A TRADE/HUMAN RIGHTS LINKAGE BY THE UNITED STATES: IS ENFORCING HUMAN RIGHTS BY USE OF TRADE SANCTIONS EFFECTIVE?

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IS ENFORCING HUMAN RIGHTS BY USE OF TRADE SANCTIONS EFFECTIVE?

by

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LL.B., Nagpur University, India, 1997

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CHAPTER I

INTRODUCTION

The linkage between trade policies and human rights has led to the growing economic interdependence among nations that promises to change the nature of trade relations. When a nation (like the United States) has considerable economic power, there is a temptation to use such power to pursue a wide variety of national objectives. However, sanctions may become even less effective, or indeed obsolete, as a foreign policy tool in light of the emergence of many new, stronger markets and economies.

Human rights have not figured prominently on the agenda of the nine members Association for Southeast Asian States (ASEAN) since its inception in 1967. Rather, the pursuit of regional security and cooperative measures for promoting trade and economic development has been paramount ASEAN objectives.

By insisting on a strict separation between human rights policy and trade issues, ASEAN has marginalized human rights and has consistently opposed the use by foreign states or international organizations of economic or other forms of change to induce change in human rights practices.

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1 Increased economic interdependence has made it easier for countries, which are targeted for sanctions "to find alternate suppliers, markets, and financial backers to replace goods embargoed or funds withheld by the [sanctioning] country. For these reasons, we conclude that sanctions are a decreasing policy Instrument." HUFBAUER, SCOTT & ELLIOTT, ECONOMIC SANCTIONS RECONSIDERED 81 (1985).


3 Li-ann Thio, Implementing Human Rights in ASEAN Countries: Promises to Keep and Miles to go before I sleep, 2 YALE. HUM. RTS. & DEV. L. J. 1 (1999).
In an increasingly global economy, international trade is essential for economic survival and development of nearly all countries, as illustrated by the virtual collapse of Iraq’s economy due to internationally imposed sanctions. Therefore, it can be convincingly argued that trade sanctions are an effective mechanism for the international enforcement of human rights.

The question therefore arises as to why countries do not use trade sanctions, or if they do use them, why then do the sanctions often fail? There are various reasons why trade sanctions fail. First, the regional human rights conventions currently in force, the United Nations’ favored method of human rights protection, do not provide trade sanctions as an enforcement mechanism.

Secondly, the sanctioned-nations often react with refusals to comply with demands and with indignation at what they perceive to be unmerited intrusions into their domestic policies, a reaction that is entirely understandable in light of the political underpinnings of the majority of sanctions. And third, the protected rights, which are primarily political in nature, very often have no place in the sanctioned country’s domestic policy.

Therefore, for trade sanctions to be effective in the enforcement of human rights, it is necessary to distinguish between rights that are capable of international enforcement and those that are not.

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6 European Social Charter, 1961, 569 U.N.T.S. 89. (guaranteeing fundamental rights to all individuals for the benefit of society without providing economic sanctions to remedy violations).


8 See, European Social Charter, Supra notes 6 at 569 (asserting that rights which are political in nature would include, among others, democracy and freedom of speech, and would thus not be compatible with political systems).
Universally held basic human rights must remain separate from political rights. Such basic human rights are those that are so universal that all societies, systems, nations and ideology could, and do espouse them. Conversely, political rights are those that are dependent upon compatibility with the system of government in place and are therefore far less likely to garner universal support. An effective multilateral enforcement mechanism can only succeed if there is universal agreement and acceptance of the protected rights.

Accordingly, at the outset of such a mechanism, only basic human rights may be enforced through trade sanctions. Once such a system is in place, more political rights may be included.9 In chapter II of this thesis, I shall discuss a brief history of the International enforcement of human rights. Providing a brief description of human rights, which are universal in nature and therefore capable of garnering international adherence and discuss the current method of protection of human rights, specifically international and regional conventions.

Chapter III examines the WTO dispute settlement system applied to conflicts involving trade-human rights conflicts and the basis of including human rights trade sanctions in the WTO.

Chapter IV examines the unilateral trade sanctions by the United States, whether Federal, state, or local. These sanctions are used as a weapon of choice to enforce U.S. foreign policy goals. Some of the sanctions, however, attempt to impose sanctions on third-party countries that choose to trade with target nations.

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9 See, Stirling, supra note 5, at 3.
Several nations have retaliated against these sanctions by enacting blocking laws that prevent their citizens and corporations from complying with the provisions of the U.S. sanctions, and penalizing them if they do comply.\textsuperscript{10}

Chapter V examines the effectiveness of trade sanctions and identifies some instances, particularly involving small target countries and modest policy goals, where sanctions have helped alter foreign behavior.

The final chapter, examines the possible ways in which trade sanctions can be used in an effective way to enforce human rights.

\textsuperscript{10} See E.g., Foreign Extraterritorial Measures Act, R.S.C. 1985, c. F-29 (Can.).
A. Defining Basic Human Rights

The term "human rights", in itself is very problematic because of its abundance of meaning and definitions. The expression "human rights" shelters an incredibly diverse range of desire-in-dominance politics and desire-in-insurrection politics. Human rights have also been defined as a "recognition of inherent dignity and equal and inalienable rights of all members of the human family," and that this recognition is "the foundation of freedom, justice and peace in the world." In essence, the concept of human rights connotes the security of the individual or group in the face of power, and the justice due to those people by virtue of their personhood. International declarations and conventions currently in force provide a list of human rights, dividing them into civil and political rights, economic and social rights, and collective rights.

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11 Upendra Baxi, Voices of Suffering and Future of Human Rights, 8 Transnat'l L. & Contemp. Probs. 125
12 See, e.g., Universal Declaration of Human Rights, art. 4, G.A. Res. 217A(III), U.N. Doc. 810 (1948) (prohibiting nations from holding humans in slavery or servitude); see also International Covenant on Civil and Political Rights, art. 8(1), Dec. 19, 1966, 999 U.N.Y.S. 171, reprinted in 6 I.L.M. 368, 371 (precluding the institution of slavery and compulsory labor to achieve the goal of promoting human rights freedoms).
13 Id.
14 RONALD COHEN, ENDLESS TEARDROPS: PROLEGOMENA TO STUDY OF HUMAN RIGHTS IN AFRICA, IN HUMAN RIGHTS GOVERANCE IN AFRICA 4 (Ronald Cohen ed., 1993).
15 International Covenant on Civil and Political Rights, art 8 (1), Dec. 19, 1966, 999 U.N.T.S. 171,
Other conventions recognize specific human rights such as racial discrimination,\(^{16}\) apartheid,\(^{17}\) discrimination against women,\(^{18}\) and genocide.\(^{19}\) The regional conventions, and the universal declaration of human rights address the protection of these rights in varying forms and, to some extent, expand upon them.\(^{20}\) Considering the various definitions of human rights as well as the myriad of rights contained in the conventions, it becomes clear that two types of rights are involved: the right to act in a particular manner and the right to be free from a particular action upon oneself.\(^{21}\) Political and economic rights address the ability to assert one’s political opinion and achieve wealth, and therefore act in a particular manner.\(^{22}\)

The more basic and passive rights address the right to be free from being acted upon in some manner either because of some personal immutable characteristics or simply by virtue of one’s personhood.\(^{23}\)


\(^{21}\) See Sriling, supra note 5, at 8.

\(^{22}\) Id.

\(^{23}\) Id.
Some examples of the right to act in a particular manner include freedom of speech, freedom of assembly, freedom of movement, the right to work and the right to vote. All these rights involve the ability to act affirmatively in a manner that one chooses without interference from, or denial by, the state. The existence of such rights for the citizens of a state presupposes the compatibility of such rights with the existing political system. Accordingly such rights would not exist and would be unenforceable in a system of government that does not recognize political and economic rights such as freedom of speech. In light of the numerous political and economic systems in the world that do not espouse all of these rights, there could be no universal adherence to an enforcement mechanism for them.

The more political of these rights, i.e., those having to do with government and governance, are intrinsically linked with the particular system of government existing in a particular state. As there is no universal agreement on a particular political system, there can be no universal agreement on whether such political rights may be recognized or even enforced.

