland operated under the misguided theory that it could separate the economic benefits of EU membership from its social and moral policies. It soon realized, however, that the EU brings an inseparable collection of economic, social, and political values and benefits.”).

have changed institutions so that those institutions align more closely with those of the EU.<sup>151</sup>

#### 5. ISOMORPHISM AND TRADE SANCTIONS INTENDED TO CHANGE BEHAVIOR

The language and analytics of sociology provide legal scholars with new tools to explain and predict changes that can be effectuated through the use of sanctions. Trade sanctions could have an effect on each of the three processes of institutional alignment described in the preceding Section.

##### 5.1. Normative Isomorphism

Normative isomorphism occurs when actors learn together, develop standards together, or join in existing standards.<sup>152</sup> Comprehensive trade sanctions or embargos obviously obviate the possibility for the targeted nation to participate in these processes. Indeed, excluding the targeted nation and its citizens from participation in “desirable”<sup>153</sup> organizations could force them to participate in organizations that hold values contrary to those of the country imposing sanctions. This, in turn, could cause the targeted country to align its institutions with those of the less desirable organization.

It is possible that normative isomorphism has occurred in Cuba. Cuba has been excluded from participation in the Organization of American States (“OAS”) since 1962 and is the only nation in the Western Hemisphere that is not an active member.<sup>154</sup> On the other hand, Cuba did join the Soviet Union’s

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<sup>151</sup> See Laurence E. Rothenberg, *International Law, U.S. Sovereignty, and the Death Penalty*, 35 GEO. J. INT’L L. 547, 556 (2004) (“[M]oves toward eliminating the death penalty in Turkey and Russia are most likely motivated not out of *opinio juris* but rather in exchange for the benefits of membership in the economically and politically advantageous clubs of the European Union and the Council of Europe.”).

<sup>152</sup> See *supra* Section 4.1.1.

<sup>153</sup> In this case, “desirable” means desirable from the perspective of the sanctioning country.

<sup>154</sup> Enrique Lagos & Timothy D. Rudy, *The Third Summit of the Americas and the Thirty-First Session of the OAS General Assembly*, 96 AM. J. INT’L L. 173, 176 n.16 (2002); see Sarah H. Cleveland, *Norm Internalization and U.S. Economic Sanctions*, 26 YALE J. INT’L L. 1, 58 (2001) (stating that the sanctions law “obligates the United States to oppose Cuban participation in the OAS and in international financial institutions”).

Council of Mutual Economic Assistance.<sup>155</sup> Following admission to that Council, Cuba experienced a dramatic increase in the number of Soviet and Eastern European technical advisors and economic planners, thus increasing the likelihood of convergence in the nature of Soviet and Cuban institutions.<sup>156</sup> The collapse of the Soviet Union did not deprive Cuba of nations with which it could associate; Cuba has formed close relationships with Venezuela and other nations whose norms probably do not represent those that the United States would like Cuba to learn.<sup>157</sup> Just as Cuba once exchanged technical advisors with the Soviet bloc countries, it now exchanges advisors with Chavez's Venezuela.<sup>158</sup>

It is difficult to estimate the degree to which this level of socialization caused Cuban institutions to move toward those of the Communist bloc.<sup>159</sup> One thing can be guessed with far more certainty: the infusion of Soviet technical advisors did nothing to align Cuban institutions with those considered desirable by the United States.

### 5.2. *Mimetic Isomorphism*

Mimetic isomorphism occurs when entities mimic the institutions of others.<sup>160</sup> Entities tend to turn to mimicry during

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<sup>155</sup> Richard Szawlowski, Book Review, 77 AM. J. INT'L L. 711, 711 (reviewing reference book MEZHDUNARODNYE EKONOMICHESKIE I NAUCHNO-TEKHNICHESKIE ORGANIZATSII STRAN-CHLENOV SEV. SPRAVOCHNIK [THE INTERNATIONAL ECONOMIC AND SCIENTIFIC-TECHNICAL ORGANIZATIONS OF THE MEMBER COUNTRIES OF COMECON] (V. V. Vorontnikov & D. A. Lebin eds., 1980)) (discussing the Council for Mutual Economic Assistance ("COMECON") and Cuba's membership).

<sup>156</sup> See Lawrence H. Theriot & JeNelle Matheson, *Soviet Economic Relations with the Non-European CMEA: Cuba, Vietnam, and Mongolia*, in A COMPENDIUM OF PAPERS SUBMITTED TO THE JOINT ECONOMIC COMMITTEE, 96TH CONG., 551, 555 (1979) (describing the increase in technical and economic advisors).

