

ARTICLES

NAFTA and Human Rights: A Necessary Linkage

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INTRODUCTION

On January 1, 1994, the North American Free Trade Agreement (NAFTA) took effect, ushering in a new era of regional economic cooperation among the United States, Mexico and Canada. Although the scope of NAFTA is indeed far reaching, the agreement says nothing about human rights issues. This Article examines why the United States was unwilling or unable to make commitments on human rights issues in NAFTA.¹

At first glance, one might think that a trade agreement such as NAFTA is not the appropriate forum to address human rights issues. The European Union's experience, however, suggests that human rights and trade are inextricably linked and that they should be addressed together.² History reveals that the United

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¹ This article contends that the dynamics of the relationship between the United States and the rest of the American continent are such that the U.S. failure to commit to multilateral human rights obligations virtually guarantees a similar response from Mexico and Canada.

² The NAFTA countries integrated for different reasons than did the members of the Economic Union (EU), formerly the European Community (EC). As such, the character of the two integrations is distinct. NAFTA may be seen as an effort by smaller economies —Canada and Mexico—to limit

States understands this reality and, thus, has often linked its trade policy with concerns over human rights abuses in other countries. History also reveals, however, the U.S. steadfast refusal to assure this linkage when doing so would require the United States to commit itself to binding multilateral human rights obligations.

This Article contends that it is this resistance by the United States to make international human rights commitments that most fundamentally explains the omission of human rights issues in the NAFTA process. This Article further contends that until the United States accepts its obligations as a world leader by multilaterally engaging on human rights issues, prospects for regional cooperation in this area are limited.

Part I of this Article briefly surveys the development of the U.S. policy linking trade policy with human rights concerns. This Part also examines economic action that the United States has taken to support this linkage. Part II discusses the U.S. resistance to making multilateral human rights commitments and the consequences of this resistance. Part III explores the European Union's integration of trade policy with a multilateral human rights regime. Part IV examines whether recent developments suggest that the United States is moving toward international human rights obligations. Part V discusses the prospects for a human rights regime among the United States, Mexico, and Canada in light of NAFTA's passage.

I. UNITED STATES TRADE POLICY AND HUMAN RIGHTS: THE EVOLUTION OF AN IDEOLOGICAL LINK

A. *The Historical Origins of the Linkage Between United States Trade Policy and Human Rights*

The idea of linking human rights and international trade is not new. It is a product of the new world trading order that emerged after the Second World War. After World War I, economic nationalism and protectionism dominated. Central economic planning

U.S. protectionism in certain industries in exchange for the U.S. effort to protect its exports in the increasingly important intellectual property and service sectors. In contrast, the Europeans integrated to avoid another war in their region. The Europeans thus sought political integration from the beginning. Frederick M. Abbott, *Integration Without Institutions: The NAFTA Mutation of the EC Model and the Future of the GATT Regime*, 40 AM. J. COMP. L. 917, 917-918 (1992). Nonetheless, Europe's human rights regime provides an important framework for the NAFTA region, because the European regime is the most advanced in the world.

triumphed in Germany and Japan. The United States became more protectionist in this era by passing the Smoot-Hawley Tariff Act,³ which increased U.S. tariffs to the highest levels in history. The U.S. trading partners responded by enacting similar legislation. This protectionism spawned a worldwide trade war and led to a global economic decline. One commentator vividly describes this era:

All of the weapons of commercial warfare were brought into play: currencies were depreciated, exports subsidized, tariffs raised, exchanges controlled, quotas imposed, and discrimination practiced through preferential systems and barter deals.⁴

This weakening of the world's major economies provided the impetus for the rise of the Nazis in Germany and the hardliners in Japan. Close on the heels of this worldwide trade war, aggressive militarism triumphed. Japan invaded China, and Germany began to occupy Europe, setting the stage for World War II.⁵

After seeing the destruction caused by World War II, the Allied leaders committed themselves to forming an international order where dictatorships, such as Hitler's in Germany, would never again rise. Those who formed this new international order were visionaries. They were committed to creating liberal trading regimes, not only to avoid wars, but also to promote democratic values. The U.S. Secretary of State, George C. Marshall, set forth the "Marshall Plan." This plan provided aid to European countries for the express purpose of encouraging "the emergence of political and social conditions in which free institutions [could] exist."⁶ These visionaries saw the establishment of market economies and democratic institutions in the defeated Axis powers as the best way of

³ Tariff Act of 1930, 46 Stat. 590 (current version at 19 U.S.C. §§ 1202-1677k (1988)).

⁴ ROBERT E. HUDEC, *THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY* 6 (1990) (quoting CLAIR WILCOX, *A CHARTER FOR WORLD TRADE* 5-9 (1949)).

⁵ Richard N. Cooper, *Trade Policy as Foreign Policy*, in *U.S. TRADE POLICIES IN A CHANGING WORLD ECONOMY* 291, 292 (Robert M. Stern ed. 1987). Secretary of State Sumner Welles likewise judged restrictionist trade measures as one of the "contributing causes" that "paved the way for the rise of those very dictatorships which have plunged almost the entire world into war." JOHN H. JACKSON, *WORLD TRADE AND THE LAW OF GATT* 38 (1969).

⁶ George Marshall first announced the Marshall Plan at the Harvard University Commencement on June 5, 1947. RICHARD B. MORRIS, *ENCYCLOPEDIA OF AMERICAN HISTORY* 390 (1961).

ensuring a peaceful world order.⁷ Economist Lester Thurow describes this post-war ideological consensus:

But in the end what many at the time viewed as an extremely naive American approach prevailed. If countries could be made rich, they would be democratic. If their richness depended upon selling in the American market, they would be forced to be allies of the United States.⁸

The ideological linkage of market economies with democratic institutions was based on the fundamental belief that individual economic actors—not government bureaucrats—should decide what goods to produce, consume, export, and import. Individual autonomy was basic to the concept of a liberal international trading order.⁹ Authoritarian regimes precluded this civic and economic autonomy. Just as market economies depended on democratic values, democracy could only flourish where human rights were protected. George C. Marshall explained the nexus between democracy and human rights:

I realize that the word “democracy” is given many interpretations. To the American Government and citizens it has a basic meaning. We believe that human beings have certain inalienable rights—that is, rights which may not be given or taken away. . . . [These inalienable rights] include the right of every individual to develop his mind and his soul in the ways of his own choice, free of fear and coercion [Thus,] a society is not democratic if men who respect the rights of their fellow men are not free to express their own beliefs and convictions without fear that they may be snatched away from their home or family. [A] society is not free if law-abid-

⁷ Frederick M. Abbott, *Trade and Democratic Values*, 1 MINN. J. OF GLOBAL TRADE 9, 13 (1992).

⁸ LESTER C. THUROW, HEAD TO HEAD 22 (1992).

⁹ The liberal trading system derived from the economic theories of “comparative advantage” elaborated by David Ricardo and Adam Smith. See DAVID RICARDO, ON THE PRINCIPLES OF POLITICAL ECONOMY AND TAXATION 77-93 (1963); ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 39 (1776). As Frederick Abbott concluded in his excellent article *Trade and Democratic Values*:

There was thus a line from Adam Smith to David Ricardo to . . . the American architects of the post-war trading system which held that liberal economic policy provided for the maximum global output of goods and services, and served to limit government restriction of individual freedom.

Frederick M. Abbott, *supra* note 7, at 17.

ing citizens live in fear of being denied the right to work or deprived of life, liberty and the pursuit of happiness.¹⁰

U.S. representatives have continued to articulate the ideological link between the development of market economies and respect for democratic values and human rights.¹¹ While this link is fundamentally an ideological one, it has often been implemented by economic and trade policies.

B. United States Enforcement of the Linkage Between Trade Policy and Human Rights Through Economic Action

1. The Bretton Woods Conference

Together with the "containment"¹² policies of the Cold War era, the ideological commitment to link trade policy with human rights has dominated U.S. foreign policy in the modern era. The United States played a major role in developing international economic institutions to usher in a new world trade order. At the Bretton Woods Conference of 1944, the United States and other world leaders established the International Monetary Fund and the International Bank for Reconstruction and Development (World Bank) to develop financial policies. They also established the General Agreement on Tariffs and Trade to develop trade policy.¹³ These international institutions would provide financing for economic development. They would also host multilateral negotiations to

¹⁰ George Marshall, Statement to the Moscow Conference of the Council of Foreign Ministers (Mar. 15, 1947), in *N.Y. TIMES*, Mar. 15, 1947, at 2. George C. Marshall was United States Army Chief of Staff, General of the Army, United States Ambassador to China, and United States Secretary of State.

¹¹ On December 10, 1992, Undersecretary of State for Political Affairs Arnold Kanter, addressing a State Department Conference celebrating Human Rights Day, noted: "[F]rom the Marshall Plan after World War II to the Freedom Support Act of 1992, the United States has helped to build stable, market-based economies that provide the basis for nurturing democratic values and human dignity." *America's Commitment to Human Rights*, U.S. DEPT. OF STATE BULLETIN, Dec. 21, 1992, at 1. The Freedom Support Act of 1992 provides an extensive program of support for Russia, Ukraine, and the other newly independent nations of the former Soviet Union. 22 U.S.C. § 5852 (1993).

¹² President Truman first announced the "Truman Doctrine" of containment of Soviet expansion on March 12, 1947, shortly before the formal commencement of the Marshall Plan. See *MORRIS*, *supra* note 6, at 396.

¹³ General Agreement on Tariffs & Trade [hereafter GATT], Oct. 30, 1947, 61 Stat. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 187. The International Trade Organization Charter failed to win Congressional support. The GATT was intended as an interim measure. See *HUDEC*, *supra* note 4, at 59-61.

regulate trade restrictions and distortions in exchange rates. During the same period, the UN Charter proclaimed that the United Nations was to encourage "respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion."¹⁴

2. Economic Sanctions

The United States also has taken unilateral action — in the form of economic sanctions — to underscore its desire to link its liberal trade policy with human rights.¹⁵ The United States has used economic sanctions¹⁶ over eighty times since World War II, far more

¹⁴ Article 1(3) of the Charter of the United Nations, *reprinted in* FRANK NEWMAN AND DAVID WEISSBRODT, *SELECTED INTERNATIONAL HUMAN RIGHTS INSTRUMENTS* 2 (1990). In his closing speech to the San Francisco United Nations conference, President Truman emphasized that:

The Charter is dedicated to the achievement and observance of fundamental freedoms. Unless we can attain those objectives for all men and women everywhere—without regard to race, language or religion—we cannot have permanent peace and security in the world.

ARTHUR H. ROBERTSON, *HUMAN RIGHTS IN EUROPE* 22 n.22 (1985) (quoting President Truman).

¹⁵ See generally Kenneth W. Abbott, *Linking Trade to Political Goals: Foreign Policy Export Controls in the 1970s and 1980s*, 65 *MINN. L. REV.* 739, 772-77 (1981). Kenneth Abbott writes: "Intense American involvement with international human rights can be said to date from 1973, when a House subcommittee chaired by Representative Donald Fraser of Minnesota initiated hearings that produced extensive testimony of torture and other 'rampant violations of human rights' around the world." *Id.* at 772. Kenneth Abbott acknowledges that the United States "had a history of involvement in issues that would now be considered part of a 'human rights' policy." *Id.* at 772 n.172 (citing David Weissbrodt, *Human Rights Legislation and U.S. Foreign Policy*, 7 *GA. J. INT'L & COMP. L.* 231, 232-34 (1977)).

¹⁶ In his exhaustive study, Michael P. Malloy writes that "economic sanctions" is a term of art that has been defined as the "deliberate government-inspired withdrawal, or threat of withdrawal, of 'customary' trade or financial relations." MICHAEL P. MALLOY, *ECONOMIC SANCTIONS AND UNITED STATES TRADE* 12 (1990) (quoting GARY C. HUFBAUER & JEFFREY J. SCHOTT, *ECONOMIC SANCTIONS RECONSIDERED* 2 (1985)). Malloy also defines economic sanctions as "coercive economic measures taken against one or more countries to force a change in policies or at least to demonstrate a country's opinion about the other's policies." *Id.* (quoting B.E. CARTER, *INTERNATIONAL ECONOMIC SANCTIONS* 4 (1988)). Professor Malloy uses the term "to refer to any country-specific economic or financial prohibition imposed upon a target country or its nationals with the intended effort of creating dysfunction in

than any other country.¹⁷ These measures have included export and import restrictions, withdrawal or reduction of military or economic aid,¹⁸ and negative votes in international financial institutions respecting loans.¹⁹ While the United States usually has used sanctions to further its security interests, it also has used them to express its moral displeasure with a country's human rights record.²⁰ On this basis, the United States has withdrawn or reduced

commercial and economic transactions with respect to the specified target, in the service of specified foreign policy purposes." *Id.* at 13.

¹⁷ See Mark Sommer, *Smarter than Bombs: How to Fortify the Still-Spotty Effectiveness of Sanctions*, SAN DIEGO UNION-TRIB., Aug. 4, 1993, at B-5 (discussing weaknesses in U.S. attempts to impose economic sanctions). The United Nations is also becoming much more active in directing multinational action to sanction human rights violations and military aggression. During its first forty years of existence, the United Nations applied sanctions only twice—in Southern Rhodesia, now Zimbabwe, and South Africa. In the 1990s, however, the United Nations has imposed sanctions against four nations—Iraq (invasion of Kuwait), Libya (international terrorism), the former Yugoslavia (seizure of Bosnia-Herzegovina territory) and Haiti (coup of democratically elected President). The UN has also imposed arms embargoes against three countries: Liberia, Somalia, and Cambodia. Further, the UN Security Council has approved "peacekeeping" missions in Cambodia, Somalia, and the former Yugoslavia (Serbia-Montenegro).

¹⁸ Malloy argues that the term "economic sanctions" does not include the withdrawal of trade preferences, such as the granting of most-favored-nation (MFN) status, because such discretionary preferences may not reflect foreign policy objectives. MALLOY, *supra* note 16, at 18-19. However, such trade preference status has frequently been conditioned on overriding foreign policy objectives. See CARTER, *supra* note 16, at 116-22 (discussing denial of MFN status).

¹⁹ See generally CARTER, *supra* note 16, at 2-4, 32-37, 158-73, 216, 236-37 (discussing background and issues related to international financial institutions).

²⁰ Such actions have usually been in furtherance of cold war strategies or other national security concerns including non-proliferation of nuclear weapons, international terrorism, destabilizing governments, and countering military aggression. Professor Malloy describes U.S. "economic sanctions" against Afghanistan, Cambodia, China, Cuba, Nicaragua, North Korea, and North and South Vietnam as based on overriding cold war objectives. See MALLOY, *supra* note 16, at 194-99, 212-15 (discussing history of U.S. economic sanctions). Cambodia and North and South Vietnam have been subject to the full trade and financial embargo of the Foreign Assets Control Regulations [FARCs]. See *id.* at 199-200. Hufbauer and Schott also cite the use of economic sanctions against Surinam to "diminish Cuban and Soviet influence." HUFBAUER & SCHOTT, *supra* note 16, at 726. The United States has also taken economic action against Haiti, Iran, Iraq, Libya, Panama, and Yugoslavia to further its foreign policy objectives. The legislative authority for such

military or economic aid to Argentina, Bolivia, Brazil, Chile, El Salvador, Ethiopia, Guatemala, Haiti, Nicaragua, Paraguay, the Philippines, South Korea, Uruguay, and Zaire.²¹

3. Trade Preferences

The United States also has withdrawn trade preferences from countries with non-market economies based on their human rights records.²² The withdrawal of a trade preference is a powerful eco-

sanctions includes the Export Administration Act, Trading with the Enemy Act, International Emergency Economic Powers Act, and the International Security and Development Cooperation Act of 1985. *See generally* MALLOY, *supra* note 16, at 33-182 (discussing statutory authority for U.S. economic sanctions). Syria and Iran were targeted after being designated as supporting terrorism. *See* HUFBAUER & SCHOTT, *supra* note 16, at 453-54, 620-25, 666-70. The United States has used sanctions against South Korea, Taiwan, South Africa, India, Argentina, Brazil, and Pakistan to limit nuclear proliferation. The United States employed sanctions against Chile, Cuba, Ethiopia, and Iran to resolve expropriation claims. Sanctions were used to disrupt military aggression in the following cases: against Egypt in Yemen and the Congo; against England and France in Egypt; against Turkey in Cyprus; against the Soviet Union in Afghanistan; against Iraq in Kuwait; and in retaliation of the Arab League's anti-Israel boycott. Economic sanctions have been part of the arsenal to destabilize Haiti, Chile, Uganda, the Dominican Republic, Panama, and Nicaragua. *See* CARTER, *supra* note 16, at 18-19; HUFBAUER & SCHOTT, *supra* note 14, at 655-65 (describing several case histories in detail); MICHAEL P. MALLOY, *ECONOMIC SANCTIONS AND U.S. TRADE* 141 (Supp. 1993).