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25 Id. art. 20.
26 Id. art. 12.
27 International Covenant on Economic and Social and Cultural Rights, Dec. 16, supra note 24, art. 6.
28 International Covenant on Civil and Political Rights, supra note 15, art. 25.
29 Sterling, supra note 5, at 9.
30 Id.
31 Id.
32 Id.
The same can be said of the economic rights since there is no universal agreement on which economic system is more desirable, and thus there can be no universal agreement on which economic right should be recognized and enforced.\textsuperscript{34}

Contrary to economic and political rights, the more basic, passive rights do not depend upon the system of government or the economics of a particular state.\textsuperscript{35} These fall into two categories: the right to be free from action taken upon oneself because of an immutable characteristic such as race, gender or religion; and the right to be free from action taken upon oneself simply by virtue of one’s personhood.\textsuperscript{36} Examples of the former include the freedom from violent or discriminatory acts based upon one’s gender, race or religion.\textsuperscript{37} Examples of the latter include freedom from acts such as torture and arbitrary detention not by virtue of one’s immutable characteristics.\textsuperscript{38}

There are some rights, other than democracy and other political and economic rights that are more universally espoused.\textsuperscript{39} Indeed, there are rights which are so universal that all societies, systems, nations and ideologies would or do espouse them.\textsuperscript{40} These rights are the most basic of human rights, those rights that are not political or economic but rather are passive rights.\textsuperscript{41}

\textsuperscript{34} Stirling, \textit{supra} note 5, at 10.
\textsuperscript{35} \textit{id.}
\textsuperscript{36} \textit{id.}
\textsuperscript{37} \textit{id.}
\textsuperscript{38} \textit{id.}
\textsuperscript{39} Universal Declaration of Human Rights, \textit{supra} note 12 at 2.
\textsuperscript{40} \textit{id.}
\textsuperscript{41} \textit{id.}
There are two types of rights. The first of core human rights are those rights derived from immutable characteristics possessed by all human beings.\textsuperscript{42} The second type of core human rights are those derived from immutable characteristic but are possessed by virtue of personhood.\textsuperscript{43} A core human right derived from an immutable characteristic is the right to be free from an act taken upon oneself as a result of immutable characteristics.\textsuperscript{44} Accordingly, a core human right would be, for example, the right to be free from a non-political discriminatory act upon oneself based upon one’s gender or religion.\textsuperscript{45} The second type of core human right encompasses the right to be free from actions that are injurious to the inherent dignity and security of the human being.\textsuperscript{46}

For this reason, freedom from slavery, genocide, torture and arbitrary arrest are core human rights.\textsuperscript{47} While arguably a government may legitimately deprive its citizens of political rights such as democracy, freedom of speech and press, it may not legitimately deprive its citizens of the freedom to be free from slavery, genocide, torture and arbitrary imprisonment.\textsuperscript{48} Therefore, it appears that of the two forms of human rights, political/economic and core human rights, the latter are more likely to be compatible with any system of government.\textsuperscript{49}

\textsuperscript{42} Sterling, \textit{supra} note 5 at 13.
\textsuperscript{43} \textit{Id}
\textsuperscript{44} \textit{Id} at 14.
\textsuperscript{45} \textit{Id}. A denial of the right to vote based upon one’s gender, race or religion would not fall into this category as this will be denial of political right.
\textsuperscript{46} COHEN, \textit{supra} note 14, at 10.
\textsuperscript{47} Sterling, \textit{supra} note 5, at 14.
\textsuperscript{48} \textit{Id}
\textsuperscript{49} \textit{Id}
Since core human rights appear to universally held by all nations regardless of political belief, however, they could be enforced on a worldwide basis, while the other political and economic human rights, could not.

The Restatement (Third) of Foreign Relations (1987) contains a relatively limited list of human right to which customary international law applies. Specifically, Section 702 provides that it a violation of customary international law if a state, as a matter of state policy, practices, encourages and condones genocide, slavery, murder, or disappearance of persons, torture, prolonged arbitrary detention, racial discrimination or a consistent pattern of gross violations of international recognized human rights.

Another document, the protocol Additional to the Geneva Conventions of 1949, and Relating to the protection of Victims of Non-International Armed Conflicts (the Second Geneva Protocol) provides for certain minimum rights for all persons affected by such conflict. These minimum rights include freedom from torture, collective punishment, taking of hostages, acts of terrorism, outrage upon a person dignity such as rape, slavery, pillage, or threats to commit this acts. These rights apply, regardless of race, color, sex, language, religion, political opinion, national or social origin, wealth, birth or other status.

51 Id.
53 Stirling, supra note 5, at 15.
54 See, supra note 52, art. 4(2).
55 Id. art. 2(1).
B. Current Protection Mechanism

Current documents concerning human rights employ varying terms in the area of human rights. Some documents refer to the "promotion" of human rights,56 while others refer to the "protection" of human rights.57 A majority of documents "recognize" human rights. No document, however, specifically refers to "enforcement" of human rights. When one considers the definitions of these terms, the significance of the use of one term or the other becomes apparent and relevant.

By considering the standard dictionary definition of the terms, it can be said that "promotion" of human rights means the furtherance of the establishment or advancement of those rights.58 "Protect" refers to the guarding against the loss of those rights.59 "Enforcement," however means to compel the observance of those rights.60

The main human rights document is the Universal Declaration of Human Rights, which was adopted by the United Nations General Assembly in 1948.61 In its preamble the declaration reaffirms the fundamental human rights in the United Nations Charter.62 The declaration then proclaims that it is to be "a common standard of achievement for all nations," and that every organ of society" should "promote respect" for these rights, thus implying that these rights already exist.63

56 Universal Declaration of Human Rights, supra note 12 (declaring that the documents represents the commitment of all peoples and nations to promote respect for rights and freedoms).
58 THE RADOM HOUSE DICTIONARY OF ENGLISH LANGUAGE, 1548 (2d ed. 1987).
59 Id. at 1553.
60 Id. at 644.
61 Universal Declaration of Human Rights, supra note 12.
62 Id.
63 Id.
The rights contained within the declaration encompass political rights, economic rights and core human rights such as freedom from racial discrimination, arbitrary arrest, torture and slavery.

Being a declaration, the document has no enforcement mechanism and places no organ to be responsible for the enforcement. The Declaration has over time, however, acquired authority as customary international law in the preservation of human rights.

From the Universal Declaration of Human Rights came two covenants: The International Covenant of Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights, both entered into force in 1976. Both covenants conform with, as well as expand upon, the Universal Declaration.

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64 Id. art. 21 ("Everyone has a right to take part in the government of his country, directly or through freely chosen representatives").
65 Id. art. 17, 22-25 ("Everyone, as a member of society, has the right to social security....").
66 Id. art. 2.
67 Id. art. 9.
68 Id. art. 5.
69 Id. art. 4.
70 THOMAS BUERGENTHAL & HAROLD G. MAIER, PUBLIC INTERNATIONAL LAW IN A NUTSHELL, 119 (1990) (noting that the U.N. General Assembly adopted the declaration in the form of a non-binding resolution)
71 A.H. ROBERTSON & J.G. MERRILS, HUMAN RIGHTS WORLD (1989). "(The Declaration was not intended to impose legal obligations on states").
73 International Covenant on Civil and Political Rights, supra note 15.
74 Id. prid; International Covenant on Economic, Social and Cultural Rights, supra note 31.
75 See supra note 74.
In the area of protection of human rights, the International Covenant on Economic, Social and Cultural Rights contains a provision whereby parties agree to submit report to the Secretary General on measures they have taken to achieve conformity with the rights contained in the covenant.\textsuperscript{76} The reports are then transmitted to the Economic and Social Council, which in turn may transmit the report to the Commission on Human Rights for study and recommendation.\textsuperscript{77}

In addition, art 23 provides that "international action for the achievement of the rights recognized...includes such methods as the conclusion of conventions, the adoption of recommendations, the furnishing of technical assistance and the holding of regional meetings...."\textsuperscript{78} Such methods, while possibly effective for promotion of human rights cannot be seen as effective enforcement.

The International Covenant on Civil and Political Rights provides for a Human Rights committee to which states parties submit progress reports on measures they have taken to achieve the rights contained within the covenant.\textsuperscript{79} Unlike the International Covenant for Economic, Social and Cultural Rights, however, article 41 of this covenant provides for the submission of communication by one state party to the committee concerning claims that another state party is not fulfilling its obligations under the covenant.\textsuperscript{80} Under article 41, the committee may then bring the matter to the attention of the state party so accused.\textsuperscript{81}

\textsuperscript{76} International Covenant on Economic, Social and Cultural Rights, \textit{supra} note 31, art. 16(1).
\textsuperscript{77} Id. art. 16(2).
\textsuperscript{78} Id. art. 23.
\textsuperscript{79} International Covenant on Civil and Political Rights, \textit{supra} note 15, art. 40.
\textsuperscript{80} Id. art. 41(1).
\textsuperscript{81} Id. art. 41(1)(a).
The state party must then communicate with the accusing state within three months as to domestic procedures and remedies taken.82 If there is no settlement, either may present the matter to the Committee, Which will then examine the situation and issue a report.83

Additionally, if the matter is not settled, article 42 provides that the committee may appoint an ad hoc Conciliation Commission, which may also examine the situation and issue a report.84 These provisions illustrate more extensive mechanism for protection than those in the International Covenant for Economic, Social and Cultural Rights, yet none that could be characterized as effective enforcement. Further, while an optional protocol, entered into force in 1976, permits petition from individuals and non-governmental organizations,85 few states has chosen to adopt it.86 Worse still those states that have not adopted the protocol include those with the worst records on human rights.87

In addition to the general lack of acceptance of the Optional Protocol, there have been questions as to the efficacy of the reporting requirement in these documents.88 As stated above, both covenants require states parties to submit reports to the Secretary General as to the progress they have made in implementing the provisions of the covenant.

82 Id. art. 41(1)(a).
83 Id. art 41(1)(b)-(h).
84 Id. art. 42(1)(a).
86 BARRY E. CARTER & PHILIP R. TRIMBLE, INTERNATIONAL LAW SELECTED DOCUMENTS, 373 (1991) (noting that only 48 countries are parties to the optional protocol).
87 ROBERTSON, supra note 71, at 65.
88 Id
National officials who are unlikely to call the attention of an international body to their failure in the area of human rights compile these reports. Moreover the report cannot act on enforcement mechanism unless independent persons, who are not governmental officials, follow-up with examination of the information, and unless an international body takes enforcement action. Yet, regardless of these shortcomings, it cannot be denied that the very existence of these covenants is an important step towards the international protection of human rights.

