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**WEALTH, JUSTICE, THE U.S. AND
GLOBAL MULTILATERAL TREATIES**

Gerald F. Cavanagh, S.J.
Charles T. Fisher III Chair of Business Ethics
and Professor of Management
College of Business Administration
University of Detroit Mercy

Off: (313) 993-1195; Home: (313) 993-1630; FAX: 993-1653
email: cavanagf@udmercy

Wealth, Justice, the U.S. and Global Multilateral Treaties

Wealth creation and distribution is dramatically effected by international treaties. Any market system requires that an appropriate governance entity set guidelines and parameters lest wealthy and powerful countries and business firms aggregate additional power and wealth to the disadvantage of less advantaged countries and poor peoples. International agreements and treaties are a primary instrument for providing guidelines for global political and business activities. Moreover, most of these treaties are instrumental in effecting global wealth creation and wealth distribution. This paper provides an initial exploration of the question:

How much has the United States cooperated with other nations to bring about justice or an "even playing field" for all men and women?

The United States has been criticized both domestically and internationally, for being in the minority in not supporting numerous important international treaties. The most recent case was the U.S. Senate rejection of the International Treaty to ban underground testing of nuclear weapons, after minimal debate and in spite of the fact that the U.S. initiated the treaty decades ago. This treaty is but one which has not been supported by the U.S., in spite of overwhelming global support for the same treaty.

The Convention on the Rights of the Child does not allow countries to recruit children under 18 into the military; the Pentagon wants to retain the right to recruit 17 year olds. Hence, the U.S. and Somalia are the only countries that have not ratified the treaty.¹

The U.S. has not endorsed the new treaty to establish an International Criminal Court to try international war criminals (the Hitlers, Pol Pots and Slobodan Milosevics of the

world). The vote was 120 in favor, 7 opposed and 21 abstentions. Those voting with the U. S. in opposing the treaties include many nations with inadequate human rights records: China, Iraq, Israel, Libya, Qatar, and Yemen.²

The U.S. has also refused to ratify the international treaty banning anti personal land mines (122 nations in favor, with the U.S. Opposed), and the Convention on Biological Diversity (to insure the continuance of biodiversity), along with many other international treaties. On the other hand, the U.S. initiated and was one of the first countries to sign the Nuclear Test Ban Treaty and the Convention to Ban Biological and Chemical Weapons.³ While the Rights of the Child and the International Criminal Court are human rights treaties, many treaties directly influence business and commerce.

All of these global treaties can have considerable impact on business, either directly or indirectly. Peace and international stability is essential for prosperity, the well being of people and for commerce. Moreover, as global trade increases, the interdependence of nations increases proportionately. Products manufactured in sweatshops in one country are sold and may cause injury in another. Air and water pollution effects the air and water of neighboring countries. The toxic waste of one country is sometimes dumped in another. Compared to the amount of law guiding such activities that exists in a nation state, one might say that anarchy exists on the global scene.

Recognizing the importance of stable and equitable global agreements, we may now ask about the U.S. posture toward such treaties. Why does the U.S. support some multilateral international agreements, and not support others? To what extent is U.S. business lobbying a factor in the existence or absence of U.S. support? The answer to these questions is complex.

In order to gain some insight into the above issues, I propose to examine five specific case studies of multilateral international agreements to which the United States had a significant role:

- 1) The Law of the Sea Treaty
- 2) North Atlantic Free Trade Agreement
- 3) Intellectual Property Treaty
- 4) Air Crash Liability Treaty
- 5) The Infant Formula agreement

Process

In order to gain an insight into what influences the U.S. position, we will chart the official position of the U.S. during the time that the global treaty was being considered. We will thus examine:

1. The initial posture of the U.S. toward the issues embraced by the proposed agreement.
2. The arguments pro and con that were given for the treaty. We will examine those arguments in general, and those given by the business community.
3. The status of the treaty, and the current position of the U.S. toward the treaty.

To provide some background, let us briefly outline the treaty making power within the United States. Treaties or international agreements include: 1) treaties, and 2) executive agreements.⁴ The *U.S. Constitution* provides for formal treaties in that "(the president) shall have power, by and with the Advice and Consent of the Senate, to make treaties."⁵ Since the Constitution was established, the United States has "entered into over 12,000 bilateral and multilateral treaties and international agreements. Of these..., the Senate has ratified only 1286..."⁶ Most of the others are executive agreements. The president has independent authority to enter into executive agreements under the same article of the Constitution.⁷ The president often informs Congress in writing of the content of executive agreements. While the U.S. makes a distinction between treaties and executive agreements, under international law both are regarded as treaties.