²¹ For detailed case histories of these occasions of withdrawal or reduction of U.S. aid, see HUFBAUER & SCHOTT, *supra* note 16, at 473-484, 535-39, 544-563, 568-82. United States law provides that no security assistance may be granted to any country whose government engages in gross human rights violations. 22 U.S.C. § 2304(a)(2) (1988); *see also* CARTER, *supra* note 16, at 47-48 (discussing statutory changes which require President to report to Congress before making funds available to country which United States has sanctioned for human rights violations); Stephen B. Cohen, *Conditioning U.S. Security Assistance on Human Rights Practices*, 76 AM. J. INT'L L. 246, 254-56, 270 (1982) (discussing passage of legislation limiting military aid to specified countries). Such sanctions are subject to frequently employed exceptions which have greatly undermined their effectiveness. *Id.* at 275. The United States Overseas Private Investment Corporation, insurance for third world investments, and loans from the Eximbank Bank, may also be rejected on the basis of human rights violations. *See* CARTER, *supra* note 16, at 49-54; HUFBAUER & SCHOTT, *supra* note 16, at 462. The State Department prepares annual reports assessing the human rights record of countries that are members of the United Nations. *See* International Development Cooperation Act of 1979, Pub. L. No. 96-53, § 504(a), 93 Stat. 359 (codified at 22 U.S.C. § 2151n(d)(1)(B) (1988)).

²² The Trade Act of 1974 provides that no non-market country is eligible to receive most-favored-nation (MFN) treatment if the President determines that

conomic weapon. It effectively blocks a targeted country's goods by declining to grant trade concessions, such as lower tariffs, granted to other trading partners. While U.S. action in this area usually has been motivated by foreign policy concerns, trade preferences also have been used in an attempt to simply improve a country's human rights performance.

it denies its citizens the right or opportunity to emigrate. Trade Act of 1974, § 402, 19 U.S.C. § 2432 (1988). However, this prohibition, known as the Jackson-Vanik Amendment, may be waived. See JOHN H. JACKSON & WILLIAM J. DAVEY, *INTERNATIONAL ECONOMIC RELATIONS* 188-90 (2d ed. 1986). Through this waiver the President has allowed MFN treatment for East Germany, Romania, Hungary, China, Nicaragua, Czechoslovakia, Czech and Slovak Republics, the Soviet Union, Bulgaria, and Mongolia. See CARTER, *supra* note 16, at 118-20; MALLOY, *supra* note 20, at 4-5. The United States has withdrawn trade preference benefits from Panama under a similar provision found in both the Generalized System of Preferences, 19 U.S.C. §§ 2461-95 (1988), and the Caribbean Basin Economic Recovery Act, because of Panama's failure to cooperate in anti-drug efforts. See Trade Act of 1974, § 802(b), 19 U.S.C. § 2492(b) (1988); MALLOY, *supra* note 14, at 18 n.1. While the United States suspended Poland's MFN status because Poland suppressed Solidarity, the legal basis for the U.S. action was Poland's failure to meet its GATT commitments. See CARTER, *supra* note 16, at 121. For a detailed chronology of these events, see HUFBAUER & SCHOTT, *supra* note 16, at 683-95.

The Jackson-Vanik Amendment is limited to non-market countries and, thus it is, by definition, a cold war lever. Representative Stephen Solarz underscored this point in a congressional hearing on ending MFN status to China:

I think it's important to recognize, that with respect to MFN—we give MFN to a whole series of repressive regimes with respect to which we express our concerns about their violation of human rights in other ways. Iraq gets MFN. South Africa gets MFN. We have all sorts of sanctions against South Africa, but it still gets MFN. Syria gets MFN. What President Hafiz al-Assad of Syria did to the people living in the ancient quarter of Hama a few years ago makes Tiananmen Square look like a Boy Scout picnic by comparison. He murdered 20,000 people over the course of a week or two with heavy artillery and the like. Burma, which—whose army went on a rampage that exceeds the slaughter in Tiananmen Square, still gets MFN status. . . . [I]f consistency is our objective, then we have rarely before used MFN as the primary mechanism.

Most Favored Nation Status of China, Hearing of the Subcomm. on Asian and Pacific Affairs, Subcomm. on Human Rights and International Organizations, and Subcomm. on International Economic Policy and Trade of the House Comm. on Foreign Affairs, May 16, 1990 [hereafter *Hearings*], available in FED. NEWS SERVICE (remarks of Co-chairman Stephen Solarz).

There are several notable examples of the United States using trade preferences for this purpose.²³ Under the Generalized System of Preferences (GSP), a system of discretionary trade benefits to third world countries, the President has withdrawn duty-free treatment from Chile, Romania, Nicaragua, and Paraguay for "not taking steps to afford internationally recognized workers' rights."²⁴ The United States also has used trade sanctions, or withheld trade benefits, to protest human rights violations in the former Southern Rhodesia,²⁵ Uganda,²⁶ South Africa and Namibia.²⁷ In

²³ The case histories through 1984 are thoroughly cataloged in HUFBAUER & SCHOTT, *supra* note 16, at 461-64. The overall success of these particular cases has been limited. See CARTER, *supra* note 16, at 15-16.

²⁴ See CARTER, *supra* note 16, at 124. Internationally recognized workers' rights include the right of association, the right to organize and bargain collectively, a prohibition on the use of forced or compulsory labor, minimum age for the employment of children and acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health. 19 U.S.C. § 2462(a)(4) (1988). U.S. trade law also authorizes the imposition of trade sanctions on countries where there is "a persistent pattern of conduct" that denies workers the right of association, or the right to organize and bargain collectively, permits forced or compulsory labor or fails to provide standards for minimum wages, hours of work and occupational safety and health of workers. 19 U.S.C. § 2411(d)(3)(iii) (1988).

²⁵ In 1962 the United States participated in UN sanctions against Southern Rhodesia. The sanctions were in response to that government's action to thwart majority rule. U.S. compliance with the UN sanctions was less than complete. However, Southern Rhodesia, now Zimbabwe, conceded majority rule in 1979 and the U.S. and UN sanctions were lifted. Such sanctions were invoked under Section 5 of the United Nations Participation Act. See MALLOY, *supra* note 16, at 200-202.

²⁶ On October 10, 1978, in response to gross violations of human rights, President Carter signed legislation calling for a total trade ban against Uganda. The legislation was to protest the consistent pattern of gross violations of human rights. One author wrote that "the American sanctions proved devastating to the Ugandan economy . . . they helped set in motion the events that led to the fall of the regime." See Judith Miller, *When Sanctions Worked*, 39 FOR. POL'Y 118, 119 (1980).

²⁷ The United States applied economic sanctions against South Africa in protest of its control over Namibia and in protest of South Africa's policy of apartheid. In 1977, the United States complied with the UN Security Council's resolution banning munitions and military equipment sales to South Africa. In 1985, President Reagan ordered additional sanctions under the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. §§ 1701-06 (1988 & Supp. 1992), in order to avoid more broad-based congressional restrictions. MALLOY, *supra* note 16, at 447-48. In 1986, the Congress passed the Comprehensive Anti-Apartheid Act (CAAA), Pub. L. No. 99-440, 100 Stat. 1086 (codified as amended at 22 U.S.C. §§ 5001-5117 (1988)), which provided

the 1990s, it threatened China²⁸ with such sanctions and imposed

a broad range of import, export and financial transaction restrictions. Under the CAAA, U.S. nationals were prohibited from making new investments in South Africa unless they were in firms owned by "black South Africans." MALLOY, *supra* note 16, at 475.

The sanctions imposed on Namibia (and thus indirectly on South Africa) were lifted in March, 1990 following Namibia's independence. On July 10, 1991 most of the U.S. sanctions against South Africa were removed based on South Africa's compliance with specified conditions. See MALLOY, *supra* note 20, at 107; HUFBAUER & SCHOTT, *supra* note 16, at 346-50 (providing detailed chronology of events relating to U.S. sanctions against South Africa). The IEEPA is the economic sanctions remedy most often employed in recent years. See MALLOY, *supra* note 16, at 160, 215-217.

Later, the Bush Administration argued that sanctions were not effective in ending apartheid and suggested an alternative policy of "constructive engagement" through business, cultural and governmental contacts, and moral persuasion. See *United States Questions Sanctions Pressure on South Africa*, UPI, Feb. 10, 1989, available in LEXIS, Nexis Library, UPI File.

²⁸ All economic sanctions against the People's Republic of China (PRC) were lifted in January, 1980, following a U.S.-PRC settlement of all outstanding claims. See MALLOY, *supra* note 16, at 195. President Bush continued China's MFN status after Tiananmen Square, although congressional criticism for doing so was intense. In congressional hearings on the matter, Representative Christopher Smith (R-NY) stated:

[W]hile Jackson-Vanik specifically focuses on emigration figures, the level of compliance with internationally recognized human rights standards must be included in our criteria . . . [T]he Congress, because of the ongoing egregious human rights [violations] in Romania committed by the Ceausescu regime, finally came to the conclusion that the time had come to suspend MFN, that the barbaric behavior of Ceausescu just did not warrant that kind of special trading benefit. . . . I think in light of the crackdown in Tiananmen Square and the fact that the hardliners continue to rule with an iron fist, the fact that there has been an increase in the repression in the area of religious freedom, and the fact that the ongoing pervasive population control program with its reliance on forced abortion and coercion has not abated, all of these factors and others, I think, suggest that MFN would be a very unwise conference on China for another year.

Hearings, *supra* note 22 (remarks of Representative Christopher Smith (R-NY)).

However, many argued that continuing MFN treatment for China was the most effective way of nurturing respect for human rights. For example, the former U.S. Ambassador to China, Winston Lord, testified that China's export sector, which would be most injured by termination of MFN status, is the most progressive sector of the economy, "whereas those dominated by central planning state enterprises don't send so much to us. So, the specific impact is precisely on those forces that we want to help as opposed to the central gov-

them against the former Yugoslavia²⁹ and Haiti.³⁰

ernment." *Hearings, supra* note 22 (remarks of Representative Ambassador Winston Lord). However, the Ambassador added:

I'm against simple extension of MFN. . . . If we get the White House for the first time to really come out and pay tribute and align itself with the Chinese people; to reaffirm all the other existing sanctions; to move ahead on helping Hong Kong citizens emigrate and Taiwan get into the GATT; to step up Voice of America funding so the truth can get in, including the truth about MFN extensions so we can explain to the Chinese people why we're doing this, very important—VOA is extremely important, and it is being jammed effectively now, unfortunately; and if the President would meet with selected Chinese and the symbolism that would carry.

Id.; see also Michael Oksenberg, *Bush Is Right on China*, N.Y. TIMES, Dec. 13, 1989, at A31.

²⁹ On May 30, 1992 and January 15, 1993, President Bush invoked the IEEPA and issued Executive Orders in response to the actions of Serbia and Montenegro. Exec. Order No. 12,831, 58 Fed. Reg. 5253 (1993); Exec. Order No. 12,808, 57 Fed. Reg. 23,299 (1992). These two countries, acting as the "Socialist Federal Republic of Yugoslavia," had seized territory in Croatia and Bosnia-Herzegovina. Almost simultaneously, the UN Security Council ordered a full range of economic sanctions. See MALLOY, *supra* note 18, at 235-38. President Clinton, on April 25, 1993, strengthened the sanctions on Bosnia by signing an executive order which froze all U.S. business interests in the former Yugoslavia. Exec. Order No. 12,846, 58 Fed. Reg. 25,771 (1993). In addition, the order prohibited most American ships from entering the territorial waters and forbade Americans to conduct any shipping business in areas controlled by Bosnian-Serb forces. *Id.* at 238. The order also allowed the United States to board any vessel or vehicle it believed to be violating UN trade sanctions. *Id.*

³⁰ In October 1991, after the coup against Haiti's democratically elected president, President Bush imposed sanctions by issuing two Executive Orders under the IEEPA (one followed an OAS foreign minister's resolution). Exec. Order No. 12,775, 56 Fed. Reg. 50,641 (1991); Exec. Order No. 12,779, 56 Fed. Reg. 55,975 (1991). The orders prohibited import and export trade between the United States and Haiti and imposed other financial transaction restrictions. See MALLOY, *supra* note 20, at 187-88. UN sanctions against Haiti that had been lifted when a peace agreement was reached in July, 1993, were renewed in October of the same year. See Kathy Lewis, *President Backs Haiti Sanctions*, DALLAS MORN. NEWS, Oct. 15, 1993, at A1. The renewal was in response to the breakdown in the Governor's Island agreement that had set out a step-by-step restoration of democracy in Haiti. President Clinton emphasized that the goal of the sanctions was "restoration of democracy." See Martin Kasindorf & Susan Page, *U.S. in Retreat: Clinton Orders Ship to Leave Haiti Waters*, NEWSDAY, Oct. 13, 1993, at 7.

The recent developments in China demonstrate the U.S. attempts to improve human rights by economic coercion.³¹ In 1991 and 1992, Congress passed legislation that would have ended China's most-favored-nation trade status with the United States unless China improved its record on human rights. President Bush, however, vetoed this legislation.³² In May 1993, President Clinton continued China's most-favored-nation trade status without conditions, but tied its renewal in 1994 to Chinese progress on specific human rights and trade issues.³³

The United States' threats to China are the latest in the U.S. continued attempt to link trade to human rights. Such efforts may be characterized fairly as sporadic³⁴ and expedient,³⁵ in that they have

³¹ See *supra* note 28 (discussing actions taken in response to Tiananmen Square incident).

³² See Michael Wines, *Bush, This Time in Election Year, Vetoes Trade Curbs Against China*, N.Y. TIMES, Sept. 29, 1992, at A1.

³³ See Kenneth Lieberthal, *Forget the Tiananmen Fixation*, N.Y. TIMES, July 14, 1993, at A19 (arguing that bi-national commission on human rights would be a more effective approach than economic sanctions).

³⁴ Although President Carter asserted that "[h]uman rights is the soul of our foreign policy," one critic observed that "the Carter administration exhibited a remarkable degree of tentativeness and caution so that its pursuit of human rights goals was anything but 'singleminded'." Stephen B. Cohen, *Conditioning U.S. Security Assistance on Human Rights*, 76 AM. J. INT'L L. 246, 264 (1982). Another writer skeptical of Carter's human rights policy wrote:

There is no evidence that Carter intended in advance to make a great issue of human rights, but they were brought to center stage by repressive measures taken by the Soviet and Czechoslovak governments about the time Carter entered office [I]f condemnation of Soviet maltreatment of intellectuals was not to be merely anti-Soviet or anti-Communist politics, it had to be . . . applied to friends and allies. . . .