Beyond these covenants, there are a number of international documents addressing specific violations of human rights, all with varying provisions of enforcement. Some, such as International Convention on the Elimination of all Forms of Racial Discrimination, contain the same type of enforcement mechanism as noted above i.e., report by state parties to a committee. Other documents contain more specific method of enforcement that have a punitive tone.

In addition to these international document based upon the United Nations charter and Declaration of Human Rights, there are also regional conventions for the protection of human rights.

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89 Id. at 41.
90 Id. at 41-42.
91 Stirling, supra note 5 at 19.
92 Id.
93 Id.
94 See Genocide Convention, supra note 19, art. IV (mandating that, “persons committing genocide....shall be punished, whether they are constitutionally responsible rulers, public officials, or private individuals”).
95 Stirling, supra note 5 at 20.
Originally, the concept of enforcement was not favored by the United Nations due to the perception that “it might detract from the perceived universality of human rights”. As regional regimes developed, however, resistance by the United Nations decreased. Finally, in 1977, by way of Resolution 32/127, the General Assembly asked states not belonging to regional regimes such as the general homogeneity of regions and a geographic proximity that leads to greater interdependence and cooperation. In addition, the regional, as opposed to the universal aspects of the regimes provides a better chance of investigation and remedying of violations. Currently, three regional regimes are in force: The European Convention for the Protection of Human Rights and Fundamental Freedoms, The American Convention on Human Rights, African Charter on Human and Peoples’ Rights.

All the above three conventions address much the same political, civil and economic rights as the United Nations’ convention. Both the European and the American Conventions provide for human rights commissions (the European Convention and the American Convention provide for human rights commissions (the European Commission and American Convention provide for human rights and Inter- American Court of Human rights).

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97 Id. at 591.
98 Id.
99 Id. at 589-90.
103 Stirling, supra note 5 at 21.
Both conventions provide standing for states, groups and individual before either the commission or the court. The African convention provides for commission, but not court. All three provide for submission of petitions to their commission from those petitions to their commissions from those who feel their rights under the conventions have been violated.

It is generally regarded that the European convention has functioned well. Between 1953, its first year of legal effect, and 1990, 15,000 applications alleging violations were accepted for review by the commission. The majority of these applications were accepted for review by the commission. This petition led to 244 cases before the European court of Human Rights with 129 judgements against states. All judgement in which the states lost were accepted to the member states, thus illustrating a willingness on the part of Western European states to accept judgement by an international court.

The Inter-American Convention allows individuals or groups to petition the inter-American commission concerning violations of rights under the convention. The Commission then conducts investigations, including on-site investigations.

104 id.
106 American Human Rights Convention, supra note 101, art. 44; European Human rights Convention, supra note 100, art. 25; African Human Rights Charter, supra note 102 art. 47.
107 DAVID P. FORSYTHE, HUMAN RIGHTS IN THE NEW EUROPE 182 (1994) (noting that the Council of Europe "produced the most authoritative and effective system for the promotion and protection of human rights ....").
108 id.
109 id.
110 id. at 182-83.
111 American Human rights Convention, supra note 101, art. 44.
112 id. art 48.
However, while the commission conducts more on-site investigations than any other similar body in the world, it is able to pursue only a small number of petitions it receives. After the investigation the commission attempt to achieve a friendly settlement between parties. The commission also functions as a "gatekeeper" to the Inter-American Human Rights Court by selecting cases to be taken before the court. While private parties may not litigate cases before the court, their attorneys may act as legal advisors to the Commission.

One major difference between the Inter-American system and the European system is the fact that all member states of the Council of Europe have ratified the European Convention, While only two-thirds of the members of the Organization of American States have ratified the Inter-American Convention.

The African Charter for Human and Peoples rights encompasses many of the same right as the other regional convention, but with some important differences. The aim of the African Charter is to eliminate apartheid, discrimination, and remnants of colonialism. The rights contained in the charter are the rights of "peoples" and based upon the group norm rather than the rights of an individual, thus reflecting the communitarian aspects of African society.

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114 *Id.* at 108.

115 *Id.*

116 *Id.* at 109-10.


119 *Id.*
Another difference between the African Charter and other regional conventions is lack of a human rights court. As the authors of charter explained, disputes are settled in a more traditional manner of friendly arbitration rather than in the adversarial manner of the west.

While the Arab states and Asia have not created regional human rights regimes, they have taken some steps towards protection of human rights. In 1968, the Council of the Arab League adopted a resolution relating to the creation of a Permanent Arab Commission on Human Rights. Subsequently, the Council of the Arab league drafted a Declaration of Human Rights. The draft contained what one commentator referred to as three-fold objective: “(A) concern for continuity with the past, a desire to achieve an Arab unity,… and a call for justice in respect of the Arab population living in the occupied territories.”

As for Asia, there has been some non-governmental movements such as the Permanent Standing Committee on Human Rights created in 1979 by Lawasia, a professional association of Asian and Western Pacific Lawyers.

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120 Id.
121 Id. at 330.
122 ROBERTSON, supra note 71 at 196-200.
123 Id.
125 Id.
However, the vast differences in culture, political ideology, and economic development among Asian nations, coupled with lack of a regional organization have made a cohesive policy on human rights impossible.  

C. International Enforcement of Human Rights

While there is a plethora of international treaties and agreements created to protect human rights, commentators continually question whether it is even possible to enforce effectively such rights on an international level. One commentator noted that while there are numerous United Nations’ votes, international instruments for protection, and state declarations, “for a large part of humanity including a large part of what we generally call the ‘Western’ world, observance of human rights is presently a dream of things to come” as opposed to a reality.

Infringements on a state’s sovereignty are one of the primary reasons for the apparent failure to establish an effective international regime for the enforcement of human rights. Few states wish to become parties to treaties that interfere with their domestic policies, particularly those policies regarding domestic treatment of their citizens. Moreover, article 2(7) of United Nations Charter prohibits the United Nations from intervening in matters that are “essentially within domestic jurisdiction of any state.”

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127 Id. at 651.
129 Id. at 71.
130 Striding, supra note 5 at 5.
131 U.N. Charter, art. 2,
One may then question whether a state’s treatment of its citizens is truly a matter for international law, and therefore not subject to international enforcement in the event that the state violates human rights. Yet, history shows that effective international enforcement can happen. One of the first attempts at the enforcement of a human right took place in the early nineteenth century with the international effort to abolish slavery.\(^{132}\) In 1814, the Treaty of Paris between France and Great Britain established cooperation between two nations in order to suppress the traffic in slaves.\(^{133}\) Later in the spring of 1890, the major European powers held an anti-slave trade conference in Brussels.\(^{134}\) The Belgian delegate later described the conference by stating that “never before had all the Great Powers come together so singled-mindedly set on so generous, pure and disinterested a purpose to save the ‘oppressed and decimated’ races of Africa and end the monstrous trade in human flesh.”\(^{135}\)

At the end of the conference in July 1890, delegates created and later ratified an anti-slavery act, providing measures for the suppression of slavery both in Africa and the high seas.\(^{136}\) In addition, the act contained one of the earliest examples of implementation in the guise of a special office attached to the Belgian Foreign Ministry created to oversee the enforcement of the act.\(^{137}\) Later, the twentieth century saw the right to be free from enforced servitude enshrined in many international human rights documents.\(^{138}\)

\(^{132}\) ROBERTSON, supra note 71, at 15.

\(^{133}\) Id.

\(^{134}\) Id.


\(^{136}\) Id. at 399.

\(^{137}\) ROBERTSON, supra note 71, at 15.

\(^{138}\) See, Universal Declaration of Human Rights, supra note 12, art. 4, (prohibiting nations from holding humans in slavery or servitude); see also International Covenant on Civil and Political Rights, supra note 15, art. 8(1), (precluding the institution of slavery and compulsory labor to achieve the goal of promoting human rights and freedom).
Consequently, over a 150-year period, the prohibition against slavery became an established rule of customary international law that, while not always followed, nations universally accept as internationally enforceable.\textsuperscript{139} Despite this example, the question persist whether human rights can, and should be enforced internationally, or whether they are truly a domestic concern of each state. In the late 1960s, one emanate commentator, H. Lauterpacht, argued that any matter is essentially within the domestic jurisdiction of the state only if international law does not regulate it and cannot regulate it.\textsuperscript{140} Lauterpacht contended that there are few such matters, if any, and that if there are international repercussions, international law governs.\textsuperscript{141} The profusion of international documents entered in to force in the latter half of the twentieth century addressing the protection of human rights proved Lauterpacht correct by illustrating that nations no longer regard human rights as a domestic matter.\textsuperscript{142} Indeed, Lauterpacht maintained that once international obligations governs action, it no longer fall under domestic jurisdiction.\textsuperscript{143} For example, while a nation's duty to protect citizens from slavery was once a purely domestic matter,\textsuperscript{144} It is now universally accepted duty governed by international obligation.\textsuperscript{145}

\textsuperscript{139} \textit{Id.} at 15.

\textsuperscript{140} H. LAUTERPACHT, INTERNATIONAL LAW OF HUMAN RIGHTS, 175 (1968).

\textsuperscript{141} \textit{Id.}

\textsuperscript{142} See, International Covenant on Economic, Social and Cultural Rights, \textit{supra} note 31 (setting international standards and norms for the treatment of humans to promote the right to self determination).

\textsuperscript{143} LAUTERPACHT, \textit{supra} note 58, at 176.