Present practice, following the U.S. Constitution, provides that treaties are negotiated by the president and must be ratified by two-thirds of the U.S. Senate:

When the Senate considers a treaty it may approve it as written, approve it with conditions, reject and return it, or prevent its entry into force by withholding approval. In practice the Senate gives its advice and consent unconditionally to the vast majority of treaties submitted to it.⁸

Executive agreements, on the other hand, do not require Senate ratification.

Only on rare occasions has the Senate formally rejected a treaty that has been presented to it for ratification. The most famous example of this was the Treaty of Versailles that ended World War I and established the League of Nations. This treaty, which was written in part by President Woodrow Wilson, received a vote of 49 in favor and 35 against. Thus it did not receive the required two-thirds majority.⁹ More frequently the Senate does not vote on treaties that are not likely to be approved, and the treaties remain on the Senate Foreign Relations Committee agenda, sometimes for decades. There are more than 40 widely varying treaties that await action by the Foreign Relations Committee of the U.S. Senate, and these treaties cover everything from banning chemical warfare to agreements on mining the sea.

Trying to please multiple parties in formulating an international agreement is a difficult and complex process. This is illustrated at the beginning of the U.S. by the experience of the first president, George Washington. Although the Framers of the *Constitution* intended that the President consult extensively with the Senate on the content of international agreements, George Washington is the only president to have done so, and he did it only once in 1789. He was so frustrated with the cumbersomeness of the

process, even in dealing with a U.S. Senate of only 26 men at the time, that he never consulted again; none of his successors have done so either.¹⁰

The steps in the process of making treaties and executive agreements in the U.S. are: 1. negotiation by the President, 2. consideration by the Senate, if submitted, 3. Presidential ratification, and 4. final disposition: implementation, modification or termination.¹¹

A negotiated and then ratified treaty is considered the law of the land within the U.S. That is, the courts will recognize it as law in any cases that come before them without further law making actions required. Let us now examine the specifics of the five selected treaties.

LAW OF THE SEA TREATY

Negotiations for the Law of the Sea Treaty began in 1966 when the U.S. and the U.S.S.R. agreed to consult all nations on a new law of the sea. The initial concern was to set the limit of a country's claim to the sea at 12 miles, and to insure freedom of navigation through international straits covered by the 12 mile limit.¹² The United Nations then expanded the agenda to include the issue of deep seabed mining in areas beyond national jurisdiction.

The U.S. supported provisions of the treaty that gives every nation sovereign control over waters up to 12 miles from the shore, exclusive fishing rights to 200 miles, exclusive access to oil and gas in its continental shelf up to 350 miles out, limits on marine pollution, and a mechanism to resolve disputes. The U.S. Department of Defense supported the treaty from the beginning because of its provisions for free passage of ships and aircraft. On the rights to seabed minerals beyond territorial waters, in 1966 President Johnson said that such minerals belonged to all nations. In 1970 the U.N. declared them to be the "common heritage of mankind", and the U.S. delegation voted in favor of the declaration.¹³

The Treaty was negotiated through the administrations of three presidents. Between 1973 and 1980 the U.S. and over 153 other countries agreed on the substance of the treaty. Following on President Johnson's statement and the above U.N. declaration, developing Nations, called the Group of 77, proposed a Seabed Authority to oversee the harvesting of seabed minerals. By 1975 all nations agreed to the general outlines of the treaty, except for the seabed issues, such that two U.S. representatives wrote that there would be "a widely acceptable Law of the Sea Treaty in 1975."¹⁴ This prediction was premature, and working out the seabed authority proved difficult. Secretary of State Henry Kissinger, under President Nixon, proposed a useful package of compromises that established a Seabed Authority for such mining in international waters that included parallel private and public enterprises that could mine the seabed. His compromise was accepted.