ROBERT WESSON, *THE UNITED STATES AND BRAZIL: LIMITS OF INFLUENCE* 93 (1981).

³⁵ The distinction between general foreign policy goals and human rights protection was blurred in the Reagan Administration. Hufbauer and Schott note that U.S. Ambassador to the United Nations Jeanne Kirkpatrick distinguished between "authoritarian" right-wing governments and "totalitarian" Communist regimes. The Ambassador found that the former are more amenable to democratic liberalization than are the latter, and thus deserve more sympathetic treatment from the United States. HUFBAUER & SCHOTT, *supra* note 16, at 463-64. The authors state that this distinction became the cornerstone of the Reagan administration's human rights program. *Id.* at 463. One particularly egregious example of this double standard was the U.S. involvement in the civil war in El Salvador. The United States supported El Salvador's military at the rate of \$1.5 million a day while

closely tracked cold war strategies. But, the manner in which the United States has attempted to achieve this link has remained constant. The United States has acted unilaterally³⁶ to improve the human rights records of other countries by using its economic leverage.

II. THE UNITED STATES RESISTANCE TO MULTILATERAL HUMAN RIGHTS COMMITMENTS

While this unilateral approach may have proved successful in the formation of the post-war international order, it is outmoded and ineffective in this current world of regionalism. This section explores how the U.S. approach to the linkage between trade policy and human rights has remained unilateral rather than multilateral. The section then explores the negative impacts of this approach.

A. *United States Resistance to United Nations Human Rights Conventions*

The U.S. resistance to multilateral human rights commitments can be seen in its approach to UN human rights conventions. Of the seven most important and fundamental UN human rights instruments,³⁷ the United States Senate has only given its advice

death squads linked to the military wantonly killed thousands of their fellow citizens. Over 70,000 people died in political violence in El Salvador during the 1980s. Marjorie Miller, *A Rush to Judgment on Duarte of El Salvador*, L.A. TIMES, June 19, 1988, at E2. The United States abstained or voted against UN condemnation of this slaughter on at least two occasions. *U.N. Assembly Assails Terrorism*, N.Y. TIMES, Dec. 7, 1985, at A3.

³⁶ Even when the United States has joined a multilateral effort to impose economic sanctions in the name of human rights, its policies were not always in unison with the collective effort, as was the case in Southern Rhodesia and South Africa.

³⁷ See Convention on the Prevention and Punishment of the Crime of Genocide, *adopted* Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951); International Convention on the Elimination of All Forms of Racial Discrimination, *adopted* Dec. 21, 1965, 600 U.N.T.S. 195 (entered into force Jan. 4, 1969); International Covenant on Economic, Social and Cultural Rights, *adopted* Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976); International Covenant on Civil and Political Rights, *adopted* Dec. 16, 1966, 999 U.N.T.S. 717 (entered into force March 23, 1976); Optional Protocol to the International Covenant on Civil and Political Rights, *adopted* Dec. 16, 1966, 999 U.N.T.S. 302 (entered into force Mar. 23, 1976); Convention on the Elimination of All Forms of Discrimination against Women, *opened for signing* Mar. 1, 1980, 19 I.L.M. 33 (1980) (entered into force Sept. 3, 1981); Convention Against Torture and Other Cruel, Inhuman, or Degrading

and consent on three of these as of March 1, 1994.³⁸ Moreover, two of these remain unenforceable under domestic law because of the absence of implementing legislation.³⁹ Even when the United States has taken action it has been so conditioned as to be arguably meaningless.⁴⁰

There is considerable sentiment in the U.S. Senate, which traditionally must ratify all international human rights instruments, that human rights commitments cannot be effected by treaty alone but require adoption of legislation.⁴¹ In the 1950s, Senator John Bricker of Ohio proposed a constitutional amendment to this effect, which failed by only one vote in the first stage of the amending process.⁴² But his real target—the human rights conventions being debated at that time—was soundly defeated by the U.S. Senate.⁴³ The American Bar Association's Committee on Peace and Law Through United Nations spearheaded the anti-human rights convention effort by successfully linking international human rights conventions to a litany of undesirable consequences. Those conse-

Treatment or Punishment, Mar. 9, 1984, 23 I.L.M. 1027 (1984) (entered into force June 26, 1987) (hereafter Torture Convention); see also FRANK NEWMAN & DAVID WEISSBRODT, *INTERNATIONAL HUMAN RIGHTS* 578-579, 784-785 (1990).

³⁸ The International Covenant on Civil and Political Rights (ICCPR), The Torture Convention, and The Genocide Convention were approved by the Senate. 102d Cong., 2d Sess., 138 CONG. REC. 4,781 (Apr. 2, 1992); 101st Cong., 2d Sess., 136 CONG. REC. 17486 (Oct. 27, 1990); S. Res. 347, 99th Cong., 2d Sess., 132 CONG. REC. 109 (Feb. 19, 1986).

³⁹ Only the Genocide Convention has become a binding obligation of the United States under international law as well as part of U.S. law through implementing legislation. The Torture Convention will not be enforceable under either international or domestic law until the passage of implementing legislation. The ICCPR is binding under international law because the instruments of ratification have been deposited. However, it will not be binding under domestic law until implementing legislation is approved. See *infra* notes 120-72 and accompanying text.

⁴⁰ For an excellent discussion, by several experts, on the numerous and varied restrictions that the United States imposed on its ratification of the ICCPR, see Symposium, *The Ratification of the International Covenant on Civil and Political Rights*, 42 DEPAUL L.R. 1167-1412 (1993).

⁴¹ Arthur Rovine & Jack Goldklang, *Defense of Declarations, Reservations, and Understandings*, in U.S. RATIFICATION OF THE HUMAN RIGHTS TREATIES 54, 59-60 (Richard B. Lillich ed., 1981) [hereafter RATIFICATION OF HUMAN RIGHTS TREATIES].

⁴² See NATALIE H. KAUFMAN, *HUMAN RIGHTS TREATIES AND THE SENATE* 196 (1990) (discussing Bricker Amendment).

⁴³ Senator Bricker identified the Human Rights Convention, along with other human rights treaties, as the motivation for his amendment. *Id.* at 115.

quences included the diminishment of rights through encroachment on American sovereignty and states' rights and the expansion of Soviet influence.⁴⁴

Two legacies emerged from the Bricker era. One legacy was that international human rights commitments should be avoided at all costs. The second and narrower legacy is that commitments to these international human rights conventions cannot be enforceable without separate implementing legislation passed by the Senate. While the first proposition is certainly debatable, "Brickerism" in the latter sense remains today in a very real way.⁴⁵ When, for example, the Carter administration sent four international human rights instruments⁴⁶ to the Senate in 1978 it included a clear statement that the operative articles were not to be effective without implementing legislation.⁴⁷ Succeeding administrations have all agreed that human rights treaties require implementing legislation and thus are not self-executing. This limitation makes ratification of a treaty ineffective because, without more, a treaty will not become U.S. law. Under these circumstances, U.S. courts are not called upon to interpret such "ratified" convention norms, and pertinent human rights tribunals do not benefit from U.S. case law on the meaning of the Conventions.⁴⁸

The United States will not be a player in the development of international human rights law unless and until domestic legislation explicitly implements the pertinent international provisions. Critics contend that the non self-executing nature of treaties under U.S. law⁴⁹ is to blame for the U.S. failure to make international

⁴⁴ See KAUFMAN, *supra* note 42, at 42-59 (presenting arguments against the Genocide Convention).

⁴⁵ JACKSON & DAVEY, *supra* note 22, at 117.

⁴⁶ See RATIFICATION OF HUMAN RIGHTS TREATIES, *supra* note 41, at 85-87 (presenting Carter's transmittal letter of four treaties).

⁴⁷ See *id.* at 103, 105 (discussing ICCPR arts. 1-27 and the American Convention arts. 1-32).

⁴⁸ See Thomas Buergenthal, *The American Convention on Human Rights, in* RATIFICATION OF HUMAN RIGHTS TREATIES, *supra* note 41, at 51.

⁴⁹ The question is whether the framers of the treaty or executive agreement intended to prescribe a rule that, standing alone, would be enforceable in the courts. See *Foster & Elam v. Neilson*, 27 U.S. (2 Pet.) 253 (1829) (holding that a treaty respecting land grants was a contract between nations and as such created no private titles unless and until Congress undertook to fulfill this obligation); see also *Sei Fuji v. California*, 242 P.2d 617, 619-22 (Cal. 1952) (holding United Nations Charter was not self-executing as it did no more than pledge cooperation and set forth moral commitment).

human rights commitments. While this argument is superficially appealing, it ignores the deeper political traditions of the United States. Although the Constitution does not prohibit treaties that govern human rights,⁵⁰ any treaty may be overridden by ordinary federal legislation.⁵¹ Accordingly, the mere ratification of an international instrument, which may be binding under international law, cannot, in any legal or constitutional sense, preclude the Congress and President from adopting future conflictive measures.

This transforms the problem from a legal to a political one. For better or for worse, our political tradition favors non self-executing ratification. The important issue is whether the required implementing legislation conforms to the pertinent international agreement⁵² and is adopted within a reasonable time. And, on a broader level, the task at hand is to build and sustain a political consensus to respect our international obligations.

⁵⁰ See Louis Henkin, *The Covenant on Civil and Political Rights*, in RATIFICATION OF HUMAN RIGHTS TREATIES, *supra* note 41, at 20-26.

⁵¹ When a treaty or congressional executive agreement and a federal law "relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but if the two are inconsistent, the one last in date will control. . . ." *Whitney v. Robertson*, 124 U.S. 190, 194 (1888). The Latin maxim *leges posteriores priores contrarias abrogant* (the last expression of the sovereign will must control) aptly states the principle. The Congress may amend its laws as it chooses, as a matter of internal law, despite whatever international law violations may be implied. See *Moser v. United States*, 341 U.S. 41 (1951); *Foster*, 27 U.S. at 253. See generally LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 163, 221-222, 407 (1972).

⁵² A further significant difference, for U.S. courts, is whether the implementation legislation strictly conforms to U.S. international obligations or simply overrides the international agreement. For example, the implementation legislation of NAFTA provides that "[n]o provision of the [international] agreement . . . which is inconsistent with any law of the United States shall have effect." North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182, § 102(a), 107 Stat. 2057 (1993). In contrast, when Congress enacted the Refugee Act of 1980, the Conference Committee Report stated that the definition of "refugee" in the Act was accepted "with the understanding that it is based directly upon the language of the Protocol [Relating to the Status of Refugees] and it is intended that the provision be construed consistent with the Protocol." See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 437 (1987) (citing S. Rep. No. 96-590 (1980)). In the former instance the international agreement is irrelevant, while in the latter, our courts could contribute to, and benefit from, the interpretation of the same agreement by other tribunals.

B. *The Organization of American States*

United States policy toward the Organization of American States (OAS) also highlights the U.S. resistance to multilateral cooperation on human rights issues. The human rights regime in the Americas is under the Organization of American States. To understand the U.S. role in this human rights regime it is necessary to understand the basic contours of the OAS system.

The overarching entity charged with implementing and enforcing the OAS regime is the Inter-American Commission on Human Rights (IACHR). The IACHR derives its enforcement powers from two sources: (1) the Charter of the Organization of American States⁵³ and the American Declaration of the Rights and Duties of Man⁵⁴ (hereafter "American Declaration") and (2) the American Convention on Human Rights⁵⁵ (hereafter "American Convention"). While the Inter-American Commission provides the enforcement mechanism for both the American Declaration and the American Convention systems, the remedies are distinct. Although the Charter and Declaration apply to all OAS members, the Convention system is only binding on those member states that have ratified it.⁵⁶ For the American Declaration system, the Com-

⁵³ Charter of the Organization of American States, Apr. 30, 1948, 2 U.S.T. 2394, T.I.A.S. No. 2361, 119 U.N.T.S. 3 (entered into force Dec. 13, 1951); Protocol of Buenos Aires, Feb. 27, 1967, 21 U.S.T. 607, T.I.A.S. No. 6847, 721 U.N.T.S. 324 (entered into force Feb. 27, 1970).

⁵⁴ See NEWMAN & WEISSBRODT, *supra* note 14, at 83 (discussing American Declaration of the Rights and Duties of Man and Novena Conferencia Internacional Americana).

⁵⁵ American Convention of Human Rights, Nov. 22, 1969, OAS T.S. No. 36, at 1, OAS Off. Rec. OEA/Ser. L/V/II.23 doc. 21 rev. 6 (1979), 9 I.L.M. 673 (1970) [hereafter AMERICAN CONVENTION] (entered into force, July 18, 1978).

⁵⁶ Those nations which have ratified the Convention include Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Peru, Suriname, Trinidad & Tobago, Uruguay, and Venezuela. The United States and some Eastern Caribbean States have not. See Jean-Bertrand Marie, *International Instruments Relating to Human Rights*, 14 HUM. RTS. L.J. 57, 63 (1993).

Mexico ratified the American Convention on Human Rights on April 2, 1982, but has not made a declaration recognizing the binding jurisdiction of the Inter-American Court of Human Rights. See AMNESTY INTERNATIONAL, MEXICO: TORTURE WITH IMPUNITY 28 n.2 (1991); MINNESOTA LAWYERS HUMAN RIGHTS COMMITTEE, PAPER PROTECTION: HUMAN RIGHTS VIOLATIONS AND THE MEXICAN CRIMINAL JUSTICE SYSTEM 38 (1990). President Carter signed the American Convention on Human Rights in 1977 and transmitted it to the U.S.

mission issues country studies and may hear individual petitions.⁵⁷ Adverse findings in a Declaration case may result in a report to the General Assembly and a non-binding resolution.⁵⁸ Only petitions brought under the Convention may be referred eventually to the Inter-American Court of Human Rights for a binding decision if the state party has accepted the Court's jurisdiction.⁵⁹

The Inter-American Court of Human Rights interprets and applies the American Convention in both contentious and advisory jurisdictions.⁶⁰ In contentious cases, the Court may award compensatory damages and injunctive relief.⁶¹ The Court lacks jurisdiction to enforce its judgments and rulings and must rely on the OAS General Assembly.⁶² The Court's annual reports to the General Assembly must specify which state has not complied with the Court's judgments and the Court may make recommendations.⁶³ A

Senate for ratification in 1978. See Manuel J. Corbera, *In the Wrong Place, at the Wrong Time: Problems with the Inter-American Court of Human Rights Use of Continuous Jurisdiction*, 25 VAND. J. TRANSNAT'L. L. 919, 946, 947 (1993); David P. Stewart, *U.S. Ratification of the Covenant on Civil and Political Rights: The Significance of the Reservations, Understandings, and Declarations*, 14 HUM. RTS. L.J. 77 (1993). But the United States obtained a "federal clause" in the Convention which limits a state's binding obligations to matters over which it "exercises legislative and judicial jurisdiction." THOMAS BUERGENTHAL, *INTERNATIONAL HUMAN RIGHTS IN A NUTSHELL* 146 n.3 (1988).

⁵⁷ See Corbera, *supra* note 56, at 946; Newman & Weissbrodt, *supra* note 37, at 45.

⁵⁸ See Corbera, *supra* note 56, at 928.

⁵⁹ The jurisdiction of the Inter-American Court over private petitions is limited to those parties that have by declaration ceded jurisdiction to the Court. AMERICAN CONVENTION, *supra* note 55, at art. 62. Not one of the NAFTA parties have ceded its jurisdiction. As of January 1, 1993, fourteen years after the Court began to function, only fourteen countries have accepted its jurisdiction. They are Argentina, Chile, Colombia, Costa Rica, Ecuador, Guatemala, Honduras, Nicaragua, Panama, Peru, Surinam, Trinidad & Tobago, Uruguay, and Venezuela. See Marie, *supra* note 56, at 63.