<sup>157</sup> See Larry Catá Backer, *Odious Debt Wears Two Faces: Systemic Illegitimacy, Problems, and Opportunities in Traditional Odious Debt Conceptions in Globalized Economic Regimes*, 70 LAW & CONTEMP. PROB. 1, 43 & n.184 (2007) (describing the relationship between Cuba, Venezuela, and Bolivia in the Bolivarian Alternative for Latin America).

<sup>158</sup> See Luz Estella Nagle, *Global Terrorism in Our Own Backyard: Colombia's Legal War Against Illegal Armed Groups*, 15 TRANSNAT'L L. & CONTEMP. PROBS. 5, 55 (2005) (describing the extent of the exchange between Venezuela and Cuba).

<sup>159</sup> See Edward Yates, *Central Planning Meets the Neighborhood: Land Use Law and Environmental Impact Assessment in Cuba*, 16 TUL. ENVTL. L.J. 653, 653-54 (2003) (describing Cuba's choice to align itself with the Soviet Union).

<sup>160</sup> See *supra* Section 4.1.2.



conditions of uncertainty, and tend to copy the institutions of those with whom they have had repeated interaction.

One effect of a comprehensive trade sanction or embargo is that it precludes the repeated interaction that may lead to mimicry. Cuba, cut off from interaction with democratic nations, could not easily copy those democratic nations' institutions. On the other hand, Cuba could easily copy the institutions of those nations who did not comply with the United State's sanctions, and in particular with the Soviet countries. One vivid example of this is the Cuban legal system, which President Fidel Castro ordered completely rewritten.<sup>161</sup> The development of a legal system almost always requires mimicry—the development of a completely novel legal system is a staggering undertaking.<sup>162</sup> The Cuban legal system, unsurprisingly, is a socialist legal system.<sup>163</sup> Far from forcing Cuba to imitate the legal systems of democratic countries, the trade sanctions imposed by the United States virtually guaranteed that Cuba would mimic those of the countries engaged in a cold war with the United States.

### 5.3. Coercive Isomorphism

Coercive isomorphism describes the convergence of institutions in response to incentives; these incentives can be either negative or positive.<sup>164</sup> Trade sanctions constitute a negative incentive.

This Article does not purport to review the mass of economic indicator-based literature evaluating the effectiveness of the United States' sanctions on Cuba. The mass of evidence, however, suggests that punishment has not caused Cuba to change and in fact has given Cuba's regime a plausible excuse for further

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<sup>161</sup> It was unlikely that the existing Cuban legal system, developed during periods of foreign domination or political turmoil, would have survived scrutiny by the Cuban people.

<sup>162</sup> See Otto Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 MOD. L. REV. 1, 27 (1974) (discussing the reception of law); Alan Watson, *Legal Transplants and Law Reform*, 92 LAW Q. REV. 79, 80 (1976) (same). Watson points to the wholesale reception of Roman law throughout Europe as an example of this widespread process. ALAN WATSON, *THE EVOLUTION OF LAW* 66–97 (1985).

<sup>163</sup> See Jessica Garcia, *Made In America: Latin American Consumers Meet Their Maker*, 4 ILSA J. INT'L & COMP. L. 759, 761 (1998) (describing the infiltration of Castro's Socialist regime into the Cuban legal system).

<sup>164</sup> See *supra* Section 4.1.1.

repressing the liberties of individual Cubans.<sup>165</sup> It is important to understand the context in which these negative incentives are imposed: Cubans do not have a democratic tradition to which they long to return, most Cubans traditionally did not have access to economic opportunity or to the markets, and Cubans who are old enough to recall the pre-revolution relationship with the United States are likely to remember organized crime and exploitation.<sup>166</sup> The “punishment” of not interacting with the United States may not seem overwhelmingly burdensome to many Cubans.<sup>167</sup>

On the other hand, lack of interaction with sanctioning nations may actually enhance the perceived benefit of interaction with non-sanctioning nations, or even lead to dependency on those nations.<sup>168</sup> Such was the case with Cuba. Cuba became a client state of the Soviet Union,<sup>169</sup> and on occasion acted in accordance with the Soviet Union’s wishes rather than its own.<sup>170</sup> Using the language of sociologists, exclusion from association with sanctioning states makes the positive incentives offered by non-sanctioning states more attractive and thus perversely increases the likelihood of coercive isomorphism with the institutions of those nations.