\textsuperscript{144} See ROBERTSON, \textit{supra} note 71, at 15 (discussing the 150-year transition issue of slavery from being purely domestic to being solely under the authority of international law).

\textsuperscript{145} \textit{Id.} at 15.
The main reason for the international acceptance of freedom from slavery as an internationally enforceable human right is the fact that it transcends politics and economics. The freedom from enforced servitude is a right that is basic to the citizens of any society, state or political system. As such, it is one that may be, and has been, agreed to and enforced on an international level under the auspices of the United Nations without any assertion by any members of interference in their domestic political systems. While some commentators argue that the primary purpose of the United Nations is the enforcement of international peace and security, there are those who assert that the United Nations has a second and equally important purpose as evidenced in the Charter’s preamble, namely the international protection of human rights. Beyond the preamble, other commentators point to Articles 13, 55, 68 and 76, which all address human rights in various forms, thus establishing the United Nations’ competence and duty to protect human rights. In addition, most commentators now agree that article 2(7) allows the United Nations to act to protect human rights, particularly because egregious violations of human rights represent a threat to international peace.

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146 Stirling, supra note 5, at 6.
147 id.
148 id.
However, while the United Nations' may clearly recognize human rights, it does not effectively enforce them. This lack of effective enforcement is due in large part to the expansiveness of the United Nations' definition of what constitute human rights. As the enforcement of the prohibition of slavery suggest, however, if the enforced human rights are truly universal in nature and apolitical, then effective international enforcement is possible.
CHAPTER III

TRADE-BASED DECISIONS ON TRADE/HUMAN RIGHTS CONFLICT

The theoretical risk posed to human rights law from the differing approaches to moral decision-making adopted by trade law and human rights law is borne out at the doctrinal level when one examines the approach the WTO dispute settlement system would actually take to conflicts involving trade and non-trade values, including trade-human rights conflict.\(^\text{152}\)

A. Human Rights Trade Sanctions in the WTO

As the GATT treaty stands today, there is no single clearly applicable exception for Human rights violations. However there has been domestic trade-restrictive measures adopted at the national level against an egregious rights-violating state, Examples of such measures might include a national-level decision to suspend GATT-obligated MFN treatment as a response to particular human rights violation,\(^\text{153}\) the imposition by a sub-federal unit of a government procurement ban in response to human rights violations, or the imposition of a trade ban on the products of indentured child labor, either unilaterally or perhaps in response to a future ILO convention prohibiting such practices.\(^\text{154}\)

The common denominator here is state action imposing trade sanctions on human rights violations as a mechanism to both punish the state and to encourage compliance with international human rights law.

\(^{153}\) Id.
\(^{154}\) Id.
However, the target state would challenge such actions in a WTO dispute settlement proceeding. The most likely basis for such challenge would be that the measure violates the most-favored-nation and national treatment rules contained in GATT Articles I and III. The challenge measure would be determined a prima facie Article I violation, because the like product from other WTO Member State which are not target are subject to trade restriction. The measure is also likely to be determined a prima facie Article III violations, because like domestic products are also not subject to the same trade restriction. Therefore, the sanctioning state is going to find a GATT-authorized exception applicable in such cases, or face a judgment that the measure nullifies or impairs the target state’s expected trade benefits, and the likelihood of being itself subject to WTO-authorized sanctions if it fails to amend or withdraw the measure.

There are, however, several exceptions, which might apply if interpreted with human rights in mind. One possible avenue is that the sanctioning state could seek the National security exception in Article XXI. Article XXI permits state to unilaterally enact trade-restrictive measures when the state judges such measures to be “necessary for the protection of its essential security interests” during time of “emergency in international relations.”

155 *ld*


157 *ld* at 436 nn. 327.

158 *ld*

However, this is a controversial provision much disliked and distrusted by the majority of WTO Member States, in that its not justifiable as it has been interpreted.\textsuperscript{160} Therefore, states would be reluctant to invoke this provision absent at least a plausible national security risk, and the WTO would likely to oppose any effort to read that exception broadly enough to include general human rights-based trade sanctions.\textsuperscript{161}

Another possible exception is Article XX, whose exceptions are intended to permit GATT violations, including Article I and III violations, in pursuit of several categories of non-trade policy goals.\textsuperscript{162} Three Article XX exceptions in particular, the public morals, human life and health, and prison labor exceptions, may be relevant in connection with human right measures.\textsuperscript{163} Article XX(a) permits measures “necessary to protect human morals.”\textsuperscript{164} Article XX(b) permits measures “necessary to protect human, animal or plant life or health.”\textsuperscript{165} Finally, Article XX(e) permits measures “relating to the products of prison labor.”\textsuperscript{166}

The availability of these exceptions turns on two sorts of interpretive problems. First, each presents at the outset a similar textual issue, namely whether the scope of the exception can be interpreted to accommodate human rights-based measures.\textsuperscript{167}


\textsuperscript{161} Garcia, \textit{supra} note 153 at 12.

\textsuperscript{162} As a preliminary matter, it should be noted that the availability of the Article XX exceptions is limited by the chapeau test prohibiting that measures otherwise justifiable under that article be applied so as to be “a means of arbitrary or unjustifiable discrimination...or a disguised restriction on international trade.” GATT, \textit{supra} note 160, art. XX.

\textsuperscript{163} Garcia, \textit{supra} note 153 at 12.

\textsuperscript{164} GATT, \textit{supra} note 163, art. XX(a).

\textsuperscript{165} GATT, \textit{supra} note 163, art. XX(b).

\textsuperscript{166} GATT, \textit{supra} note 163, art. XX(e).

\textsuperscript{167} Garcia, \textit{supra} note 153 at 13.
The prison labor exception is least likely to serve in this case, despite the fact that arguably it is the clearest case of human rights exception in GATT, for the very reason that it is so clearly drafted to refer to a single category of products, namely those produced by prison labor.\textsuperscript{168} The public morality exception should apply in at least a subset of human rights-related claims, but its broader applicability turns on whether the provision can be interpreted to encompass a wide range of human rights concerns beyond traditional "public morals" issues.\textsuperscript{169}

Finally, interpreting Article XX(b) to include human rights violations as threat to "human ... life or health," would run counter to existing, albeit limited, GATT jurisprudence on this issue.\textsuperscript{170} Second, availability of both public morals and human rights exception depends upon whether Articles XX(a) and XX(b) would be interpreted as available for "outward-oriented" measures designed to influence human rights policies of another jurisdiction,\textsuperscript{171} which existing GATT jurisprudence calls into question.\textsuperscript{172} If none of these exceptions are available on scope or territoriality grounds, then the hypothetical human rights measure proposed above would be ruled a GATT Violation.

\textsuperscript{168} GATT, \textit{supra} note 163, art. XX(e); but see Striling, \textit{supra} note 5, at 33-39 (arguing it would be a "logical extention" of Article XX(e) to apply it to a broad range of human rights violations).


\textsuperscript{170} Garcia, \textit{supra} note 153 at 11.

\textsuperscript{171} \textit{Id}.

\textsuperscript{172} \textit{Id}.
If, however, these scope of issues could be resolved so as to bring human rights-based domestic measures within the ambit of either Article XX (a) or (b), then adjudication of GATT claim would ultimately rest on the application of the “necessity” test required by the language of the article. As the test is applied, the WTO panel would rule that the disputed measure was not in fact necessary, and therefore a GATT violation, if it were to find that another less trade-restrictive measure was “reasonably available.”

In conditioning the availability of these Article XX exceptions, and therefore any human rights favorable resolution of this conflict, on the necessity test, the WTO is applying what has been called a trade of device, a term encompassing various legal techniques used in trade institutions to relate the trade burden of a given measure against its intended non trade regulatory benefit. It is in the utilization of trade-off devices, and in choice of application of a particular device, that the WTO dispute resolution system embodies the utilitarian approach to normative conflict in trade, and in so doing raises issues about its compatibility with human rights law.

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173 Id. at 64-65.
174 Id.
175 Id.
177 Garcia, at supra note 153.
B. Trade-off Mechanism in The Trade/Human Rights Linkage

The very notion of trade-off devices runs counter to the deontological approach to human rights. In human rights terms, one cannot morally trade a certain amount of human rights violation in exchange for a greater amount of trade welfare benefit, even if the later is seen as enhancing or embodying other human rights. While it is foreseeable that a trade-based forum may be legally required to engage in some sort of balancing analysis, weighing the human cost of protection against the human rights cost of acquiescence, such analysis might be objected by human right advocates at the outset as simply inadequate in view of the absolute moral obligation to enforce human rights regardless of consequences. On this view, the preeminent mechanism for resolving policy disputes in trade institutions by its very nature defeats the fundamental tenet of human rights law.

In thus failing to distinguish a subset of values the trade off which is not permitted, some may view any trade analysis as already skewed in favor of trade values over human rights values. However, it may nevertheless be inevitable that a trade-off type of analysis will be carried out in the event of regulatory conflicts, at least under the current international governance regime.

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178 Id.
179 Id.
181 Garcia, supra note 153 at 13.
182 Id.
183 Id.
Some form of balancing is often involved in policy formation: one compares two options in terms of their mutual effects on identified values, and one decides. In particular where the dispute is not directly between trade law and human rights law, but trade law and domestic measures enacted to enforce human rights, it is conceivable that the balancing be used in determining the appropriate or most effective means towards achieving the human rights goals when there is a trade cost. Any such approach, however, and in particular the trade-off device actually employed, must be carefully examined and carefully utilized in policy decisions where rights are involved, or the very nature and principle of rights has been violated at the outset. Therefore, it becomes important to evaluate each trade-off device in terms of degree in which it discriminates against human rights. Trachtman concludes that from a trade perspective certain measures are to be preferred over others, citing in particular the necessity test.