⁶⁰ AMERICAN CONVENTION, *supra* note 55, at arts. 62, 64. Any OAS Member State as well as OAS organs have standing to request an advisory opinion. BUERGENTHAL, *supra* note 56, at 163; NEWMAN & WEISSBRODT, *supra* note 37, at 731.

⁶¹ AMERICAN CONVENTION, *supra* note 55, at art. 63(1), 63(2), 68(2) (permitting but not requiring states to establish a mechanism for the domestic execution of the Court's money judgments).

⁶² The Organization of American States (OAS) includes 35 member states, including all three parties to NAFTA and most of the sovereign states in the Americas. Each member is represented in the General Assembly. BUERGENTHAL, *supra* note 56, at 128-129.

⁶³ AMERICAN CONVENTION, *supra* note 55, at art. 65.

nation that does not comply with the Court's ruling violates the Convention.⁶⁴

The United States lobbied other Latin American countries to ratify the American Convention, arguing that enforceable multilateral human rights obligations would obviate the need for unilateral intervention by the United States.⁶⁵ President Carter also urged other OAS member states to accept the compulsory jurisdiction of the Inter-American Court.⁶⁶ Yet, the United States itself has often been hostile to the OAS human rights regime.⁶⁷ The United States resisted the OAS's movement toward binding human rights obligations under the American Declaration and the American Convention and abstained from voting on the creation of the IACHR.⁶⁸ Although President Carter signed the American Convention in 1977, he did so subject to numerous reservations. Among these was the demand that Articles 1 through 37 be non self-executing.⁶⁹ He also stated that the acceptance of the more important and more controversial jurisdiction of the Inter-American Court would require separate advice and consent by the Senate.⁷⁰ As of March 1, 1994, the U.S. Senate still had not ratified the American Convention or submitted to the jurisdiction of the Inter-American Court of Human Rights.⁷¹

C. The Consequences of the United States Resistance to Multilateral Human Rights Commitments

It is counterproductive for the United States to use a unilateral strategy for improving human rights in this hemisphere. No matter how well-intentioned, this approach inevitably hits a sensitive nerve with Latin Americans in general and Mexicans in particular. During the NAFTA ratification campaign, the Clinton administration

⁶⁴ *Id.* at art. 68. The Court will also determine what substantive article the offender has violated.

⁶⁵ Buergenthal, *supra* note 48, at 49-50.

⁶⁶ See Corbera, *supra* note 56, at 947 n.199; David Forsythe, *Human Rights, The United States and the Organization of American States*, 13 HUM. RTS. Q. 66, 88 (1991).

⁶⁷ Forsythe, *supra* note 66, at 77-88.

⁶⁸ *Id.* at 77, 82.

⁶⁹ See *id.* at 87. See generally RATIFICATION OF HUMAN RIGHTS TREATIES, *supra* note 41.

⁷⁰ See RATIFICATION OF HUMAN RIGHTS TREATIES, *supra* note 41, at 112.

⁷¹ See Marie, *supra* note 56, at 63 (listing countries that have ratified the American Convention and ceded jurisdiction to the Inter-American Court of Human Rights as of January 1, 1993).

proposed sending a delegation of international observers to monitor Mexico's 1994 elections to soften congressional criticism of Mexico's election practices. Predictably, Mexican officials reacted angrily and defensively, viewing the suggestion as an unwarranted interference into Mexico's sovereignty.⁷² This reaction is perfectly understandable given the United States past intervention into Mexico's internal affairs.⁷³

Multilateralism does not guarantee an end to human rights violations. There are, however, significant differences between the unilateral and multilateral approaches that demonstrate why multilateralism is more likely to be successful. Multilateral remedies, such as using election observers, are complaint driven. Such remedies have been invoked by Mexican nationals with some success.⁷⁴ The direct involvement of aggrieved nationals in a multilat-

⁷² Mexico's Foreign Minister Felix Solana reacted very negatively to this suggestion by U.S. Secretary of State Warren Christopher. The participation of a former Carter Administration official as an observer in Mexico's election was similarly resented. See Elizabeth Kurylo, *Hostility Greets Observers of Mexican Elections*, ATLANTA J. & CONST., July 19, 1992, at A12.

⁷³ Mexicans are better historians than Americans. They know that their beloved President Francisco I. Madero, the Berkeley educated "apostle of democracy," struggled for years for a U.S. style democracy. His book "La Sucesión Presidencial en 1910" opposed the dictatorship of Porfirio Diaz and called for a genuine democracy. He was elected President in 1911 in what has been called the cleanest election in Mexican history. See Enrique Krauze, *England, the United States, and the Export of Democracy*, 12 WASH. Q. 189 (1989). His administration was dedicated to the deepening of democratic institutions and ideals. But Madero was overthrown and assassinated not by a revolution, but by a barrack's revolt led by U.S. Ambassador Henry Lane Wilson. See HENRY BAMFORD PARKES, *A HISTORY OF MEXICO* 329-34 (1966). Given the history of the two countries which, wholly apart from the assassination of President Madero, includes the U.S. invasion and absorption of half México's territory, Mexican distrust of U.S. unilateralism is axiomatic. *Id.* at 211-21.

⁷⁴ In 1985 and 1986, the *Partido Acción Nacional* (PAN) filed three petitions with the IACHR protesting alleged fraud in recent Mexican elections. Mexico argued that the IACHR's acceptance of jurisdiction over the petition was violative of the principle of non-intervention (OAS Charter, Art. 18) and threatened to denounce the American Convention should the Commission decide for the petitioners. The Commission rejected this argument finding that the American Convention protected the right of voters, "[t]o effectively appeal against an electoral process that they consider fraudulent. . . ." The Commission, with the agreement of the petitioners, declined to decide the merits of the case, noting that in prior cases its views on the election process resulted from its direct monitoring of the electoral process. The IACHR suggested internal reforms. Later the Mexican Government annulled several state elections because of allegations of fraud. Dinah Shelton has written, "it is

eral process enhances the possibility of positive reforms. Local protests against electoral fraud have resulted in the reversal of four gubernatorial elections from August 1991 to December 1993.⁷⁵ Following the January 1, 1994 uprising in Chiapas, the rebel demand for international election observers was accepted by President Salinas. Clearly the same suggestion was more palatable coming from a national voice.⁷⁶ Apart from Mexican nationalism there is another reason that multilateralism would be more acceptable than unilateralism to Mexico. As the smaller and weaker neighbor, Mexico's foreign policy favors an international order governed by law. Unlike the United States, Mexico prides itself on its adherence to international obligations. Dr. Cesar Sepulveda, a celebrated Mexican jurist of public international law, has written:

clear that international pressure to remedy persistent election fraud has an impact on the Mexican government." Dinah Shelton, *Representative Democracy and Human Rights in the Western Hemisphere*, 12 HUM. RTS. L.J. 353, 353-59 (1991).

⁷⁵ In August 1991, an interim Panista governor was appointed in the state of Guanajuato after two weeks of domestic and foreign pressures, including a strongly worded editorial from The New York Times. President Salinas intervened and the state legislature nominated the opposition mayor from León before the elected Partido Revolucionario Institucional (PRI) "candidate" took office. See Tim Golden, *Mexican Rulers Yield on State Election*, N.Y. TIMES, Aug. 31, 1991, at A3. In San Luis Potosí, the declared PRI candidate winner resigned from office two weeks after being sworn in. See *The Last Gasp of the Dinosaurs?*, L.A. TIMES, Oct. 13, 1991, at M4. In Michoacán, *Proceso* later described the stepping down of the PRI candidate, Eduardo Villaseñor, as part of the same pattern seen in Guanajuato and San Luis Potosí, "[M]uddy elections, complaints from the opposition, official disdain, threats of violence, disillusionment of the aggrieved. And then the final—when everything appears lost for them, the reversal in the last minute, escalated mobilization and then like a disengagement, the fall." Pascal Beltrán del Rio & Francisco Castellanos, *El Caso Michoacán no Puede Darse Por Cerrado Cristóbal Arias*, PROCESO, Oct. 12, 1992, at 16 (translated from Spanish to English by author). On December 2, 1993, the newly elected PRI governor of Yucatán, Dulce María Sauri, resigned over charges that the PRI won through electoral fraud. See Tod Robberson, *In Mexico, Gore Stresses Goal of Democracy*, WASH. POST, Dec. 2, 1993, at A37.

⁷⁶ On January 1, 1994, a rebel army occupied several towns in the southern Mexican state of Chiapas. After weeks of negotiation between rebel and government spokespersons, President Salinas granted one of the rebel demands by announcing the reversal of Mexico's long-standing opposition to foreign observers in Mexico's elections. See Dudley Althaus, *Another Step Closer to Peace; Chiapas Accord May Set Stage for Democracy*, HOUS. CHRON., Mar. 3, 1994, at A16; Martin Langfield, *Salinas to Propose International Election Observers*, REUTERS, March 1, 1994.

The examination of the Mexican practice reveals that no norm has existed that attempts to limit compliance with an international treaty, nor have the courts established binding precedent, in any case, to place the Constitution over treaties. Also, it is certain that the Mexican nation has complied in good faith with all of its obligations derived from the international legal order, despite its effect on its internal interests. The logical consequence is that in general International Law is superior to the norms of the Mexican state.⁷⁷

The United States does have a critical role to play in the evolution of a regime of human rights protection in the NAFTA countries and the Americas as well, both by example and as a teacher.⁷⁸ Indeed the absence of such human rights leadership by the United States has meant that the system of human rights protection in the Americas remains feeble. Antonio Gramsci, an influential Western European Marxist of the twentieth century, argued that a hegemonic leader leads because others defer to the hegemon, willingly or subconsciously, by its ability (usually at least partially based on its superior power) to persuade them to accept its policy.⁷⁹ Thus, the hegemon's moral leadership rests not only on power, but on the persuasiveness of espousing a "good" or "principled" position.⁸⁰ A "dominant" leader, in contrast, uses its power to coerce.

Another commentator, political scientist David Forsythe, contends that it is the "combination of moral leadership and putative dominant leadership that produces an hegemonic leadership." In specific reference to the Organization of American States he also states, "influence by the United States . . . may be characterized at

⁷⁷ CESAR SEPULVEDA, *DERECHO INTERNACIONAL* 80 (1986) (translated from Spanish to English by author).

⁷⁸ The United States can and should promote democratic values and respect for human rights in Mexico and Latin America as well as the rest of the world. Enrique Krauze, a Mexican historian and commentator who has written widely on the subject of democratizing Mexico observes that unlike the British Empire, "United States history recognizes neither the notion of limits nor the pride of disseminating democracy beyond its borders." Krauze, *supra* note 73, at 197. The Peruvian economist and commentator Hernán de Soto, who advocates a market economy and democratic reforms for Latin America, has called upon the United States to make a concerted effort to teach the nuts and bolts of democratic institutions abroad, and to train democratic leaders. Hernando de Soto, *A Voice From Latin America; Some Lessons In Democracy—For the U.S.*, N.Y. TIMES, Apr. 1, 1990, at D2.

⁷⁹ ANTONIO GRAMSCI, *SELECTIONS FROM POLITICAL WRITINGS 1921-26* (discussing Marxist theory). See generally JOHN HOFFMAN, *THE GRAMSCIAN CHALLENGE: COERCION AND CONSENT IN MARXIST POLITICAL THEORY* (1984).

⁸⁰ See Forsythe, *supra* note 66, at 70-72.

times as dominant but [it is] rarely hegemonic, and at times as moral leadership but mostly not."⁸¹ Professor Forsythe notes that the human rights regime of the Americas has been hampered by a hemispheric preoccupation with Communism. He describes the dynamic of the U.S. relations with the other OAS states as being characterized by:

[T]he widespread hemispheric resistance to United States influence on many questions, which takes the diplomatic and legal form of an emphasis on traditional national sovereignty and is the result of repeated United States intervention in the internal affairs of hemispheric states. These persistent claims to national sovereignty help explain the absence—in most cases—of US hegemonic power, and offer an important reason why the regime has been less effective than the West European human rights regime. This factor operates to make most successful exertions of power by the United States dominant rather than hegemonic, and to limit the effectiveness of the regime's protection of human rights. National sovereignty is thrown up as a barrier not only against the United States but against the regime itself. Complicating and enhancing the use of national sovereignty is the fact that the United States itself has championed such claims at times.⁸²

United States resistance to internationally enforceable human rights obligations,⁸³ combined with a pattern of unilateral intervention, has crippled the effectiveness of the human rights regime of the Americas. United States support for the human rights regime of the Americas has waxed and waned but it has always remained clearly subservient to overriding security considerations.⁸⁴ While the United States has exercised hegemony in national security and economic affairs in this hemisphere, it has not done so with respect to human rights.⁸⁵ To the contrary, the United States continues to be regarded by Latin America as an imperialistic democracy whose policy is "votes on the inside, and the big stick on the outside."⁸⁶ Despite this image, the United States views itself as a missionary that has discovered the true path and has a moral obligation to prevent evil from triumphing. United States moral leadership is critical to advance the cause of human rights in the Americas but can occur

⁸¹ *Id.* at 74.

⁸² *Id.*

⁸³ See *supra* notes 37-52 and accompanying text (discussing U.S. resistance).

⁸⁴ See *supra* notes 34-35.

⁸⁵ See Forsythe, *supra* note 66, at 74.

⁸⁶ See Krauze, *supra* note 73, at 191.

only if a genuine commitment to international institutions is practiced as well as preached.

A particularly well-known example of U.S. disregard for the multilateral obligations occurred when Nicaragua sued the United States for mining its harbors and funding a war against it. The United States withdrew its consent to jurisdiction of the International Court of Justice only after the court ruled against it.⁸⁷ This case is frequently cited by Latin Americans to explain why they must insist on their sovereignty and distrust multilateral fora.⁸⁸

III. LINKAGE OF TRADE POLICY AND MULTILATERAL HUMAN RIGHTS COMMITMENTS: THE EUROPEAN UNION⁸⁹

In direct contrast to the Americas, the member states of the European Union (EU) have succeeded in linking their trade policy to multilateral human rights commitments. Although the European Union's development is in many fundamental ways historically distinct from the regional developments in the Americas, the EU's experience with human rights institutions and a human rights regime remains instructive. The EU has linked trade and human rights in part to foster democratic values through decentralized governments and individual economic autonomy. But, there are also important economic reasons for linking trade policy and human rights. Where respect for human rights is widely disparate

⁸⁷ See Corbera, *supra* note 56, at 948; Forsythe, *supra* note 66, at 93 n.74.

⁸⁸ See Corbera, *supra* note 56, at 948. The author has often heard this view expressed in Latin American conferences and seminars concerning the resolution of international controversies.

⁸⁹ On Nov. 1, 1993, the twelve member states of what was known as the European Community (EC) approved the Treaty of Maastricht, creating the European Union (EU). The EU is intended to provide the EC with a common foreign and security policy. See *European Union*, FIN. TIMES, Nov. 1, 1993, at 15.

On March 1, 1994, Finland, Sweden, and Austria announced their agreement on the terms for acceding to the EU. If their voters approve the accession the EU will have fifteen members and a population of 368 million.

The European Community (EC) resulted from the merger of three European Communities. They are the European Coal and Steel Community (ECSC) (1951), the European Economic Community (EEC) (1957), and the European Atomic Energy Commission (Euratom) (1957). The EEC, the most important and comprehensive regional organization, was created through the Treaty of Rome of 1957. The original EC included Belgium, France, Italy, Luxembourg, the Netherlands, and West Germany (the "Six"). Denmark, Ireland, and the United Kingdom joined in 1973, Greece in 1981, and Portugal and Spain in 1986.