When Ronald Reagan became President of the U.S. in 1981, he ordered a total reevaluation of the treaty. After a year-long review, Reagan outlined five reasons for

rejecting the treaty: 1) the Seabed Authority had too much control over private companies, 2) it limited production, 3) the required sale of seabed mining technology to poorer countries, 4) the competition between the private firms and the Seabed Enterprise (Kissinger's compromise), and 5) the fact that after 20 years the treaty could be amended by three fourths of the signers. Moreover, the chief U.S. negotiator, Leigh S. Ratiner, later said that hardline conservatives had set the written guidelines under which they were to negotiate:

Other delegations did not understand that the U.S. delegation was operating under instructions containing a restrictive interpretation of the president's objectives and was under pressure to adhere to them as the sole guidance for interpretation.¹⁵

Hence the U.S. delegation had little if any room to negotiate.

Advocates of the treaty maintained that the U.S. would suffer in the long run if it did not sign. Production ceilings were set so high that they are meaningless, and the terms for transferring mining technology favor the seller. Moreover, many fear that if the U.S. does not sign the treaty, its navigational rights and recognition of territorial waters will not be protected. International law scholar, Louis Henkin of Columbia University says, "The treaty is probably the best one obtainable, and is certainly better than the alternative of isolating the U.S. by not signing the agreement."¹⁶

"After 14 years of negotiations, in the final session the U.S. sought to renegotiate essential elements of a package that already commanded widespread support and near consensus."¹⁷

On a separate track, during those negotiations, the U.S. sought to convince the other industrialized nations not to sign the Law of the Sea Treaty and in place of it to devise a "mini-treaty" that would better protect their own national and property interests.

The chief negotiator for the Reagan Administration, Ratiner, was chosen because he was a conservative and because of his broad experience in sea-law and as lobbyist for Kennecott and other firms interested in mining the seabeds. He saw what he felt were serious flaws in the treaty, and he worked to overcome those flaws. Compromises were reached, but his efforts "were undermined by the hardliners' rigid and unrealistic demands, which convinced the Group of 77 that the U.S. wasn't negotiating in good faith."¹⁸

On April 30, 1982, 130 nations voted to adopt the treaty and open it for signature. The United States was the only Western industrialized country to vote against the treaty; joining the U.S. in a no vote were Israel, Turkey and Venezuela. The Soviet bloc countries and some other Western countries abstained.

The seabed mining section was rewritten, and the U.S. finally did sign on and joined then over 170 other nations in 1994. The revision of the treaty was made largely to answer

U.S. opposition; nevertheless, "the U.S. Senate has yet to hold more than a public hearing on ratifying the pact."¹⁹

NORTH AMERICAN FREE TRADE AGREEMENT

Perhaps no international treaty in recent years has attracted as much attention among the American public than the North American Free Trade Agreement (NAFTA) has in the 1990's. The NAFTA agreement was signed by the U.S. President Bush Canadian Prime Minister Mulroney, and Mexican President Salinas in December, 1992. Its intention is to eliminate restrictions on the flow of goods, services, and investment in North America by phasing out tariffs over a 15 year period. In addition, the agreement protects intellectual property and provides a mechanism for dispute settlement. Moreover, when he took office, President Clinton negotiated "side agreements" to protect the environment and worker wages and working conditions.²⁰

Obtaining the approval of the U.S. Congress to negotiate this pact was difficult. Republicans tended to favor NAFTA, and most of the opposition was among the Democrats. The first battle was over "fast track" authority for the President to negotiate the treaty. Fast track has become the standard process by which Congress delegates power to the president to negotiate on its behalf. By this mechanism, Congress commits itself to limited debate and to a yes or no vote without amendment on the agreement presented by the President. In May, 1991, Congress did grant this authority to President Bush for two years.²¹

In January, 1993 a coalition of labor, environmental, farm, consumer, religious, human rights groups and some small manufacturers received considerable attention when they questioned both fast track and the NAFTA pact itself. The opposition to NAFTA focused on the perceived loss of American jobs, the plight of Mexican workers and the environmental degradation brought on by NAFTA.

The then Democratic majority leader Richard Gephardt wrote to President Bush calling for negotiations that were broader than traditionally was the case in trade pacts. Gephardt said:

I request that you not limit the talks to what used to be traditionally known as "trade issues" -- tariffs, trade-related investment restrictions, dispute resolution and the like -- but rather that we address North American Free Trade systematically. ...To do so will require discussing issues like transition measures, wage disparity, environmental protection and worker rights.²²

Labor and Environmental Issues

When Bill Clinton was took office as U.S. President, he directed that new negotiations be undertaken to obtain "side agreements" on labor and the environment. It was a challenge to negotiate these agreements, without losing the support of business interests and thus a number of key Republican votes.