C. The WTO Necessity Test as a Trade-Off Device

Notwithstanding the argument that some sort of balancing is required in policy-formulation where competing values are at stake, the necessity test is clearly objectionable in human-rights terms as a trade-off device on the ground that it is biased in favor of trade values.

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184 *ld*
185 *ld*
186 *ld*
187 *ld*
188 Trachtman, *supra* note 177, at 81-82.
In other words, the test evaluates measures favorably precisely insofar as their impact on trade is least possible, despite the fact that more trade-impacting measures might be more effective in realizing the non-trade value. Not only does this trade-off mechanism fail to recognize the high priority which rights must hold in any policy determination, but in fact the necessity test turns this on its head, and privileges trade values over all other competing values.

To a limited extent the “reasonably available” qualification invites some consideration of the effectiveness of the disputed measure in accomplishing its non-trade regulatory purpose, since any less trade-restrictive measure, which forms the basis for an invalidation of the chosen measure, must be “reasonably available” in view of the state’s non-trade regulatory objectives. The extent of such consideration, however, depends entirely on the interpretation of such language, and the application of the qualification, by GATT panel. In particular, the language clearly does not require specific consideration of the effectiveness of alternative measures in achieving their non-trade goals.

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190 Garcia, at supra note 153.

191 See Thomas J. Schoenbaum has argued that the current GATT/WTO interpretation of the Article XX(b) necessity test turns the provision “on its head” in a literal sense, in that “necessay” refers syntactically to the need for protection of life and health, and not to the trade effects of the measure, and is thus wrong on textual grounds. Thomas J. Schoenbaum, International Trade and Protection of the Environment: the Continuing Search for Reconciliation, 91 Am. J. Int’l L. 268, 276 (1997).

192 See Garcia at supra note 153.

193 Id.

194 Id.
Therefore, it would be consistent with the language of the necessity test as currently interpreted for GATT panel to find that a measure significantly less effective in achieving the non-trade purpose would nonetheless be identified by the panel as "reasonably available," and therefore serves as the basis for invalidating the chosen measure.\(^{195}\)

This is disturbing in that, since such measure was in fact not chosen by the sanctioning state, this language has the effect of substituting the trade forums opinion of rationality of alternatives for the opinion of the legislative forum.\(^{196}\) If one considers that domestic legislatures may, in principle and at least in certain cases, produce legislative outcomes "on the merit," then it is clear that the language of Article XX (a) and (b) invites the questionable substitution by a panel of trade experts, with a built-in bias favoring trade values, of less effective human rights measure in the place of a more effective, democratically-selected, human rights measure on the basis of the measure’s effect on trade.\(^{197}\)

\(^{195}\) Id.

\(^{196}\) Trachtman, supra note 177 at 69.

\(^{197}\) Garcia, at supra note 153.
CHAPTER IV

UNITED STATES ENFORCEMENT OF THE LINKAGE BETWEEN TRADE POLICY AND HUMAN RIGHTS THROUGH SANCTIONS

The United States uses unilateral action as the predominant method by which it involves itself in the international human right sphere, particularly in its encouragement of democracy.\(^{198}\) It often acts unilaterally in response to what it considers to violations of human rights.\(^{199}\) Its actions take the form of sanctions and, most recently in the case of Haiti, armed force.\(^{200}\) While often inclined to employ unilateral actions when it feels another nation is violating human rights, the United States has been reluctant to become a party to International Conventions for the protection of human rights.\(^{201}\)

The apparent reluctance of the United States to assume international obligations is a major stumbling block to a concerted international effort at enforcing human rights, the largest and the most powerful democracy in the world is largely absent from the multilateral protection of human rights.\(^{202}\)

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\(^{199}\) Stirling, supra note 5, at 33.

\(^{200}\) id.


\(^{202}\) Stirling, supra note 5.
The litany of treaties and convention to which the United States is yet to become a party includes the American Convention of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of Discrimination against Women, The United States ratified the Convention on the Prevention and Punishment of the Crime of Genocide, but not until twenty-eight years after initial transmission to the senate. In 1988 the United States ratified the Convention Against Torture, but only after adding numerous reservations regarding among other things, the death penalty and the definition of torture. The reservations includes almost all possible defenses to a torture prosecution. In addition, the United States recently ratified the International Covenant on Civil and Political Rights, albeit with five reservations, five understanding and four declarations. The United States not to adopt the optional protocol allowing individual petitions.

Rather than becoming an international participant in the multilateral enforcement of human rights through ratification of the conventions, the United States has in recent years, preferred the use of unilateral action such as sanctions.

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204 See supra note 24.

205 See supra note 18.

206 Genocide Convention, supra note 19.


208 Id.


210 Id.

211 Oksenberg, supra note 199 at Cl.
A. Federal Trade Sanctions

1. The Jackson-Vanik Amendment

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 it denies its citizens the right opportunity to emigrate.212 Under title IV, section 402, in order for a country, not receiving MFN treatment and to benefit from certain other U.S. credit and guarantee programs, it must comply with the freedom of emigration requirements of section 402 and enter into a trade agreement with the U.S. under section 405 of the Act.213 Section 402 requires that a country not deny its citizens the right or opportunity to emigrate and not impose more than a nominal tax on emigration, or on visas or other document required for emigration.214 Section 402 permits the waiver of these strict requirements in the event that the President determines that a waiver will substantially promote the objectives of section 402 and receives assurances that the emigration practices of the country concerned will henceforth lead substantially to the achievement of section 402.215 There are specific procedures set out for congress to take action to override the President’s action and deny MFN treatment.216

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214 Id.
215 Id.
216 Id.
2. The Helms-Burton Act

i. Background

Helms-Burton\textsuperscript{217} is intended, in part, to apply increased political pressure and economic pressure on Castro government in order to facilitate the establishment of a democratically elected government in Cuba.\textsuperscript{218} Helms-Burton attempts to reach this goal through a reaffirmation and strengthening of existing trade sanctions against Cuba and a creation of action against persons who “traffic” in real property owned by U.S. nationals but expropriated without compensation by the Castro government on or after January 1, 1959.\textsuperscript{219} The stated purposes of the four provisions of Helms-Burton are:

1. To seek international sanctions against the present Castro government;
2. To assist Cuba toward a transition to a “democratically elected;”
3. To protect the “property rights of U.S nationals” who had their property in Cuba expropriated by the Castro government as a result of the 1959 Cuban Revolution by providing them with a private cause of action; and
4. To exclude from the United States aliens who have or “traffic in” property confiscated from U.S. nationals in Cuba.\textsuperscript{220}

\begin{footnotesize}
\begin{itemize}
\item\textsuperscript{218} Helms-Burton § 3, 22 U.S.C.A. § 6022.
\item\textsuperscript{219} Helms-Burton, 22 U.S.C.A. § 6032 (a).
\item\textsuperscript{220} See \textit{id.} §§ 6031-6046, 6061-6067, 6081-6085, 6091.
\end{itemize}
\end{footnotesize}
Title III of the Helms-Burton creates a private right of action against persons who "traffic"\textsuperscript{221} in real property that was once held by U.S. nationals\textsuperscript{222} but later expropriated without compensation by the Cuban government on or after January 1, 1959. Under Title III, persons or companies who traffic in confiscated property would be held liable for money damages\textsuperscript{223} to any U.S. national who owns a claim to the confiscated property.\textsuperscript{224} The most onerous provision permits claimant to seek damages in an amount equivalent to the full value of the property and not limited to the value of the property from which the defendant has actually benefited or used.\textsuperscript{225}

Additionally, Title III explicitly rejects the acts of state doctrine and empowers U.S. courts to adjudicate property claims arising from a foreign government's expropriation that occurred on foreign soil.\textsuperscript{226} These provisions are an attempt to exercise U.S. law extraterritorially. Title IV of Helms-Burton provides broad immigration exclusion from the United States of any alien who have confiscated property of U.S. nationals or who traffic such property.\textsuperscript{227}

\textsuperscript{221} See id. § 6023 (13). Defines "traffic" as follows:

(A).... Person “traffic” in confiscated property if that person knowingly and intentionally—(i) sells, transfers, distributes, dispenses, brokers, manages, or otherwise dispose of confiscated property, or purchases, leases, receives, possesses, obtains controls of, manage, uses, or otherwise acquires or holds an interest in confiscated property; (ii) engages in commercial activity using or otherwise benefiting from confiscated property, or (iii) causes, directs, participates in, or profit from trafficking (as described in clause (i) or (ii) by another person, or otherwise engages in trafficking (as described in clause (i) or (ii) through another person, without the authorization of any United States national who holds claim to the property.