See JACKSON & DAVEY, *supra* note 22, at 199.

between countries they will not be competing on a "level playing field." This phenomenon is known as "social dumping."⁹⁰ Thus, a country that produces goods made by prison labor, for example, will have an unfair competitive advantage over one that does not.⁹¹ The same is true where the government represses labor unions, ignores environmental problems or fails to provide social services for its people. Thus, labor and political rights are inextricably related to fair trade considerations. As a region begins to integrate economically, and its citizens are interacting more frequently across national borders, human rights violations increasingly will raise regional concerns that are intertwined with economic and trade issues. For example, in Mexico commercial "fraud" is a crime and a joint venture that goes sour may result in the imprisonment of a U.S. investor.⁹²

These concerns prompted the European Union to address human rights issues together with trade policy. The European human rights regime, or Strasbourg process,⁹³ has linked economic integration to human rights. The Strasbourg instruments and institutions require member states to adhere to regional norms in human rights. The Treaty of Rome and other instruments of the EU require the member states of the EU to comply with the pertinent regional trade and commercial law.⁹⁴ Both these regimes require that the member states submit to the jurisdiction of super-

⁹⁰ Within the EU region there has been a perceived need to counter the spread of "social dumping," whereby companies relocate to countries where social costs are cheaper. The EU has reacted to the problem by harmonizing social legislation with monetary policies under the EMU. See Janet McEvoy, *EMU Threatens to Worsen "Social Dumping"*, REUTERS, Oct. 25, 1993. The EU's Parliament has declared it "essential" that a social clause be included in the World Trade Organization, the successor body to GATT. The concern is that the use of low wages and the absence of minimum labor norms may attract European firms to developing countries to produce cheaper goods for export. See *Parliament Urges Social Clause Be Included in GATT Accord*, EUROWATCH, Feb. 21, 1994, at 22.

⁹¹ From the very beginning the GATT recognized that such products could be excluded. GATT, art. XX(e).

⁹² See Dianne Solis, *Commercial Risk: In Mexico, a Dispute Over a Business Deal May Land You in Jail*, WALL ST. J., Sept. 27, 1993, at A1.

⁹³ The European Human Rights Convention was drafted in Strasbourg, Austria, which is also the location of the Council of Europe and the European Commission and the European Court of Human Rights. See ROBERTSON, *supra* note 14, at 10.

⁹⁴ All fifteen member states of the EU are member states of the Council of Europe, the progenitor body of the Strasbourg Process. See *infra* note 102.

national courts that enforce such regional treaties and conventions. What follows is a brief description of the institutions within the European Union's human rights regime.⁹⁵

The most experienced and prestigious European human rights institutions were created under the Council of Europe's auspices.⁹⁶ The Council of Europe was formed in 1949. Like the earlier United Nations Charter, the Statute of the Council called for "the maintenance and further realization of human rights and fundamental freedoms. . . ."⁹⁷ Moreover, every Member of the Council must "accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms."⁹⁸ A member violating this condition may be suspended or expelled from the Council.⁹⁹

The Council of Europe ratified its first treaty—the European Convention on Human Rights—on September 3, 1953.¹⁰⁰ The

⁹⁵ The European Process is pertinent because it successfully linked economic integration with the institutionalization of human rights. See *infra* note 111 and accompanying text. Without the integrative force of institutions that enforce the rule of law, we are left with the imperfect status quo in which the rules of trade and commerce, and the institutions that govern them are wholly independent of the norms and regime of democratic values and human rights. On the world level this separateness is seen in the World Trade Organization (WTO), recently created in the Final Act of the Uruguay Round of the General Agreement on Tariff and Trade which is wholly separate from the United Nations. See General Agreement on Tariffs and Trade—Multilateral Trade Negotiations (The Uruguay Round): Final Act Embodying the Results of the Uruguay Round of Trade Negotiations, Dec. 15, 1993, 33 I.L.M. 1 (1994). Such compartmentalization is maintained in NAFTA and the Organization of American States.

⁹⁶ While the UN and Helsinki systems protect a broader range of human rights, the Strasbourg or Convention system includes adjudicative bodies and legally binding decisions. See NEWMAN & WEISSBRODT, *supra* note 37, at 480.

In 1972-1975 the Conference of Security and Cooperation in Europe (CSCE), better known as the "Helsinki Process," involved thirty-five nations including Turkey, the former Soviet Union, the United States and Canada, met to discuss cultural, humanitarian, and political concerns. All twenty-three of the Council of Europe's member states participated. See *generally id.* at 411-32 (discussing the ongoing process).

⁹⁷ See ROBERTSON, *supra* note 14, at 3 (citing Art. 1 of the Statute of the Council of Europe).

⁹⁸ See *id.* (citing Art. 3 of the Statute of the Council of Europe).

⁹⁹ See *id.* (citing Art. 8 of the Statute of the Council of Europe).

¹⁰⁰ European Convention for the Protection of Human Rights and Fundamental Freedoms [hereafter EUROPEAN CONVENTION], Nov. 4, 1950, 213 U.N.T.S. 222 (entered into force Sept. 3, 1953) (as amended by Protocol No. 3, entered into force Sept. 21, 1970, and Protocol No. 5, entered into force

European Commission and Court of Human Rights were later established to preserve human rights, due process, and democratic principles.¹⁰¹ All fifteen member states of the European Union have ratified the Convention and submitted to its enforcement machinery.¹⁰²

The Convention requires that anyone whose rights are violated must be provided with an effective remedy before a national

Dec. 21, 1971). The Convention guarantees the right to life, freedom from torture or degrading treatment and punishment, due process of law, freedom from *ex post facto* punishment, right to family and private life, freedom of thought, and religion, freedom of expression and assembly, right to marry and found a family. *Id.*; see BUERGENTHAL, *supra* note 56, at 82.

¹⁰¹ See BUERGENTHAL, *supra* note 56, at 84.

¹⁰² See GEORGE A. BERMAN ET AL., CASES AND MATERIALS ON EUROPEAN UNION LAW 146 (1993) (citing twelve member states of the EC). The new member states of the EU, Austria, Sweden and Finland, like the original 12 of the EC, have all ratified the Convention and conferred the right of private petition by special declaration. *Cf.* EUROPEAN CONVENTION, *supra* note 100, at art. 25 (providing for private petition). As of January 1, 1993, the Council's membership was twenty-six with some thirteen additional states who have applied for membership and been accorded special guest status. The twenty-six member states are Austria, Belgium, Bulgaria, Cyprus, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Italy, Liechtenstein, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, San Marino, Spain, Sweden, Switzerland, Turkey, and United Kingdom. *See Council of Europe, Strasbourg*, 14 HUM. RTS. L.J. 56 n.1 (1993). As of January 1, 1993, those in special guests status included Albania, Belarus, Croatia, Czech Republic, Estonia, Latvia, Lithuania, Moldova, Romania, Russia, Slovak Republic, Slovenia, and Ukraine. *Id.* at 56.

Most, but not all of the member states have ratified eight Protocols to the European Convention. Protocol 1 adds a right to property, education and undertakings by the member states to hold free and secret elections. Protocol 4 prohibits deprivation of liberty for breach of contract and bars forced exile and collective expulsion of aliens. Protocol 6 abolishes the death penalty. It has been ratified by eighteen member states. Protocol 7 provides due process for aliens expelled and a right of appeal in criminal proceedings. It also grants compensation in cases of miscarriage of justice and the right not to be subjected to double jeopardy. Protocol 7 has been ratified by thirteen member states. *See Marie*, *supra* note 56, at 63.

Ratification of the European Convention alone does not confer the right of private petition, which requires a special declaration. EUROPEAN CONVENTION, *supra* note 100, at art. 25(1). As of January 1, 1993, Poland was the only Member State of the Council of Europe that had not ratified Art. 25, respecting the right of individual petitions, or Art. 46, respecting the compulsory jurisdiction of the European Court of Human Rights. *Council of Europe, supra*, at 56.

authority.¹⁰³ The Convention allows a member state to file a interstate complaint before the European Commission of Human Rights without having to demonstrate any special interest or relationship to the victim.¹⁰⁴ In about one-half of the member states the Convention is part of the domestic law. As such, it creates rights directly enforceable by individuals. In the other member states implementing legislation is required to assure comparable protection. National courts frequently refer to the Convention to aid them in interpreting such legislation.

The European Court of Human Rights has jurisdiction¹⁰⁵ over cases referred to it by the European Commission of Human Rights as well as member states that have accepted its jurisdiction. Before 1980, the Court had decided few cases. Since then, however, the Court has decided more and more cases every year.¹⁰⁶ Although the Court's judgments are not formally binding precedents they are traditionally followed.¹⁰⁷ The Court is authorized to award "just satisfaction" including declaratory as well as money damages.¹⁰⁸ The Court has developed a rich case law respecting the civil liberties of Western Europe.¹⁰⁹ The Court of Justice of the European Union

¹⁰³ EUROPEAN CONVENTION, *supra* note 100, at art. 13.

¹⁰⁴ Such petitions are rare, perhaps because of their diplomatic sensitivity. See BUERGENTHAL, *supra* note 56, at 89. However, there have been eighteen interstate applications relating to six situations. NEWMAN & WEISSBRODT, *supra* note 37, at 478. Most concerned allegations of human rights violations including the absence of a fair trial, inhuman interrogation techniques, and torture. See *id.* In the most dramatic case, Denmark, Netherlands, Norway, and Sweden filed a complaint against the Greek military government, who seized power by coup, concerning massive human rights violations. The Greek government refused to reach a friendly settlement through a democratic election and later walked out of a Committee of Ministers meeting when it became clear the vote to oust them from the Council of Europe would pass. See *id.* at 478-79. The Committee of Ministers is composed of official government representatives. It is the governing body of the Council of Europe and other organs of the Council. BUERGENTHAL, *supra* note 56, at 84-85.

¹⁰⁵ Advisory jurisdiction is limited to requests by the Committee of Ministers regarding "legal questions concerning the interpretation of the Convention and the Protocols thereto." EUROPEAN CONVENTION, *supra* note 100, at Protocol No. 2, art. 1(1).

¹⁰⁶ See Brian Walsh, *The European Court of Human Rights*, 2 CONN. J. INT'L L. 271, 284 (1987).

¹⁰⁷ BUERGENTHAL, *supra* note 56, at 111-12.

¹⁰⁸ *Id.* at 113.

¹⁰⁹ See, e.g., Soering Case, 161 Eur. Ct. H.R. (ser. A) (1969). In the Soering Case the Court found that a German national could not be extradited to

has looked to this jurisprudence to imbue human rights principles into the European Union's legal framework.¹¹⁰

The European Social Charter, which also was drafted under the auspices of the Council, establishes a regional system for protection of economic and social rights.¹¹¹ As of January 1, 1993, twenty of the twenty-six member states of the Council were parties to the Charter.¹¹² The Charter sets forth extensive labor and family rights as well as vocational training and health and social security protection. A state that becomes a party to the Charter undertakes to consider the proclaimed rights "as a declaration of the aims which it will pursue by all appropriate means."

There is a strong relationship between the European Union's legal institutions and the European system for protection of human rights. The Court of Justice of the European Union¹¹³ has held that law of the EU includes the protection of "fundamental human rights," with the implications that member state measures in violation thereof would be annulled.¹¹⁴ As one author has observed, "[t]he Court has indicated its intention to look to the Convention whenever an issue of human rights comes up before it."¹¹⁵ The Court of Justice has likewise affirmed that fundamental rights form an "integral" part of law derived from member state constitutional traditions, the European Human Rights Convention and its Protocols.¹¹⁶ Such fundamental rights jurisprudence often has profound

Virginia because he might face the degrading prospect of a long wait on death row. *Id.* By September, 1989 the court had decided 151 cases. BUERGENTHAL, *supra* note 56, at 116.

¹¹⁰ BUERGENTHAL, *supra* note 56, at 116.

¹¹¹ See European Social Charter, *opened for signature* October 18, 1961, 529 U.N.T.S. 89 (entered into force February 26, 1965).

¹¹² See Marie, *supra* note 56, at 63. Members of the Social Charter include Austria, Belgium, Cyprus, Denmark, Finland, France, Germany, Greece, Iceland, Ireland, Italy, Luxembourg, Malta, Netherlands, Norway, Portugal, Spain, Sweden, Turkey, and the United Kingdom. *Id.*

¹¹³ The European Court of Justice has thirteen judges. At least one judge from every Member State sits on the Court. The Court may entertain litigation against community institutions and member states to enforce the Treaty of Rome. See BERMANN ET AL., *supra* note 102, at 69.

¹¹⁴ See, e.g., Case 29/69, *Stauder v. City of Ulm*, [1969] E.C.R. 419 (recognizing that community institutions must respect basic human rights).

¹¹⁵ See Joseph H.H. Weiler, *Protection of Fundamental Human Rights Within the Legal Order of the European Communities*, in INTERNATIONAL ENFORCEMENT OF HUMAN RIGHTS 113, 134 (Rudolf Bernhardt & John A. Jolowitz eds., 1987).

¹¹⁶ See BERMANN ET AL., *supra* note 102, at 147. The Court of Justice has recognized that "international treaties for the protection of human rights on

commercial implications.¹¹⁷ The 1992 Treaty on Economic Union now requires the Union to respect the European Human Rights Convention.¹¹⁸

In total, these several institutions work together to ensure that human rights considerations play an integral part in trade policy and governmental action. The EU experience is a reminder that a multilateral approach to the human rights problem can succeed. The process, however, is evolutionary and likely to involve the interfacing of legal systems.

IV. IS THE UNITED STATES MOVING TOWARD INTERNATIONAL HUMAN RIGHTS OBLIGATIONS?

The issue then remains as to how the United States and its regional partners can achieve a link between trade and institutionalized human rights. It hardly needs to be argued that there are human rights violations serious enough to justify establishing this link.¹¹⁹ Yet, as has already been suggested, this move toward the

which the member states have collaborated, or of which they are signatories, can supply guidelines which should be followed within the framework of Community law." Case 4/73, *Nold v. Commission*, [1974] E.C.R. 491.

¹¹⁷ In *Elliniki Radiophonia Tileorassi v. Dimotiki Etairia Phiroforissis*, Case C-260/89 (June 18, 1991), the Court of Justice rejected a Greek appeal to public policy to justify its television monopoly, holding that such considerations are limited by the guarantee of freedom of expression of Article 10 of the European Convention on Human Rights. See BERMANN ET AL., *supra* note 102, at 566-67.

¹¹⁸ See BERMANN ET AL., *supra* note 102, at 146.

¹¹⁹ See Martin Shepack, *Human Rights and the United States—Mexico Free Trade Agreement*, 4 HARV. HUM. RTS. J. 163 (1991). See generally ACLU & HUMAN RIGHTS WATCH, *HUMAN RIGHTS VIOLATIONS IN THE UNITED STATES* (1993); AMERICAS WATCH, *BRUTALITY UNCHECKED: HUMAN RIGHTS ALONG THE U.S. BORDER WITH MEXICO* (1992); AMERICAS WATCH, *HUMAN RIGHTS IN MEXICO: A POLICY OF IMPUNITY* (1990); AMERICAS WATCH, *MEXICO, HUMAN RIGHTS WATCH/AMERICAS WATCH WRITES TO PRESIDENT CLINTON URGING NAFTA SUMMIT ON HUMAN RIGHTS* (1993); AMERICAS WATCH, *UNCEASING ABUSES: HUMAN RIGHTS IN MEXICO ONE YEAR AFTER THE INTRODUCTION OF REFORM* (1991); AMERICAS WATCH, *UNITED STATES FRONTIER INJUSTICE* (1993); *TORTURE WITH IMPUNITY*, *supra* note 56; *PAPER PROTECTION*, *supra* note 56; MINNESOTA ADVOCATES FOR HUMAN RIGHTS, *NO DOUBLE STANDARDS IN INTERNATIONAL LAW* (1992) [hereafter *NO DOUBLE STANDARDS*] (unpublished paper of file with author). Reported human rights violations in Mexico include disappearances, unlawful arrests, torture, and assassination. Victims of this government abuse include: political party leaders and followers, land reformers and rural human rights activists, labor union organizers, human rights workers, lawyers, and journalists. The March 23, 1944 assassination of the PRI presidential

institutionalization of human rights must begin with a commitment by the United States to fundamentally alter its approach. In short, the United States must shift from its historical approach of imposing the link between human rights unilaterally to the EU's approach of accepting a multilateral human rights regime.