The corollary of this observation is that trade sanctions do not offer, indeed they preclude, positive incentives for regime change. Most examples of coercive isomorphism, however, are the result of positive incentives. The EU’s significant effect on the institutions of potential members, for example, is not the result of threats made

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<sup>165</sup> See James M. Cooper, *Creative Problem Solving and the Castro Conundrum*, 28 CAL. W. INT’L L.J. 391, 421 (1998) (quoting former Canadian Prime Minister Jean Chretien: “They’re just making it possible for Castro to stay in power, because he has an excuse, he can blame the Americans.”).

<sup>166</sup> See *supra* notes 90–93 and accompanying text.

<sup>167</sup> See Cooper, *supra* note 165, at 421–22 (explaining that the U.S. embargo against Cuba does not put the Castro regime in jeopardy).

<sup>168</sup> Theriot & Matheson, *supra* note 156, at 552 (“[E]xtensively isolated from the non-Communist trading community, a small nation’s dependence on a major power like the USSR inevitably grows; its autonomy in foreign policy is reduced, and some degree of subservience to Soviet global interests becomes unavoidable.”).

<sup>169</sup> See Colin Crawford, *Environmental Justice in Cuba: Capital Needs, Developing a Tourist Infrastructure, and Liberty of Access to National Resources*, 14 TRANSNAT’L L. & CONTEMP. PROBS. 55, 55–56 (2004) (identifying Cuba as a former client state of the Soviet Union and identifying some of the problems that accompanied that status).

<sup>170</sup> See Theriot & Matheson, *supra* note 156, at 552–53 (noting that Cuba only reluctantly supported the Soviet invasion of Czechoslovakia).

against those countries but instead is the result of substantial incentives offered.<sup>171</sup>

#### 5.4. *A Lesson from Sociology*

Sociological theory regarding changes toward convergence in institutions offers a rigorous means of analyzing the probable effects of trade sanctions. The preceding discussion also suggests a potentially fatal weakness of unilateral sanctions. To the extent that sanctions are not coordinated among every country in the world, there will remain potential partners with whom the target country may associate and on whom the target country may come to depend. This will only enhance the probability of normative, mimetic and even normative isomorphism. The convergence in institutions, however, will not be with the institutions of the sanctioning country. Instead, the convergence will be with the institutions of countries that do not cooperate with the sanctioning country, countries whose institutions are more likely to be antithetical to those of the sanctioning country. Institutions shape behavior. Thus, an imperfectly coordinated sanction may actually be more likely to engender undesired behavior than it is to engender the desired behavior.

### 6. CONCLUSION

Trade sanctions have become a tool of choice in the last fifteen years.<sup>172</sup> The important interface between trade sanctions and the international trade regime demands that legal scholars analyze trade sanctions with every tool at their disposal. Positive legal theory, economic theory, and political sciences including international relations theory each provide useful perspectives. The valuable contributions from sociology, however, are often overlooked.

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<sup>171</sup> See *supra* notes 143–46 and accompanying text.

<sup>172</sup> See Sarah H. Cleveland, *Norm Internalization and U.S. Economic Sanctions*, 26 *YALE J. INT'L L.* 1, 53 (2001) (noting the increasing frequency of threats of unilateral sanctions given the prohibition of forcible interference in state affairs under customary international law); Paul C. Szasz, *The Security Council Starts Legislating*, 96 *AM. J. INT'L L.* 901, 901 (2002) (noting the increasing frequency of trade sanctions directed by the United Nations Security Council and requiring compliance by all states); see also Shauna C. Bryce, *Life Plus Seventy: The Extension of Copyright Terms in the European Union and Proposed Legislation in the United States*, 37 *HARV. INT'L L.J.* 525, 543 (1996) (noting in general that “[t]hreats of trade sanctions, for example, are frequently used”).

Some types of trade sanctions seek to change the behavior of targeted nations, and in particular seek to align the behavior of targeted nations with the “acceptable” behavior of the sanctioning nation and its peers. Behavior is dependent on underlying institutions, such as law. Institutional sociology offers theoretical explanations as to why entities’ institutions will converge. As can be demonstrated with the United States’ embargo of the Republic of Cuba, theories of isomorphism can in fact explain the outcome of these types of trade sanctions.

Theories of isomorphism can also predict the outcome of trade sanctions. Theories of isomorphism offer a caution with respect to unilateral trade sanctions. Unless those sanctions are carefully coordinated with other international actors, each of the theories of normative, mimetic, and even coercive isomorphism suggest that trade sanctions may actually produce the opposite of the desired outcome.