\textsuperscript{222} id. § 6023(c)(1)
\textsuperscript{223} id. § 6082(a)(3)(B)(C).
\textsuperscript{224} id. § 6023(15).
\textsuperscript{225} id. § 6082(a).
\textsuperscript{226} id. § 6082(a)(6).
\textsuperscript{227} id. § 6091(a) (discussing the “Grounds For Exclusion”).
The provision is broad in the sense that it defines excludable aliens as including not only those individuals directly responsible for confiscation of property but also anyone who directed or oversaw a confiscation or gained from a conversion of confiscated property, including corporate officers and controlling shareholders of companies that have been "involved" in the confiscation or trafficking of property as well as their spouse and minor children. The authority to determine who will be denied a visa for travel to the United States under Title IV rests with the Secretary of State.

ii. International Law Implications

One principle of customary international law prohibit a court in state A from sitting in judgment of public acts of government of state B if the effects of the public acts of state B occur solely in state B. This principle of international law is based on sovereignty and comity. In the United States, the principle is known as the act of state doctrine. It applies when tangible property is situated in the taking state at the time of expropriation. Helms-Burton appears to violate this principle.

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229 Id.


232 Id.

233 LOWENFELD, supra note 231, at 523.

234 Oyer, supra note 229 at 438.
Helms-Burton also may violate the international legal principle of “continuity of claim.”235 Under this principle a U.S. Claimant must have been a U.S. citizen or national from the time the claim arose, continuously until the time the claim is adjudicated.236 Helms-Burton, however authorizes claimants who were Cuban citizens at the time of their claims arose to bring claims if they are U.S. citizens at the time of their claim of damages under Title III is made.237 By permitting current U.S. citizens who were Cuban citizens who were at the time of the expropriation to bring claims, Helms-Burton is violating significantly broadens the class of permissible claimants beyond the bounds of what is allowable under current international law.238

Helms-Burton also raises the issue of violation of national “sovereignty”. Sovereignty is a long-recognized principle of customary international law.239 The principle of sovereignty holds that a state has full power to enact laws that govern its own internal affairs within its own territorial jurisdiction, but cannot enact laws that govern the internal affairs of other recognized sovereign states.240 Helms-Burton violates Cuban sovereignty because it allows a U.S court to sit judgment of the acts of the Cuban government in confiscating the property of its own citizens.241 Moreover, and more troubling to most countries, is that by imposing sanctions on foreign countries such as Canada and Mexico who choose to trade with Cuba.242

236 Id. at 158.
237 Id.
238 Oyer, supra note 229 at 439.
239 BROWNLIE, supra note 232, at 287-88.
240 Id.
241 Oyer, supra note 229 at 439.
242 Id.
The effect of Helms-Burton is to chill third-country business activity with Cuba. While the economic isolation of Cuba is part of the congressional intent underlying Helms-Burton, the penalizing of third-country parties for continuing to trade with Cuba is tantamount to secondary boycott. This is problematic from an international law perspective because of secondary boycotts, encroach on the sovereignty of other nations.243

Helms-Burton’s greatest encroachment on existing international law may exist in the arena of jurisdiction to prescribe.244 The concept of jurisdiction to prescribe defines the extent to which a nation may extend its laws extraterritorially.245 Title III of Helms-Burton provides a cause of action in the U.S. court against any foreign individual or company that has made the requisite definition of trafficking in expropriated Cuban property.246 The provision allows a U.S. court to seize or attach the property of any foreign defendant located in the United States and to gain personal jurisdiction over that defendant in order to satisfy a civil judgment under Helms-Burton based on an act or decision that occurred entirely outside the United States.247

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243 Id at 440.
244 Id.
245 LOWENFELD, supra note 231, at 46.
247 See id. §§ 6082(c)-(e). Apparently, even property temporarily located in the United States satisfies the requirement. For example, a foreign ship in transit that calls into a U.S. port is subject to seizure and attachment.
iii. International Reaction to Helms-Burton

On July 16, 1996, President Clinton suspended the authorization for filling of private action under Title III for six months, presumably to avoid an immediate rash of fillings and consequent reaction from other nations. Every six months after the initial suspension President Clinton renewed the suspension of Title III for another six-month period, thus continually delaying the most contentious of the Act’s provision.

The international reaction to Helms-Burton has been an overwhelming denouncement of it as violative of established international law. The Canadian Parliament responded by amending existing blocking laws to make it illegal for Canadian business, including Canadian subsidiaries of U.S parent companies to comply with Helms-Burton. It further amended their Foreign Extraterritorial Act (FEMA) to provide Canadian companies with a means of counter suing in Canadian courts to recover damages awarded by U.S. courts under Title III of Helms-Burton. The Canadian legislation also prevents enforcement in Canada of U.S. judgment that results from the Helms-Burton litigation in the United States.

In early September 1996, Mexico’s Senate unanimously approved a Helms-Burton “antidote” law, fining Mexican companies that allow themselves to be sanctioned by Helms-Burton.

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248 Oyer, supra note 229 at 442.
252 Id. § 9.
253 Id. § 8.
Also in early September 1996, the eleven-member Juridical committee of the Organization of American States (OAS) wrote a unanimous statement condemning Helms-Burton as contrary to international law.\textsuperscript{254}

The European Union (EU) has followed the lead of Canada and Mexico and enacted legislation (EU Regulation) that prohibits nationals or business entities of the EU from complying with the provisions of Helms-Burton.\textsuperscript{255} The EU Regulation has both a “Blocking” provision and a “Claw-back” provision.\textsuperscript{256} The blocking provision prevents the courts of EU member nations from either recognizing or enforcing judgments that give effects to the provision of Helms-Burton.\textsuperscript{257} The claw-back provision authorizes EU nationals and companies that have suffered damages as a result of U.S. sanctions to counter-sue the responsible U.S. party in a civil action in any EU member nation.\textsuperscript{258}

The congressional intent was to redress the wrongs committed by the Castro regime against foreign property owners and hasten the demise of his regime, However in trying to do so the violated the principles of sovereignty, continuity of claim, and jurisdiction to prescribe under customary international law.

\textsuperscript{254} Oyer, supra note 229 at 444. The Mexican Senate passed the “antidote” law by vote of 118-0. Under the Mexican Senate version of the “antidote” law, Mexican companies would be fined equivalent of 100,000 days of the minimum wage for submitting to any sanctions from foreign countries.


\textsuperscript{256} Id. art. 4 \& 5, at 2 (Non-Recognition of Foreign Judgements and Non-compliance with Foreign Orders, respectively).

\textsuperscript{257} Id. art. 6, at 2-3 (Recovery of Damages).

\textsuperscript{258} Id.
B. State Trade Sanctions

Most of the state and local sanctions are in the form of:

1. Selective purchasing restrictions, where the state or local government is prohibited from purchasing goods or services produced by the target country;
2. Investment restriction where the state or local government is restricted from investing in the target country;
3. Divestiture, where the state or local government must divest itself of any current investment in the target country; or
4. Secondary restrictions, where the state or local government is prohibited from contracting with or investing in companies doing business with the target countries. 259

1. State of Massachusetts

Massachusetts enacted a selective purchasing statute in June 1996 that targets Burma (Myanmar). 260 The statute bars the government of Massachusetts from purchasing from companies that do business with Burma. 261 This amounts to secondary boycott because Massachusetts is penalizing not only Burmese companies, but also any company in the world that carries on business with Burma and also wants to conduct business with Massachusetts. 262

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259 Oyer, supra note 229 at 451.
260 Id.
261 Id.
2. State of Florida

Another example of state secondary boycott law is the 1996 enactment of the Cuban Freedom Act by the Florida Legislature. The CFA imposes criminal sanctions on violators of its provisions. The CFA imposes a secondary boycott by virtue of section 288.853(6)(a), Which makes it a third degree felony for “any person, firm, or corporation to import into Florida any sugars, syrups, or molasses that are the product of a country that imports sugar, syrup, or molasses from Cuba.” The intent of this section is to prevent indirect subsidization of the Cuban sugar industry through countries that buy sugar for domestic consumption then sell their on sugar to the United States at inflated prices under sugar quota allotment program. While the intent of this provision is a laudable one, the effect is the imposition of secondary boycotts on anyone importing sugar or sugar products into Florida via a threat of criminal sanctions. Section 288.853(3) of the CFA makes it a third degree felony for a financial institution located or doing business in Florida to finance transactions involving confiscated property in Cuba.

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264 If any citizen or legal resident of Florida, state agency, or financial institution located or doing business in Florida extend a loan, credit, or other financing to a person for the purpose of financing transaction involving confiscated property in Cuba, that person, agency, or institution commits a felony of the third degree. Id. § 288.853(3). Moreover, any person firm, or corporation that’s imports into Florida any syrups, or molasses that are the product of a country that has imported sugar, syrup, or molasses from Cuba commits a felony of the third degree. Id. § 288.853(6)(a).
265 Id.
266 Id.
267 This provision provides protection to the Florida sugar industry while the CFA fails to apply such restrictions on any other commodity or product of Florida. Id.
268 Id. § 288.853 (3).
C. County and City Secondary Boycott Laws

Like state governments, county and city governments have enacted laws and ordinances that have the effect of imposing secondary boycotts. The City of Berkeley, California, for instance, has enacted laws that prohibit the city from purchasing from firms that transact business with Burma, Nigeria, or Tibet. Like the other states and local sanctions, Berkeley’s sanction laws are enacted on moral grounds as a response to human rights violations in the target countries.