A. *Signs of Progress: The United States Ratification of Three Human Rights Conventions*

Is the United States prepared to make this transition? Many have hailed developments over the last decade as a signal that the United States is finally prepared to accept international human rights obligations. The first such development was President Reagan's call for the ratification of the Genocide Convention.¹²⁰ The Genocide Convention was a casualty of the earlier chronicled "Bricker" movement of the 1950s.¹²¹ The Genocide Convention's opponents in the 1980s repeated the well-honed arguments against "government by treaty," that had succeeded in the 1950s, but the Senate approved the Genocide Convention in 1986.¹²²

President Reagan's re-submission of the Genocide Convention was seen by many as a turning point in securing U.S. adherence to international human rights obligations. Professor Forsythe observed that Senate resistance may no longer be an insurmountable obstacle after the Senate's ratification of the Genocide convention.¹²³

Professor Barbara Stark wrote in a similarly optimistic vein:

[R]ecent developments, including the economic unification of Europe and the unprecedented Gulf War coalition, signal a sea

candidate, Luis Donaldo Colosio Murieta, was part of this pattern of human rights abuse in Mexico. He was apparently murdered by former members of the State Judicial Police of Baja California Norte, a group associated with police abuse, torture, and with the impunity of the local political order. TORTURE WITH IMPUNITY, *supra*, at 6.

¹²⁰ The U.S. Senate gave its advice and consent to the Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 (1951), on February 18, 1986, but delayed ratification until the adoption of the implementing legislation. See Genocide Convention Implementation Act of 1987, Pub. L. No. 100-606, 102 Stat. 3045 (1988) (codified at 18 U.S.C. §§ 1091-1093 (1988)).

¹²¹ See generally Kaufman & Whiteman, *supra* note 120, at 333 (discussing effects of Bricker Amendment).

¹²² KAUFMAN, *supra* note 42, at 196; Stewart, *supra* note 56, at 78 n.5.

¹²³ DAVID P. FORSYTHE, THE INTERNATIONALIZATION OF HUMAN RIGHTS 135 (1991).

change in international law. The United States is becoming more involved in international organizations, and more concerned about its credibility in the international community. We are in the process of shaping a new leadership role for ourselves that transcends that of "world policeman." This includes a renewed and expanded commitment to international human rights.¹²⁴

This optimism was fueled in part by the United States rapid ratification of the Torture Convention, which entered into force on June 26, 1987.¹²⁵ President Reagan signed it on April 18, 1988¹²⁶ and the Senate gave its advice and consent to ratification on October 27, 1990.¹²⁷ The Convention established a regime of "universal jurisdiction" whereby each state party is required to prosecute (or extradite for prosecution) torturers found in its territory.¹²⁸

This trend toward ratification continued in August, 1991, when the Bush Administration recommended Senate ratification of the International Covenant on Civil and Political Rights (ICCPR).¹²⁹ On April 2, 1992, the U.S. Senate gave its advice and consent to the ICCPR.¹³⁰ On September 8, 1992, the United States deposited its instruments of ratification and the ICCPR became a binding inter-

¹²⁴ Barbara Stark, *Economic Rights in the United States and International Human Rights Law: Toward an "Entirely New Strategy,"* 44 HASTINGS L.J. 79, 85-86 (1992).

¹²⁵ The Senate gave its advice and consent to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, 39 U.N. GAOR Supp. (No. 51) at 197, 27 I.L.M. 1027 (1984) (entered into force June 26, 1987), on October 27, 1990, but the United States will not deposit its instruments of ratification until Congress adopts the necessary implementing legislation. Stewart, *supra* note 56, at 78 n.5 & 6; see Natalie H. Kaufman & David Whiteman, *Opposition to Human rights Treaties in the United States Senate: The Legacy of the Bricker Agreement*, 10 HUM. RTS. Q. 309, 332-33 (1988) (describing factors inhibiting Congressional action); see *infra* notes 142-55 and accompanying text (discussing U.S. ratification of Torture Convention).

¹²⁶ Message to the Senate Transmitting the Convention Against Torture and Inhuman Treatment or Punishment, PUB. PAPERS, 623-24 (May 20, 1988). See Marie, *supra* note 56, at 65; Stewart, *supra* note 56, at 78 n.6.

¹²⁷ 101st Cong., 2d Sess., 136 CONG. REV. 17,486 (Oct. 27, 1990). As of January, 1993, the United States had not yet ratified the Convention for lack of implementing legislation. See Marie, *supra* note 56, at 65; Stewart, *supra* note 56, at 78 n.6.

¹²⁸ See Marie, *supra* note 56, at 65; Stewart, *supra* note 56, at 78 n.6.

¹²⁹ See *International Covenant on Civil and Political Rights*. DEP'T ST. DISPATCH, Sept. 16, 1991 (stating that President Bush urged Senate to renew consideration of ICCPR). For the text of the ICCPR, see *International Covenant on Civil and Political Rights*, Dec. 16, 1966, 999 U.N.T.S. 171.

¹³⁰ 102d Cong., 2d Sess., 138 CONG. REC. 4,781 (Apr. 2, 1992).

national obligation for the United States, sixteen years after it came into effect internationally.¹³¹ After languishing in the Senate for some fourteen years, the bitter resistance to the ICCPR's ratification had so diminished that the vote of the Senate Foreign Relations Committee was unanimous and there was no objection on the Senate floor.¹³² The signing of the ICCPR is a particularly important milestone because the ICCPR is the single most important international human rights convention.

B. Ratification and Reservations: The Illusory Nature of Recent United States International Human Rights Commitments

Although the U.S. Senate has given its advice and consent to three human rights conventions over the last decade, upon closer examination it is clear that the United States is not really moving toward accepting international human rights commitments. Even though the Senate has approved these conventions, it has done so with such extensive "reservations" that the U.S. commitment to the conventions is often illusory.

A reservation is a mechanism whereby a country declines to follow a particular aspect or provision of a treaty.¹³³ Such reservations are essential to a binding commitment in that some international conventions may require changes to a country's constitutional order that its political institutions cannot tolerate. For a country to ratify conventions without reservations would be meaningless unless the country had the political will to modify fundamental constitutional norms. Such symbolic ratification is often practiced by authoritarian regimes, who ratify human rights conventions without any intention of compliance.¹³⁴ Liberal democracies have not engaged in such insincere ratification, but rather have frequently used reservations.¹³⁵ On the other hand, however, extensive reser-

¹³¹ Text of the Resolution of Ratification, 31 I.L.M. 658 (1992).

¹³² See Stewart, *supra* note 56, at 78.

¹³³ The Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331, T.S. No. 58 (1980), 8 I.L.M. 679 (1969), defines a reservation as "a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that state." *Id.* at art. 2(d).

¹³⁴ See Morris B. Abram, *Human Rights and the United Nations: Past as Prologue*, 4 HARV. HUM. RTS. J. 69, 71 (1991) (deploring ratification by countries with "neither the intention nor the desire to abide by them").

¹³⁵ Finland, Denmark, Austria, and the former Federal Republic of Germany are countries who took reservations to the International Covenant

vations can "make . . . a mockery of the international human rights consensus reflected in these treaties."¹³⁶ This section explores the extent and effect of the U.S. reservations taken with respect to the Genocide Convention, Torture Convention, and the ICCPR.

1. The Genocide Convention

President Truman transmitted the Genocide Convention to the U.S. Senate on December 11, 1948. Although the Senate Foreign Relations committee favorably reported the measure to the Senate in 1970, 1971, 1973, and 1976, the Senate did not give its approval until 1986. By the end of July, 1988, 98 states were party to the Convention.¹³⁷ Senate ratification was qualified by numerous reservations. Frank Newman and David Weissbrodt describe these limitations as follows:

Ratification was qualified by two reservations, five understandings, and one declaration. One reservation requires specific consent to submitting a dispute about the treaty to the International Court of Justice. The Senate also asserted a reservation indicating the supremacy of the U.S. Constitution over any treaty obligation. The five understandings limited the meaning of several provisions.¹³⁸

The Senate specifically declared that implementing legislation would be required before the administration could deposit the formal ratification of the treaty. Such legislation was adopted and the Convention was formally ratified on November 25, 1988.¹³⁹ Nine European nations objected to the U.S. reservations indicating the supremacy of the U.S. Constitution over the Convention.¹⁴⁰

2. The Torture Convention

On April 18, 1988, President Reagan signed the Torture Convention,¹⁴¹ which the Senate ratified on October 27, 1990.¹⁴² President Reagan's letter of transmittal, however, stated that the United States

while the former East German regime, which was far from compliance, did not. Rovine & Goldklang, *supra* note 41, at 57-59.

¹³⁶ KAUFMAN, *supra* note 42, at 197.

¹³⁷ See NEWMAN & WEISSBRODT, *supra* note 37, at 402.

¹³⁸ *Id.*

¹³⁹ *Id.* at 402-03.

¹⁴⁰ *Id.*

¹⁴¹ See *supra* notes 125-27 and accompanying text (discussing U.S. actions regarding Torture Convention).

¹⁴² As of January, 1993, the United States has not yet ratified the Convention for lack of implementing legislation. See Marie, *supra* note 56, at 65; Stewart, *supra* note 56, at 78 n.6.

would not recognize the UN Committee Against Torture's (UNCAT) competence to confidentially investigate charges of torture in the United States. The transmittal also noted that the United States would not recognize the Committee's ability to receive and consider communications from nations or individuals that allege that the United States is violating the Convention.¹⁴³

The Senate also added numerous substantive and procedural reservations. The Senate rejected the prohibition on "cruel, inhuman or degrading treatment."¹⁴⁴ The European Court of Human Rights had construed such treatment to include the U.S. practice of lengthy reviews of death sentences and the conditions of death row confinement.¹⁴⁵ The Senate adopted the reservation rejecting the arbitration or adjudication of inter-nation disputes over the interpretation of the Convention.¹⁴⁶ The Senate significantly narrowed the definition of torture,¹⁴⁷ restricted the liability of public officials

¹⁴³ Ronald Reagan, *Message to the Senate Transmitting the Convention Against Torture and Other Inhuman Treatment or Punishment*, 24 WEEKLY COMP. PRES. DOC. 642 (May 20, 1988). Accordingly, it was President Reagan's intention to exempt the United States, as provided by art. 28, from the confidential complaint system of art. 20, and to decline to recognize inter-state or individual complaints under arts. 21 or 22. President Reagan's letter also stated that "[i]t would be possible for the United States in the future to accept the competence of the Committee pursuant to Articles 20, 21, and 22, should experience with the Committee prove satisfactory and should the United States consider this step desirable." *Id.*

The Senate later recognized the competence of the UNCAT to receive intra-State communication but "only if they come from a State party which has made a similar declaration." Senate of the United States, *Advice and Consent to the Ratification of the U.S. Convention against Torture with Reservations* [hereafter *Torture Reservation*], reprinted in 12 HUM. RTS. L.J. 276 (1991).

¹⁴⁴ *Torture Reservation*, *supra* note 143, sect. I(1), at 276 (restricting "cruel, inhuman or degrading treatment or punishment" to treatment or punishment forbidden by the U.S. Constitution).

¹⁴⁵ See *Soering Case*, 161 Eur. Ct. H.R. (ser. A) (1969).

¹⁴⁶ *Torture Reservation*, *supra* note 143, sect. I(2), at 276.

¹⁴⁷ The UNCAT defines torture as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted . . ." *Torture Convention*, *supra* note 37, at art.1. The Senate reservation provides that "in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from: (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to

for such acts,¹⁴⁸ and limited the protection available to persons deported to a country where they “would be in danger of” torture.¹⁴⁹ A further Senate reservation limited damage actions for torture taking place in the territory of the state party¹⁵⁰ and recognized the jurisdiction of the states to decide these matters.¹⁵¹ Finally, the Senate refused to ratify the Convention until the President had notified all parties that such ratification would not require action “prohibited by the Constitution of the United States as interpreted by the United States.”¹⁵²

The Torture Convention reservations are comprehensive and substantial. They include almost all possible defenses to a torture

death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.” *Torture Reservation*, sect. II(1)(a), *supra* note 143, at 276.

¹⁴⁸ The UNCAT proscribes the use of torture by or with the acquiescence, instigation or consent of a public official. Pain or suffering arising from a lawful sanction is exempted. Torture Convention, *supra* note 37, at art.1. The reservation, however, provides that torture “is intended to apply only to acts directed against persons in the offender’s custody or physical control.” *Torture Reservation*, sect. II(1)(b), *supra* note 143, at 276. Additionally, “the United States understands that ‘sanctions’ includes judicially imposed sanctions and other enforcement actions authorized by United States law or by judicial interpretation of such law.” *Id.* sect. II(1)(c), at 276. The reservation goes on to add—in what would appear to eviscerate whatever may have been left of the convention—that “‘acquiescence’ requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his legal responsibility to intervene to prevent such activity.” *Id.* sect. II(1)(d), at 276. The reservation concludes with the disclaimer that “the United States understands that noncompliance with applicable legal procedural standards does not per se constitute torture.” *Id.* sect. II(1)(e), at 276.

¹⁴⁹ The Senate reservation provides that “the United States understands the phrase ‘where there are substantial grounds for believing that he would be in danger of being subjected to torture’ as used in Article 3 of the Convention, to mean, ‘if it is more likely than not that he would be tortured’.” *Id.* sect. (II) (2), at 276. In the immigration context, the Supreme Court rejected the “more likely than not” standard for the “well-founded fear” criteria of political asylum, pursuant to 8 U.S.C. § 1158. *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987).

¹⁵⁰ The Reservation provides that the U.S. government shall act consistent with the Federal system. *Torture Reservation*, sect. II(3), *supra* note 143, at 276.

¹⁵¹ *Id.* sect. (II) (5), at 276. It would appear that this federalism provision is an anachronism after *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 537-47 (1985), which held that the Tenth Amendment set no affirmative limit on Congressional power under the Commerce Clause.

¹⁵² *Torture Reservation*, sect. IV, *supra* note 143, at 276.

prosecution. Further, as of March 1, 1994—well over three years after the Senate's advice and consent—the United States had not deposited instruments of ratification for the Torture Convention.¹⁵³ Canada and Mexico have ratified the UN Torture Convention. But, of the NAFTA parties, only Canada has recognized the competence of the UNCAT.¹⁵⁴ Mexico has been criticized severely by the UNCAT for its failure to prevent or sanction torture which was found to be a “generalized and systematic practice.”¹⁵⁵

3. The International Covenant of Civil and Political Rights

Optimistic commentators also point to the ratification of the International Covenant of Civil and Political Rights as a signal of

¹⁵³ See Marie, *supra* note 56, at 65; Stewart, *supra* note 56, at 78 n.6; *State Department Human Rights Report*, Hearing of the International Security, International Organizations, and Human Rights Subcomm. of the House Foreign Affairs Comm. [hereafter *Human Rights Report*], Feb. 1, 1994, available in FED. NEWS SERVICE (testimony of Assistant Secretary of State Timothy Wirth) (Mr. Wirth testified that “[t]he Senate provided its advice and consent to the Convention Against Torture in 1990, and we’re waiting for Congress to enact the necessary implementing legislation on that.”).