In addition, reopening negotiations with the Mexico and Canada also presented problems. In Mexico the Chiapas Zapatista guerrilla leader Subcomandante Marcos protested the treatment of Indians by the Mexican army. He criticized the depopulation of rural areas and concentration of poor in the cities and blamed this on NAFTA.²³

Meanwhile, in the U.S. business leaders recognized that it was wise for them to become engaged in the negotiations. The Business Roundtable, an organization of chief executive officers of the largest U.S. firms, formed a "blue" and a "green" team to deal with labor and environmental negotiations. Business leaders were against providing the authority to impose trade sanctions for violating provisions of the agreement.

Prior to NAFTA approval, studies on the potential effects of NAFTA on jobs in the U.S. showed very little effect. These studies predicted anywhere from no effect to 200,000 new jobs. A challenged AFL-CIO study predicted a loss of 500,000 jobs. To place these figures in perspective, the U.S. economy regularly generates up to 200,000 new jobs each month.

NAFTA was finally approved by the U.S. Congress in January 1994, and thus created the largest free trade area and richest market in the world. Global businesses especially have benefited from NAFTA, as expected. The U.S. Department of Commerce calculated:

NAFTA is the most comprehensive regional trade agreement ever negotiated by the United States and is scheduled to be fully implemented by the year 2008. In 1996, U.S. two way trade in goods under the NAFTA with Canada and Mexico stood at \$420 billion, a 44% increase since the NAFTA was signed.²⁴

The Department of Commerce estimated that 311,000 jobs in the U.S., paying 13-16% above the average U.S. wage, have been created in exporting goods to Mexico and Canada. Moreover the NAFTA Commission on Environmental Cooperation (CEC) is addressing illegal trade in hazardous wastes, endangered wildlife and the elimination of certain toxic chemicals and pesticides, such as DDT and chlordane.²⁵ A detailed study of several industries, computers, semiconductors, automobiles, bearings, telecommunications, construction equipment, minerals and insurance, showed that global trade did shift production to some extent. However, they found that lower wages were not the determining factor in new investment:

The dynamic logic of comparative advantage dictates that most successful firms should make long-term commitments to countries that will act as the best platforms over time for a broad array of activities, beyond pure cost minimization.²⁶

Global firms supported NAFTA from the beginning, and business lobbying was important for the final approval of NAFTA. Labor unions and environmental groups, along with Ross Perot, Pat Buchanan and others opposed and almost defeated NAFTA. Perot had been very outspoken in his criticism with his much quoted "great sucking sound" of the loss of jobs to Mexico. But two public events were crucial in changing public opinion. First, the public appearance at the White House of four ex-presidents of the U.S. from both parties -- Ford, Carter, Bush, and Clinton -- all supporting NAFTA.

The second event was the TV debate of Ross Perot and Vice President Al Gore on NAFTA. Gore was better prepared and he pressed Perot on his populist statements. Perot became flustered and irritated, and polls showed that Gore thus won the debate.

Conclusions on NAFTA

In sum, while NAFTA benefited global business firms, and their support was important in the approval of NAFTA, it was by no means sufficient. Some environmental groups worked with the negotiators to develop the environmental side agreement, and then supported the treaty. While labor unions and other environmental groups opposed NAFTA, their traditional supporters, such as Jimmy Carter, Bill Clinton, and other Democrats supported NAFTA. Both Carter and Clinton were convinced that the people of the U.S. would ultimately benefit from NAFTA, and they thus gave their support to the treaty.

The principal arguments opposing NAFTA reappeared in the much publicized public protest at the World Trade Organization (WTO) meetings in Seattle in December, 1999. Human rights, wages, working conditions and protecting the environment were the principle issues that the demonstrators protested were being neglected by WTO negotiations. President Clinton then took those issues to assembled members of the WTO in his opening address. Developing nations then objected to the U.S. forcing these issues, with the possible consequence of thus undermining their own competitive advantage in the global market.

Footnotes

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7. U.S. Constitution, Article II, Section, 1, 2 and 3.
8. *Treaties and Other International Agreements...*, pp. xv.
9. *Treaties and Other International Agreements: The Role of the United States Senate*, A Study prepared for the Committee on Foreign Relations, United States Senate by the Congressional Research Service. (Washington: U.S. Government Printing Office, 1993), p xv.

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