The unilateral sanctions taken by the United States to enforce human rights appear to have engendered a great wariness towards United States on the part of smaller nations, particularly those of South and Central America. Rather than joining its neighbors in the collective enforcement of human rights by way of conventions and the like, the United States appears instead to its neighbors to be inflicting its beliefs upon them. Consequently, its South American neighbors appear to look upon the United States as an “imperialist democracy.” In addition to a wariness, there is resentment on the part of those neighbors as a result of the United States refusal to join in the regional regimes to protect human rights. This resentment is perhaps due to the manner in which the United States appear to be quick to judge what it deems to be its neighbors’ violation of human rights, while seemingly not allowing any judgement of its own possible violations.


\[270\] Id.


\[272\] Id. at 816.

\[273\] See Id. at 812 (citing the resistance by the United States to the O.A.S. human rights regime).

\[274\] See Id at 812 (comparing and contrasting the fact that the United States applies pressure on Latin America countries to ratify the American Convention, yet President Carter signed the American Convention contingent upon numerous reservations).
Unilateral actions by the United States also have another adverse effect: that of garnering support not for the United States, but rather for the object of those actions, as was recently seen in the case of Burma.\textsuperscript{275} The United States policy towards Burma’s brutal regime was to isolate the country by cutting off all trade.\textsuperscript{276} No Asian nation would cooperate with the United States, however, forcing it to reopen talks with Burma’s leaders.\textsuperscript{277} During trade talks in Indonesia in November 1994, Chinese President Jiang Zemin stated that many Asian nations, including China, reject the United States view that individual liberty and political freedom are fundamental human rights that take precedence over an entire nation’s stability and communal rights of its citizens.\textsuperscript{278} Burma is an example of a less successful attempts of the United States to act independently as a world arbiter of human rights.\textsuperscript{279}

\textsuperscript{275} Ross Howard, \textit{Canada Puts Trade Before Rights}, Toronto Globe \& Mail, May 12, 1995, at A1. Canada’s government, in agreement with ASEAN, announced its intent to sever the link between human rights and trade, particularly in regard to Burma and China. \textit{Id.} Canada’s Foreign Relations Minister, Andre Ouellet, stated that the best way to promote democratic development is through developing trade, regardless of whether other governments are in agreement with Canada’s beliefs about human rights. \textit{Id.}

\textsuperscript{276} \textit{Id} at 31.


\textsuperscript{278} \textit{Id}.

\textsuperscript{279} See supra note 5 at 31.
The participation of the United States, arguably the most powerful and influential country in the world, would greatly add to the strength of the international and regional human rights conventions.
CHAPTER V

EFFECTIVENESS OF TRADE SANCTIONS

For trade sanctions to be used effectively to enforce human rights it is important that the sanctions are targeted to the extent where they will be effective in making a real change in the target country’s behavior by making it change its policies in a major way, while not inflicting unduly concentrated cost on the targeting country or countries.

The sanctions that were enforced against Yugoslavia and South Africa are examples of situations where sanctions have been used effectively to change the human rights situations of these countries:

A. Trade Sanctions against Yugoslavia

The former Yugoslavia is an example where sanctions were used effectively to enforce human rights violations. In June 1991, open hostilities broke out in former Socialist Federal Republic Of Yugoslavia (SFRY). Following the declaration of independence by Slovenia and Croatia, two of the six republics of SFRY, the government of Belgrade deployed Yugoslav National Army (JNA) against the two republics. Responding to the situation, the security Council established a comprehensive arms embargo against the SFRY on September 25, 1991 (Res. 713(1991)).

281 Id.
However when it was clear that the government of the Federal Republic of Yugoslavia (FRY) was not complying with the repeated demands of the Security Council to withdraw units of the JNA from the territory of Bosnia and Herzegovina and to cease interference there, the Security Council adopted Res. 757 (1992). 282

On May 30, 1992, establishing a comprehensive sanctions against Yugoslavia. The regime included economic sanctions, a ban on flights, and diplomatic sanctions. 283 Specifically, the resolution prohibited the import of commodities and products originating in the FRY and export of goods to Yugoslavia. 284 It also prohibited the transfer of funds to the authorities of FRY for commercial, industrial or public utility undertakings. 285 Paragraph 7 of the resolution established a ban on all flights departing from or arriving in Yugoslavia or flying over the territory of the UN member states. 286

Through this resolution, the members decided to reduce the number of diplomatic representatives from Yugoslavia and even prohibited individuals or groups representing Yugoslavia from playing in sporting events in their territories. 287 In addition, scientific and technical cooperation and cultural exchanges with persons or groups sponsored by the Yugoslav authorities was suspended. 288 The resolution did allow trans-shipment through Yugoslavia of products originating outside SFRY, but only for the purpose of transshipment.

283 See, supra note 282.
284 See paragraph (4) of resolution 757 (1992).
285 Id. [rule 4.1] at para 5.
286 See Braha, supra note 282. at 5.
287 Id.
288 Id.
Finally, the resolution contains provisions for humanitarian exceptions allowing the shipment of medical supplies and flight upon prior approval from the Security Council Sanctions Committee, which oversee the implementation of sanctions.289

By Resolution 787 (1992) of November 16, 1992, the Council prohibited the Trans-shipment through SFRY of certain products including crude oil, petroleum products, coal, iron, steel, vehicles, and aircraft. The Council also decided that any vessel in which the majority or controlling interest is held by a person or undertaking in or operating in FRY shall be considered FRY property for purposes of implementing security Council resolutions.290 These prohibition of transshipment were done in order to prevent good from being diverted for use in FRY. In order to enforce these prohibitions, the Council authorized states to take measures to halt and verify any vessel destined for FRY ports.291

Resolution 820 (1993) further strengthened the sanctions regime and expanded its application to areas under Serb control in Bosnia Herzegovina and Croatia. Under this resolution, vessels which were suspected of having violated Security Council resolutions, would be stopped from entering Yugoslavia’s Ports.292 By enacting this resolution, the Security Council decided to freeze all funds belonging to FRY or persons in FRY and to prevent citizens from making funds available to FRY. Similar to resolution 757, certain humanitarian exceptions were provided.

289 Id.
290 Id.
291 Id.
292 Id.
Finally, the resolution prohibited all services to Yugoslavia both financial and non-financial, leaving exceptions for telecommunications, postal services, legal services in accordance with 757 (1992), and those approved by the SC Sanctions Committee.293

Following a decision by the Yugoslav authorities to close the international border with Bosnia-Herzegovina, covering the areas controlled by the Bosnia Serbs, the Security Council decided for the first time to ease sanctions against Yugoslavia by suspending for one hundred days the ban on civilian flights, Civilian ferry transportation and participation in sporting events.294 On the same day, the Council authorized a strengthened regime of sanctions against Bosnia Serb Party.295 By resolution 1022(1995),296 the Security Council decided to suspend sanctions against Yugoslavia indefinitely. On the same day, the Council decided to phased termination of arms embargo against former Yugoslavia, established in pursuant to resolution 713 (1991).297 Application of the measures against Bosnia Serbs party continued however, it was not until October 1, 1996 that sanctions were terminated with respect to Yugoslavia and Bosnia Serbs.

The UN sanctions against Yugoslavia, was the most comprehensive set of sanctions ever implemented. The chronology of the resolution indicates that the Council used its power to impose economic sanctions with great degree of flexibility.298

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293 S.C. Res. 820. U.N. SCOR.
294 S.C. Res. 943. U.N. SCOR.
295 S.C. Res. 942. U.N. SCOR.
297 S.C Res.1021. U.N. SCOR.
298 Braha, supra note 282. at 6.
The U.S. and European Union used certain forms of coercion, which produced some limited effects. However, up until the adoption of resolution 757, such coercion was partial and fragmented and therefore ineffective in its goal to change the behavior of the Bosnia Serbs.299

There was also unnecessary delay in establishing the sanctions, which further crippled the effectiveness of the Security Council action. The Security Council wasted one year in calling for an end to the arms embargo, which ironically was established upon request of the Belgrade Government, harmed only the victim of aggression, because the limited flow of arms made establishing an effective defense very difficult.300

The sanctions against FRY were both punitive and coercive. They were punitive because of the Yugoslav Government’s major responsibility for the continuation of the conflict, and coercive in seeking to restrain its behavior in supporting the Bosnia Serbs.301 In large part, however, “they were also a response to gross human rights violations, particularly to ‘ethnic cleansing.”’302

The Sanction that were placed against Yugoslavia forced them to change their policy of open support for the Bosnia Serbs and thus forcing them to negotiate peace that led into the acceptance of the peace agreement of November 1995.

299 Id.
300 Id.
301 Id.
B. Trade Sanctions Against South Africa

On June 18, 1986, the House passed an economic sanctions bill, which would have virtually ended all trade with South Africa and would have required all U.S. businesses to leave that country within a six-month period. The Senate rejected the stringent sanctions bill passed by the House, and began work on its own sanctions bill in July 1986.

The Senate version was ultimately adopted by both houses of Congress but was vetoed by President Reagan on September 26, 1986. Both houses voted to override the veto and the Act became law on October 2, 1986. The declared purpose of the Act, as stated in subsection (a) of Section 104 thereof, is “to set forth a comprehensive and complete framework to guide the efforts of the United States in helping to bring an end to apartheid in South Africa and lead to the establishment of a non-racial, democratic form of government.” To accomplish this end, the Act specifies that, “the United States will work towards this goal by encouraging the Government of South Africa to:

• repeal the present state of emergency and respect the principle of equal justice under law for citizens of all races;

• release Nelson Mandela, Govan Mbeki, Walter Sisulu, black trade union leaders, and all political prisoners;

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304 Id.