¹⁵⁴ See Marie, *supra* note 56, at 65.

¹⁵⁵ In its November 17, 1992 meeting the UNCAT concluded that “an extremely large number of acts of torture of all kinds were perpetrated in Mexico despite the existence of a legal and administrative act designed to prevent and punish them.” The UNCAT further found that “the judicial police, in particular those officials who were responsible for acts of torture, [seem] to enjoy a high degree of impunity in Mexico.” *Mexico’s Record—Human Rights and Workers’ Rights*, Hearing Before Comm. on Foreign Affairs, Subcomm. on International Security, International Organizations and Human Rights and Subcomm. on Western Hemisphere Affairs, Oct. 26, 1993 (testimony of Carlos M. Salinas, Government Programs Officer, Amnesty International) (transcript on file with author). In November 1992, the UNCAT rejected the Mexican government’s report as insufficient and said torture continued to be a “generalized and systematic practice.” See Rep. John LaFalce, *Why I Oppose NAFTA, At the Core of My Concern: Mexico Has Dramatic and Stark Differences With Us In Its Approach to Democracy, Human Rights, Justice*, ROLL CALL, Mar. 29, 1993. Mexico was to report back to the Committee as to what measures it had taken to correct what the UN body in Geneva described as “a shocking tolerance of torture by law enforcement agencies.” See David Todd, *A Reputation on the Line: Mexico’s President Wants to be Remembered Favorably, He May Have Blown His Chance*, VANCOUVER SUN, Jan. 15, 1994, at B5. In another case, the Committee Against Torture took the unprecedented step of asking Canada not to deport a Mexican national who claimed he had been tortured for being a whistle blower on corruption. Alexander Norris, *Torture Victim Denied Freedom; Mexican Spends Christmas in Jail*, THE GAZETTE (Montreal), Dec. 26, 1993, at A3.

the increasing United States commitment to international human rights commitments.¹⁵⁶ Yet, the United States also took extensive reservations in ratifying this treaty.

The ICCPR was ratified subject to reservations respecting federalism,¹⁵⁷ non self-execution,¹⁵⁸ free speech guarantees,¹⁵⁹ equal protection,¹⁶⁰ capital punishment,¹⁶¹ criminal sentencing,¹⁶²

¹⁵⁶ See generally Stewart, *supra* note 56.

¹⁵⁷ See *id.* at 79. As it did with the Torture Convention, *supra* note 37, the United States stated that the Covenant "shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matter covered and otherwise by the state and local government." The Federal Government is further committed to "take measures appropriate to the Federal system" to ensure that the state and local governments fulfill their obligations.

¹⁵⁸ The operative provisions of the ICCPR, articles 1 to 27, are not self-executing. See *id.*

¹⁵⁹ The ICCPR, unlike U.S. free speech protection, restricts speech that incites discrimination. Thus, this was one instance where the ICCPR provisions were more restrictive than U.S. law. See *id.* Critics of the reservations have approved this one. See *Lawyers Committee for Human Rights (LCHR), New York*, 14 HUM. RTS. L.J. 125, 125 (1993) [hereafter *Frankel & Posner*] (printing Dec. 10, 1991, letter of Marvin E. Frankel, Chairman of the Lawyers Committee for Human Rights and Michael Posner, Executive Director); Nadine Strossen, *United States Ratification of the International Bill of Rights: A Fitting Celebration of the Bicentennial of the U.S. Bill of Rights*, 24 U. TOL. L. REV. 203, 216 (1992). The United States adopted a declaration stating, "States Party should wherever possible refrain from imposing any restrictions or limitations on the exercise of rights recognized and protected by the Covenant even when such restrictions and limitations are permissible under the terms of the Covenant." Stewart, *supra* note 56, at 80.

¹⁶⁰ The United States reservation excepted discrimination that is rationally related to legitimate government objectives. An example of this is the protection of the aged. See Stewart, *supra* note 56, at 80.

¹⁶¹ For example, the United States reservations are designed to avoid the ruling of the United Nations Human Rights Committee, which like the European Court of Human Rights have held that prolonged judicial proceedings in capital cases may constitute cruel, inhuman or degrading treatment, or punishment in contravention of the International Covenant or European Convention standards. *Cf. Soering Case*, 161 Eur. Ct. H.R. (ser. A) (1969). Moreover, the reservations address Convention art. 6, para. 5 that prohibits the death penalty for crimes committed by persons under the age of 18, by shielding the laws of a majority of states which provide for such penalties. See Stewart, *supra* note 56, at 81; *cf. Stanford v. Kentucky*, 492 U.S. 361 (1989) (upholding death penalty for offenses committed by juveniles). Sixteen states do not explicitly forbid capital punishment of pregnant women. Marvin Frankel criticizes the failure of the United States to bring its law into conformity with the international standard. *Frankel & Posner, supra* note 159, at 126.

separating accused from the convicted and juvenile from adult offenders,¹⁶³ the right to compensation for unlawful arrest or detention,¹⁶⁴ appointment of counsel of choice,¹⁶⁵ compulsory attendance of witnesses,¹⁶⁶ and double jeopardy.¹⁶⁷ The Lawyers Committee for Human Rights of New York objected strongly to what it viewed as the Administration's attitude that "this treaty should not, in any way, change or commit us to change anything in United States law or practice, now or in the future." It called upon the Senate to delay ratification until the "most objectionable reservations are removed."¹⁶⁸ Further, the question remains whether the implementing legislation, known as the International Human Rights Conformity Act of 1992, will achieve substantial United States compliance with the ICCPR¹⁶⁹ and thereby usher in broader human rights protections.¹⁷⁰ A related question is when the implementation legislation will be enacted.

¹⁶² The United States excepted itself from the Covenant requirement that State parties give offenders the benefit of any post-offense reduction in penalty. See Stewart, *supra* note 56, at 81. The New York Lawyer's Committee notes that the fact that United States law does not require this practice is no reason not to adopt it. Frankel & Posner, *supra* note 159, at 126.

¹⁶³ While United States law generally conforms to this, the Senate felt that the United States needed flexibility to cover certain "exceptional" circumstances. See Stewart, *supra* note 56, at 82.

¹⁶⁴ United States law ordinarily does not provide for damages for arrests or detention made in good faith but later found unlawful. See *id.* The Lawyer's Committee sees this reform as a desirable one that "would not impose undue burdens . . ." Frankel & Posner, *supra* note 159, at 127.

¹⁶⁵ United States law does not allow an indigent defendant to receive counsel of her choice nor does it provide counsel at all where the defendant is financially able to afford counsel or when imprisonment is not imposed. See Stewart, *supra* note 56, at 82.

¹⁶⁶ United States law may require a showing of necessity before a defendant can compel the attendance of witnesses. See *id.*

¹⁶⁷ United States double jeopardy protection does not prohibit successive trials for the same crime in state or federal courts or in courts of two states. See *id.* at 83. The Lawyer's Committee sees, "no reason why the U.S. should not now adopt this position by convention and make the change required." Frankel & Posner, *supra* note 159, at 127-28.

¹⁶⁸ See *Lawyers Committee for Human Rights (LCHR), New York*, 14 HUM. RTS. L.J. 125, 129 (1993) (printing Mar. 2, 1992, letter of Marvin E. Frankel, Chairman of the Lawyers Committee for Human Rights).

¹⁶⁹ See Strossen, *supra* note 159, at 203.

¹⁷⁰ The ICCPR is more rights-protective for privacy or sexual autonomy than the United States Constitution. In *Bowers v. Hardwick*, 478 U.S. 186, 192-196 (1986), the Supreme Court ruled that consensual homosexual activity had been universally condemned "throughout the history of western

The Optional Protocol to the Covenant on Civil and Political Rights enables private parties to file individual complaints with the Human Rights Committee. As of January 1, 1993, Canada is the only NAFTA party that has ratified the Optional Protocol.¹⁷¹ There is no indication that the Clinton administration is more likely than the Carter administration to submit the Optional Protocol to the Senate for ratification.¹⁷²

In sum, the signals of a shift in U.S. policy toward accepting multilateral human rights commitments appear to be illusory.

V. PROSPECTS FOR IMPROVING THE NORTH AMERICAN HUMAN RIGHTS REGIME IN THE ERA OF NAFTA

The U.S. agreement to join Mexico and Canada in a regional trade agreement presents an ideal opportunity for the United States to accept multilateral human rights obligations. While NAFTA is not an effort to form an "American Union" or a political integration, it is a regional agreement of extraordinary breadth that will undoubtedly evolve. NAFTA not only establishes a free trade

civilization." *Id.* at 196 (Burger, C.J., concurring). Five years earlier, the European Court of Human Rights held that the right to engage in homosexual sodomy is guaranteed under the European Convention on Human Rights. *Dudgeon Case*, 45 Eur. Ct. H.R. (ser. A) (1981) (invalidating Northern Ireland law); *accord Norris Case*, 129 Eur. Ct. H.R. (ser. A) (1988) (invalidating Irish statute criminalizing homosexual conduct).

In *Rust v. Sullivan*, 111 S. Ct. 1759, 1777-78 (1991), the United States Supreme Court held that employees at government-funded medical clinics may not speak about the availability of abortion, even when abortion is medically indicated for a particular patient. The European Commission on Human Rights held that it violated the international human rights norms secured by the European Convention to prohibit health professionals from giving information to Irish women about getting abortions in other countries, even though such abortions were outlawed in Ireland. *Open Door Counselling Ltd. v. Ireland*, 14 E.H.R.R. 131 (1991); *see Strossen, supra* note 159, at 218-219.

¹⁷¹ *See Marie, supra* note 56, at 62. The Carter Administration believed that the Senate might reject all U.N. human rights treaties if the more controversial Optional Protocol had been submitted. *See Rovine & Goldklang, supra* note 41, at 54-55. This Optional Protocol has never been signed by any United States president. *See NEWMAN & WEISSBRODT, supra* note 37, at 578.

¹⁷² Secretary of State Warren Christopher and Assistant Secretary of State Timothy Wirth have described the Clinton Administration's goals for achieving Senate ratification of human rights conventions without mentioning the Optional Protocol. There has been no indication that President Clinton will sign the Protocol.

area,¹⁷³ but includes regional agreements respecting energy, investment, services, telecommunications, competition policy, intellectual property, the environment, and labor.¹⁷⁴ One writer has commented that the scope of the agreement is far more intrusive than ordinary trade agreements.¹⁷⁵

Also, and importantly, the public and Congress recognized during the NAFTA debate that human rights concerns such as the lack of a reliable judicial system and the protection of workers' rights to organize were significant.¹⁷⁶ There was intense focus on the issue of "social dumping."¹⁷⁷ As the number of Americans involved in

¹⁷³ To engage in preferential trade practices, the NAFTA parties must eliminate "duties and other restrictive regulations of commerce . . . on substantially all the trade between the constituent territories." GATT, *supra* note 13, at art. XXIV:8.

¹⁷⁴ North American Free Trade Agreement, arts. 601-09, Dec. 17, 1992, 32 I.L.M. 289, 364-68 (energy and basic petrochemicals); arts. 1201-13, 32 I.L.M. 649-53 (cross-border trade in services); arts. 1301-10, 32 I.L.M. at 653-57 (telecommunications); arts. 1501-05, 32 I.L.M. at 663-64 (competition policy, monopolies, and state enterprises); arts. 1701-21, 32 I.L.M. at 671-80, 32 I.L.M. at 663-64 (intellectual property) (1994); see GARY C. HAUFBAUER & JEFFREY J. SCHOTT, NAFTA: AN ASSESSMENT 157-160 (1993) (describing "side accords" on environmental, labor and import surge issues).

¹⁷⁵ See Stephen Zamora, *The Americanization of Mexican Law: Non-Trade Issues in the North American Free Trade Agreement*, 24 LAW & POL'Y INT'L BUS. 391 (1993). At the same time the Final Act of the Uruguay Round has globalized such intrusiveness by including agreements on intellectual property services and investment that will govern 117 nations. Moreover, issues such as environmental protection are now seen as a necessary part of a trade agreement. See John H. Jackson, *World Trade Rules and Environmental Policies: Congruent or Conflict*, 49 WASH. & LEE L. REV. 1227, 1228 (1992).

While NAFTA does not so much as mention civil and political rights (first generation rights) nor refer to the United Nations or the Organization of American States, it does address social and economic rights with respect to protection of the environment and labor rights (second generation rights). See HUFBAUER & SCHOTT, *supra* note 84, at 157-60. Civil and political rights are characterized as "first generation" rights. BUERGENTHAL, *supra* note 56, at 176. The protection of social and economic rights have lagged behind the protection of civil and political rights in the United Nations, the European Union, and the Organization of American States. Such rights are generally classified as "second generation." *Id.* In this context a commitment to address human rights issues would be congruent with this broad ranging undertaking to harmonize legal obligations.

¹⁷⁶ *Mexico's Political and Legal Environment for Doing Business*, Hearing on North American Free Trade Agreement, Comm. on Small Business, Feb. 25, 1993 (remarks of John J. LaFalce, Chairman) (transcript on file with author).

¹⁷⁷ Ross Perot, the presidential candidate of 1992, argued that the wage disparity between the United States and Mexico would attract over six million

commercial and personal matters in Mexico increase, the threat of incarceration or torture will become more generalized. A disgruntled Mexican business partner and a willing if not corrupt Mexican judiciary may jail an American business person whose NAFTA inspired business dealings in Mexico go sour.¹⁷⁸

But, these same critics have failed to make the essential analytical leap to solve these problems. Because NAFTA has already passed, it is no longer adequate to say that the United States should not have passed NAFTA because of these human rights concerns. Further, it is not adequate to say that the United States should continue its longstanding and ineffective policy of unilateral finger-wagging and intervention to promote progress in human rights. History demonstrates that this is a failed approach. The United States must continue to work for human rights progress, but by different means. The United States should take the first step in assuring human rights progress by committing itself to the authority of international institutions.

President Clinton, in his short tenure, has continued the United States tradition of ideologically linking trade and human rights. This ideological link is clear in the U.S. policy of conditioning China's most-favored-nation status on its improvement on human rights issues.¹⁷⁹ Ironically, one of the conditions imposed by the United States for extensions of China's MFN status is their compliance with the Universal Declaration of the Rights of Man.¹⁸⁰ Yet,

jobs to Mexico, creating what he called a "giant sucking sound" to the South. H. ROSS PEROT & PAT CHOATE, *SAVE YOUR JOBS, SAVE YOUR COUNTRY, STOP NAFTA* 41 (1993).

¹⁷⁸ See Solis, *supra* note 92, at A1.

¹⁷⁹ President Clinton's executive order of May 28, 1993 requires the Secretary of State to recommend to the president by June 3, 1994 whether to extend China's MFN status for another year. The order imposes several conditions upon this extension. China must show: beginning adherence to the universal declaration of human rights; an acceptable accounting of those imprisoned or detained for non-violent expression of political and religious beliefs; humane treatment of prisoners, including allowing access to Chinese prisons by international humanitarian and human rights organizations; that it is protecting Tibet's distinctive heritage; that it is permitting international radio and television broadcasts into China. Finally, the secretary cannot recommend extension of MFN unless it will promote freedom of emigration and unless China is complying with the U.S. memorandum of understanding on prison labor. See Diane F. Orentlicher & Timothy A. Gelatt, *Public Law, Private Actors: The Impact of Human Rights on Business Investors in China*, 14 *Nw. J. INT'L L. & Bus.* 66, 79 (1993).

¹⁸⁰ See Orentlicher & Gelatt, *supra* note 179, at 79.

neither China nor the United States have ratified the Optional Protocol that permits private petitions for violations of the ICCPR.¹⁸¹ Again, as in the case of Mexico, China has deeply resented U.S. unilateralism.¹⁸² While multilateral intervention probably would not be welcome either, in the longer term the cause of human rights in China would be better served by multilateral institution building that would proceed on a parallel plane with China's accession to the World Trade Organization. Over time it may be possible to explicitly link membership in the WTO to adherence to the ICCPR and the Optional Protocol. But again the leadership of the United States is wanting.

Similarly, the reaction of the United States to the apparent human rights violations in Mexico, occasioned by the revolt in Chiapas has been decidedly unilateral. Assistant Secretary Shattuck's remarks concerning the human rights violations in Chiapas are revealing:

When the issue of Chiapas developed . . . , the United States, through its ambassador, was very much engaged in discussions with the government of Mexico, and we believe that the close relations that have in many ways been solidified by the NAFTA vote and the ratification of NAFTA has assisted in that kind of access. . . . And there is some evidence that during the first week there was excessive use of force, there was some evidence of extrajudicial killings and some evidence of torture. . . . But we are following it very closely, but by and large, we see that the Mexican government has responded in an enlightened way to the allegations of human rights abuses and that response, we hope, will continue and expand.¹⁸³

President Clinton has been considerably more tentative, however, in making multilateral commitments. In June, 1993, Secretary of State Warren Christopher informed the World Conference on Human Rights that the Clinton administration would ask the U.S.

¹⁸¹ While the United States has ratified the ICCPR it has not signed the Optional Covenant nor made the ICCPR part of U.S. law by adoption of the International Human Rights Conformity Act of 1992, which remains pending at this writing. *See supra* note 129. China has not ratified the ICCPR. *See Marie, supra* note 56, at 62.

¹⁸² The conditioning of MFN status on China's human rights performance clashes with China's resistance to another country's orders. Prime Minister Li Ping was quoted as saying "China will never accept the U.S. human rights concept." *See Elaine Sciolino, China Rebuffs U.S. Over Human Rights, N.Y. TIMES*, Mar. 13, 1994, at A1.

¹⁸³ *Human Rights Report, supra* note 153 (testimony of Assistant Secretary Shattuck).

Senate to ratify four international human rights treaties, signed by previous presidents, but never enacted into law. These treaties were the International Convention on the Elimination of All Forms of Racial Discrimination; the Convention on the Elimination of all Forms of Discrimination against Women; the American Convention on Human Rights and the International Covenant on Economic, Social, and Cultural Rights (ICESCR).¹⁸⁴

Subsequent statements by the Secretary, however, suggest that the administration will no longer seek the passage of either the American Convention or the ICESCR.¹⁸⁵ The Lawyer's Committee for Human Rights and Human Rights Watch questioned the strategy of not submitting the treaties as a package given that the American Convention and ICESCR are likely to be the most contentious.¹⁸⁶ The United States is the only major industrialized democracy that has not yet ratified the ICESCR.¹⁸⁷

¹⁸⁴ See Jim Lobe, *Human Rights: Christopher Speaks of "Moral Imperative,"* INTER PRESS SERV., June 14, 1993.

¹⁸⁵ On June 14, 1993, Secretary of State Warren Christopher announced that the Clinton administration would "move promptly to obtain the consent of our Senate to ratify The International Convention on the Elimination of All Forms of Racial Discrimination." He then added "[w]e strongly support the general goals of the other treaties that we have signed but not yet ratified. The Convention on the Elimination of All Forms of Discrimination Against Women; The American Convention on Human Rights; and The International Covenant on Economic, Social and Cultural Rights. . . ." Secretary of State Warren Christopher, Address to the World Conference on Human Rights, in Vienna, Austria (June 14, 1993).

On Feb. 1, 1994, Assistant Secretary of State Timothy Wirth described the Clinton administrations plans, stating "We've given priority to ratification of the International Convention[s] on the Elimination of All Forms of Racial Discrimination and The Convention on the Elimination of All Forms of Discrimination Against Women." He then stated the "[t]wo other treaties are also pending before the Senate: The Convention on Human Rights and the Covenant on Economic, Social and Cultural Rights." *Human Rights Report*, *supra* note 153 (testimony of Timothy Wirth).

¹⁸⁶ See Lobe, *supra* note 184, at 1.

¹⁸⁷ One hundred and four nations had ratified or acceded to the Covenant as of December 13, 1991. *Report on the Sixth Session*, Committee on Economic, Social & Cultural Rights, U.N. ESCOR, 6th Sess., Supp. No. 8, at 2, 103-12, U.N. Doc. E/1992/23, E/C.12/1991/4 (1992). The campaign for an "economic bill of rights" has generated a great deal of controversy. See Philip Alston, *U.S. Ratification of the Covenant on Economic, Social and Cultural Rights: The Need for an Entirely New Strategy*, 84 AM. J. INT'L L. 365, 387-88 (1990); A. GLENN MOWER, JR., INTERNATIONAL COOPERATION FOR SOCIAL JUSTICE: GLOBAL AND REGIONAL PROTECTION OF ECONOMIC/SOCIAL RIGHTS (1985).

Just as in the case of the European Union, which may be traced to the formation of the Council of Europe, the NAFTA countries are all members of a regional organization, the Organization of American States. While the human rights regime of the Americas was patterned from the Strasbourg Process of Europe it has not evolved in the same manner. But the basic institutions are in place. The American system, in contrast to the European Convention, establishes a mandatory individual petition system and an optional inter-state complaint procedure.¹⁸⁸ The restrictions on intra-state petitions reflect the heightened sensitivity to sovereignty concerns in the Americas. But the American Convention is more liberal than the European Convention in permitting persons or groups to file private petitions.¹⁸⁹

But what has been lacking in the American regime is ratification of the American Convention and recognition of the Inter-American Court's jurisdiction.¹⁹⁰ Not one of the NAFTA parties has ceded jurisdiction to the court and only Mexico has ratified the American Convention.¹⁹¹ Yet, there is no reason to believe that the Court,

¹⁸⁸ All Parties to the Convention have accepted the jurisdiction of the Commission over private petitions under Art. 44, but jurisdiction over inter-state complaints must be recognized by both State-Parties although it may be recognized on an ad hoc basis. See BUERGENTHAL, *supra* note 56, at 148, 153. As of Jan. 1, 1993, only nine state parties have signed an art. 45 declaration regarding inter-state complaints. They are Argentina, Chile, Colombia, Costa Rica, Ecuador, Jamaica, Peru, Uruguay, and Venezuela. See Marie, *supra* note 56, at 63.

¹⁸⁹ AMERICAN CONVENTION, *supra* note 55, at art. 44. The European Convention limits the petitions to individual or groups who are injured by the violations alleged. EUROPEAN CONVENTION, *supra* note 100, at art. III(25).

¹⁹⁰ The Inter-American Court of Human Rights has seven judges who are elected in their individual capacity for six-year terms by the state parties to the American Convention. The jurisdiction of the Inter-American Court over private petitions is limited to those State Parties who have by declaration ceded jurisdiction to the Court under art. 62. As of January 1, 1993, fourteen years after the Court began to function, only fourteen countries have accepted their jurisdiction. See Lynda E. Frost, *The Evolution of the Inter-American Court of Human Rights: Reflections of Present and Former Judges*, 14 HUM. RTS. Q. 171, 172-73 (1992). The fourteen are: Argentina, Chile, Colombia, Costa Rica, Ecuador, Guatemala, Honduras, Nicaragua, Panama, Peru, Suriname, Trinidad & Tobago, Uruguay, and Venezuela. See Marie, *supra* note 56, at 63.

¹⁹¹ While Canada does not have the same historic resistance to multilateral human rights regimes as does the United States, it does face delicate issues on abortion, the death penalty and federalism that must be resolved before it can ratify the American Convention. William A. Schabas, *Substantive and Procedural*

which awards compensatory damages and permanent or temporary injunctive relief,¹⁹² could not evolve into a prestigious tribunal.

As of January 3, 1994, the Court has decided only three contentious cases, all involving forced disappearances in Honduras. Four additional cases have been heard, one of which was dismissed.¹⁹³ In the meantime the Court has rendered twelve advisory opinions.¹⁹⁴ The Court has emphasized the close relationship between fundamental human rights and representative democracy.¹⁹⁵ In what is perhaps the Court's best known case, *Velásquez Rodríguez v. Honduras*,¹⁹⁶ the Court awarded damages to the family of the victim of an officially tolerated death squad. The case has generated favorable commentary and has unquestionably increased the Court's visibility and energized the Inter-American system.¹⁹⁷

The Inter-American Court's jurisprudence is neither extensive nor impressive but its achievements so far demonstrate that its

Hurdles to Canada's Ratification of the American Convention on Human Rights, 12 HUM. RTS. L.J. 405, 407-08 (1991).

¹⁹² See AMERICAN CONVENTION, *supra* note 55, at arts. 63(1), 63(2) (requiring states to restore rights and to pay compensation); *id.* at art. 68(2) (permitting but not requiring states to establish a mechanism for domestic execution of Court's money judgments).

¹⁹³ See ROBERTSON, *supra* note 14, at 23; Frost, *supra* note 190, at 174.

¹⁹⁴ See BUERGENTHAL, *supra* note 56, at 166-170.

¹⁹⁵ As one commentator explained:

Given the principles upon which the Inter-American System is founded, the Court must emphasize that the suspension of guarantees cannot be disassociated from 'the effective exercise of representative democracy' referred to in Article 3 of the OAS Charter. The soundness of this conclusion gains special validity given the context of the Convention, whose Preamble reaffirms the intention (of the American States) 'to consolidate in this hemisphere, within the framework of democratic institutions, a system of personal liberty based on respect for the essential rights of man.'

See ROBERTSON, *supra* note 14, at 10.

¹⁹⁶ The Velásquez Rodríguez Case, Inter-am Ct. H.R. (ser. c) No. 4 (July 29, 1988).

¹⁹⁷ See Amy S. Dwyer, *The Inter-American Court of Human Rights: Towards Establishing an Effective Regional Contentious Jurisdiction*, 13 B.C. COMP. L. REV. 127, 144-167 (1990); Cecilia Medina, *The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights: Reflections on a Joint Venture*, 12 HUM. RTS. Q. 439 (1990); Juan E. Méndez & José M. Vivanco, *Disappearances and the Inter-American Court: Reflections on a Litigation Experience*, 13 HAMLINE L. REV. 507 (1990).

potential is enormous.¹⁹⁸ Its limited experience with actual cases has deprived it of the opportunity to mature as an institution on the basis of such experience.¹⁹⁹ It is unlikely that this situation will change unless the United States constructively engages in an Inter-American human rights regime. The United States must ratify the American Convention, without crippling reservations, and recognize the court's jurisdiction.²⁰⁰ Mexico and other future NAFTA members will continue to ignore the OAS human rights regime if the United States, the dominant member state of the region, continues to balk at ratification of the American Convention.²⁰¹

¹⁹⁸ In its first ten years the International Court of Justice decided twelve cases and the European Court of Human Rights decided eight. The current and past judges of the Inter-American Court have expressed other reasons for the paucity of cases including the inadequacy of judicial resources and the fact that the Inter-American Commission functioned for twenty years before the Court was created. See Frost, *supra* note 190, at 177-80.

¹⁹⁹ One author has cited five disincentives to the use of the courts contentious jurisdiction: the lack of individual direct access, lengthy proceedings, lack of coordination between the Commission and the Court in referring cases, accessibility of advisory jurisdiction as an efficient alternative, and an insufficient enforcement mechanism. See Dwyer, *supra* note 197, at 144-145; see also ROBERTSON, *supra* note 14, at 24; Medina, *supra* note 197, at 461-64 (proposing structural changes which would allow system to function more efficiently); Dinah Shelton, *Improving Human Rights Protections: Recommendations for Enhancing the Effectiveness of the Inter-American Commission and Inter-American Court of Human Rights*, 3 AM. U. J. INT'L L. & POL'Y 323, 325 (1988) (noting that ambitious human rights system does not live up to its potential).

²⁰⁰ Without U.S. involvement, other states will follow their historical bent of resisting multilateralism as a threat to their sovereignty despite the irony that multilateralism may offer the best shield from bilateral or unilateral intervention by the United States. See Corbera, *supra* note 56, at 940.

²⁰¹ Understandably, Mexico has demonstrated a "marked preference" for resolving disputes under the more cumbersome UN regime because it is not subject to U.S. dominance. *Background on Mexico*, U.S. DEPT. OF STATE BULLETIN, Mar. 1986, at 1. However, Mexico's increasingly open foreign policy has had a salutary effect on its cooperation with the Inter-American regime. For example, the delegates characterized Mexico's dealings with the IACHR's Working Group on Disappearances in 1982 as being "taken for a ride" by the delegates. Kamminga, *The Thematic Procedures of the U.N. Commission on Human Rights*, 34 NETHERLANDS INT'L L. REV. 299, 312 (1987). While vigorously protesting the "intervention" of the IACHR in 1985 and 1989, the compliance has since been characterized as positive. See Corbera, *supra* note 56, at 941 (discussing Latin America's increasing trust of commission's work).

VI. CONCLUSION

For decades the United States has successfully exported democratic values and human rights along with market economics. The U.S. influence in world affairs is enormous. Yet its economic dominance is now shared by the EU and Japan. The United States, as a world leader, has a particularly critical role in its own hemisphere. But what kind of leadership will it demonstrate?

Numerous non-governmental organizations have emphasized the necessity of linking NAFTA to human rights.²⁰² But, it is difficult to be optimistic. It is hard to shake the enormous sense of déjà vu one feels when recalling the Carter administration's ineffective attempt to constructively engage the United States as a player in the development of multilateral human rights institutions. Yet it would seem that the 1990s are more propitious for such engagement. In the last decade the Senate has approved three major human rights conventions. The stillborn International Trade Organization of Bretton Woods is being resurrected in the name of the World Trade Organization. The European Parliament has called for a worldwide social charter. But, the cry to protect our sovereignty is still heard.²⁰³ Brickerism remains, but surely it is not as lethal as it once was. At least some commercial interests will join in the call for a regional human rights regime that may be useful in safeguarding their investments. What is missing is a new coalition to persuade a reluctant executive and Senate that the time has come to build democratic multilateral institutions to protect human rights. This will require something beyond the symbolic ratifications that have characterized recent actions.

²⁰² See *Human Rights in Mexico*, House Comm. on Small Business, June 29, 1993, (testimony of Juan E. Méndez, Executive Director, Americas Watch) (stating belief that NAFTA negotiation provides opportunity to address human rights issues); *Mexico's Record*, *supra* note 155 (providing testimony of Carlos Salinas of Amnesty International before the Congress); NO DOUBLE STANDARDS, *supra* note 119, at 21 (calling on NAFTA parties to link NAFTA with agreement to enforce human rights law); Andrew Reding, *A Human Rights Initiative for the Americas*, CHRISTIAN SCI. MON., June 1, 1992, at 18 (calling for ratification of human rights treaties contemporaneously with efforts to extend free trade).

²⁰³ Some argue that technological advancement and the creation of a global economy will undermine national sovereignty. See Claudio Grossman & Daniel D. Bradlow, *Are We Being Propelled Towards A People-Centered Transnational Legal Order?* 9 AM. U.J. INT'L L. & POL'Y 1 (1993). Grossman and Bradlow contend that we should focus on the democratic character of the international institutions that will supplant the nation-state. *Id.*