305 Id.

306 Id.

307 Casey, supra note 304 at 181.
• permit the free exercise by South Africans of all races of the right to form political parties, express political opinions, otherwise participate in the political process;
• establish a timetable for the elimination of apartheid laws;
• negotiate with representatives of all racial groups in South Africa the future political system in South Africa; and
• end military and paramilitary activities aimed at neighboring states.\textsuperscript{308}

The act further provides that, to encourage these six specific actions on the part of the South African government, the United States will use the economic, political, and diplomatic measures as set forth in this Act; and the United States will adjust its actions towards the government of South Africa to reflect the progress or lack of progress made by the government of South Africa in meeting the broad goal of establishing a non-racial democratic form of government.\textsuperscript{309}

The Act codifies the sanctions adopted by the President in his South African Executive Order if September 9, 1985. See Exec. Order No.12532, supra. It contains ten of the eleven measures specified in the Marlborough House Communique issued in London by the Commonwealth Heads of Government on August, 1986(all except a provision on visa services).\textsuperscript{310}

\textsuperscript{308} Id.
\textsuperscript{309} Id.
\textsuperscript{310} Casey, supra note 304 at 182.
1. The scope of the Act

The Act is intended, as its title suggest, to be comprehensive statement of U.S. anti-apartheid policy. The Act defines “South Africa” to include (1) the Republic of South Africa, (2) any territory such as Namibia under the administration, legal or illegal, South Africa, and (3) the “Bantustans” or “homeland” to which South African blacks are assigned on the basis of ethnic origin, including the nominally independent Transkei, Bophuthatswana, Ciskei, and Venda. The Acts imposes various restraints on trade with “south Africa,” a term which includes corporations, partnerships, and other business associations or entities residing or organized outside South Africa.

It also regulates the behavior of “nationals of the United States,” a term which includes U.S. citizens and any corporations or business associations organized under the laws of the United States, including affiliates and subsidiaries of foreign companies under U.S. law.

2. The Ban on New Investments and loans

The centerpiece of the bill was section 310, which states that “no national of the United States may directly or through another person, make any new investment in South Africa.” “New investment” is broadly defined to include either a loan or a “commitment or contribution of funds or other assets.”

311 Id.
312 Id.
313 Id.
314 Casey, supra note 304 at 182.
315 Id.
A loan includes overdraft, currency swaps, the purchase of debts or equity securities issued by the government of South Africa or a private South African entity, the purchase or guarantee of a loan made by another person, the sale of financial assets subject to an agreement to repurchase, or a renewal or refinancing whereby funds or credit are transferred or extended to the government of South Africa or a South African entity.\textsuperscript{316} “A commitment or contribution of funds or assets” is not defined in the Act. The Act specifically exempts, however, the following from its definition of “new investment”:

- the reinvestment of profits earned by a U.S. controlled South African entity in itself or another South African entity;

- contributions of money or other assets which are necessary to enable U.S. controlled South African entities to operate in an economically sound manner without expanding its operations or comply with the mandatory Code of Conduct based on the Sullivan principles in section 208 of the Act;

- Ownership of interest or share in South Africa entity or a security of South African government before the date of enactment of the Act (October 2, 1986), or a transfer or acquisition of such interest or security that does not result in payment, contribution of funds or assets, or credit to South African entity or the South African Government. Moreover, the ban on new investment does not apply to firms owned by black South Africans.\textsuperscript{317}

\textsuperscript{316} Id.

\textsuperscript{317} Casey, supra note 304 at 184.
Section 204 orders the U.S. Export-Import Bank to take steps to encourage the use of its facilities for extension of credit to business enterprise in South Africa "that are majority owned by blacks or other non-white South Africans."

3. Measures Affecting Exports to South Africa

Section 304 prohibits exports of computers, computer software and related goods, services and technology to the South African military, police, prison, weapons, research, and other "apartheid enforcing" agencies and organizations. According to the Export Administration Regulation issued by the Department of Commerce, other "apartheid-enforcing agencies" include the Ministry of Justice, the Ministry of Home Affairs and National Education, the Ministry of Constitutional Development and Planning, the Ministry of Law and Order. Also included are, Ministry of Manpower, the Ministry of Education and Developing Aid, including the Development Board and Rural Development Boards. Likewise, the local, regional, and "Homeland Agencies" that regulate employment, classification or residence of non-whites are included too.318

• Section 307 prohibits most export of equipment, materials, technology useful for nuclear explosive purposes.

• Sections 317 and 318 prohibit the export of any item on the U.S. munitions Control list 9 part of the International Traffic in Arms Regulations ("ITAR") of the Department of State) to South Africa.

• Section 321 prohibits the exports of crude oil or refined petroleum products subject to U.S. jurisdiction to South Africa.319

318 Id.
319 Casey, supra note 304 at 187.
4. Measures Affecting Importation of Goods and Services from South Africa

Section 301 codified the prior Executive Branch policy prohibiting importation of Krugerrands and other gold coins minted in South Africa.\(^{320}\) Section 510 contains an identically worded prohibition on importation of gold coins minted in South Africa. Section 302 prohibits the importation of arms, ammunition, military vehicles, or manufacturing data relating to such items, from South Africa.

Section 303 prohibits the importation of any article grown, produced, manufactured, marketed, or exported by South Africa Parastatal organization. “Parastatal organization” means an organization owned, controlled or subsidized by the South African government. This prohibition does not, however, include corporations or partnership that receive start-up assistance from South Africa Industrial Development Corporation but are now privately owned.\(^{321}\)

Section 309 prohibits imports of uranium ore, uranium oxide, coal, and textiles manufactured or produced in South Africa. Section 319 and 320 prohibits the import of agricultural products and their derivatives, and any “article that is suitable for human consumption” produced in South Africa, iron, and steel.

Finally, section 402 authorizes the President to limit the importation into the U.S. of any product or services of a foreign country to the extent that such country benefit from or takes any commercial advantage of the Sanctions in the Act.\(^{322}\)

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\(^{320}\) Id.

\(^{321}\) Id.

\(^{322}\) Id.

The Act requires all U.S. nationals employing at least 25 persons in South Africa to adhere to a Code of Conduct based on the Sullivan Principles. It calls for the following:

- desegregating the races in each employment facility;
- providing equal employment opportunities to people of all races;
- assuring that the pay system is applied without regard to race;
- establishing minimum wage which take into account the needs of employees and “the appropriate minimum economic level”;
- increasing the number of non-white south Africans in managerial and supervisory positions;
- taking steps to improve employees’ lives with respect to housing, transportation, schooling, recreation, and health; and
- recognizing the rights of employees to join labor organizations.

Section 313 of the Act mandated the termination of bilateral tax treaty in force between the U.S. and South Africa since 1946 and related protocol.

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323 The Sullivan Principles were proposed by the Reverend Leon Sullivan, a black West Virginian Baptist minister, while serving as a member of the Board of Directors of General Motors Corporation.

324 See Casey, supra note 304 at 189.
Section 306 of the Act also required immediate termination of landing rights for South African aircraft and prohibiting U.S. civil aircraft from flying to South Africa. The act ensured that the United States acted firmly to end apartheid in South Africa.

325 Id.

325 Id.
CHAPTER VI

CONCLUSION

Human rights and trade were for a long time exclusive from each other as they were considered not to be connected and mutually exclusive. Trade would continue between countries even when there were serious human rights violations taking place within a specific country. Human rights was considered a domestic matter and criticism of violations was considered interference with their internal affairs of their sovereign state, therefore foreign states could not intervene on the violations. This all change when the interdependence between countries lead to the adoption of universally held moral standards which has been documented in the United Nations charter which specifically recognized human rights.

After the adoption of the United Nations charter and Universal Declaration of Human Rights, human rights have therefore figured prominently whenever trade issues are discussed. This arises due to instances of some trading countries being considered to be violating the human rights conventions by their acts. This has created a moral dilemma when trading with these countries, while their citizens are often sensitive to human rights and are normally ready to boycott good from the violating countries. This has therefore lead to the conflict between human rights and trade, since some countries are reluctant to use trade as a means of enforcing human rights violations. The reason being that sometimes the violating country has an important trade item that is very essential to the country that should be enforcing the trade sanctions, and if it has to enforce the sanctions.
The effect of its own enforcement will have a devastating impact on its economy, example of this was seen with Jordan reluctant to enforce sanctions against Iraq cause it was dependent on the cheap oil from Iraq.

As already discussed in this thesis trade has been used effectively to enforce human rights and alter the behavior of the violating country forcing it to conform with the held human rights standards. As was the case in the white rule of South Africa that was forced to change its policy of apartheid and former Yugoslavia that also had to stop its human rights violations. There are also instances where trade sanctions has failed to alter the behavior but actually made the violating country more adamant in enforcing its policies despite the sanctions. Burma is an example where attempt by the United States to enforce trade sanctions failed because of lack of support from the ASEAN countries forcing the United States to change the approach. Cuba is another example where successive U S administration has failed in their attempts to weaken Fiddle Castro’s hold on power. Both this failures’ are due to the US unilateral enforcement of sanctions and lack of a coordinated universal approach.

Therefore, trade sanctions should continue to be used as a means of enforcing human rights. However, the enforcement should be on a universal basis rather than a unilateral basis, and also the decision to impose trade sanctions must also have a universal approach through the United Nations and not unilaterally by an individual state. This unilateral approach is a great source of resentment especially from smaller state’s which are normally easily targeted and consider it as imposition of neo-imperialism policy on them especially by the United States.
Effective enforcement of human rights is necessary to alter the behavior of violating countries. I hope that violations of human rights by countries will soon be a thing of the past and trade can flow smoothly between countries.
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