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Spirits in the Material World: A Post-Modern Approach to United States Trade Policy

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SPIRITS IN THE MATERIAL WORLD: A POST-MODERN APPROACH TO UNITED STATES TRADE POLICY

BY JAMES M. COOPER *

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INTRODUCTION

Senator Russell Long recognized decades ago that "U.S. trade policy has been the orphan of United States foreign policy."¹ Prior to 1962, trade issues were largely administered through the State Department because trade was a part of the foreign policy utilized by the United States, for various geopolitical reasons, during the Cold War. Trade policies were compiled on an ad hoc basis,² a product of lobbying efforts by domestic, and at times, foreign constituents. Although the United States has a history of undertaking trade work within organized international frameworks—whether multilateral, regional, or bilateral negotiating fora—there has always been room for unilateral, and often, aggressive trade practices.

Much of United States trade policy was caught up predominately in the superpower rivalry of the Cold War. As a result, the United States was willing to enter into non-reciprocal agreements with trading partners, placing economic and political priorities ahead of trade interests. In the 1960s, for example, Washington was largely antagonistic towards regional trading bloc formation, but made an exception for the European Common Market. The United States viewed Western Europe's regional moves in the context of a potential Communist threat, and economic cooperation as necessary for permanent European peace. Simultaneously, the United States favored a focus on specific countries for geopolitical, strategic, and

1. I.M. DESTLER, MAKING FOREIGN ECONOMIC POLICY 170 (1980) (detailing how trade deficits reflected the idea that trade policies had been relinquished for political objectives).

2. See Ronald N. Brand, *GATT and United States Trade Law: The Incomplete Implementation of Comparative Advantage Theory*, 2 J. LEGAL ECON. 95, 102 (1992).

trade reasons—welcoming in the first wave of bilateral free trade agreements in the 1960s.

In this seemingly rich and diverse set of policy decisionmaking, scholars have attempted to find consistency in United States trade relations. One school of thought pursues trade with an eye towards economic interdependence and security issues. These scholars believe that high technology industries are of utmost importance for American “military security, competitiveness in international trade, and domestic economic vigor.”³

Other analysts examine the basic market principles behind United States trade policy, although it is impossible that coherent and workable trade regulations could derive completely from an efficiency analysis.⁴ According to one analyst, “the economic analysis upon which enduring neoclassical international trade practices have relied has become increasingly irrelevant.”⁵ Professor Paul Krugman expressed his agreement when he stated, “[t]he new thinking about trade . . . makes one thing clear: the idealized theoretical model on which the classical case for free trade is based will not serve us anymore. The world is more complex than that.”⁶

For governments, there are an increasing number of ways to approach trade policy, just as for academics there are a number of paradigms through which to analyze these changes. The post-modern analysis of trade policy is one method to unite the varying strands of

3. David B. Bobrow & Robert T. Kudrle, *Economic Interdependence and Security: U.S. Trade and Investment Policy for a New Era*, 3 MINN. J. GLOBAL TRADE 61, 61 (1994) (explaining this theory of trade policy and noting that the Clinton Administration adheres to this idea).

4. See Daniel K. Tarullo, *Beyond Normalcy in the Regulation of International Trade*, 100 HARV. L. REV. 546, 550 (1987) (rejecting the market correction model since no model can be formed representing international trade).

5. Mark S. Ehrlich, Comment, *Towards a New Dialogue Between International Relations Theory and International Trade Theory*, 2 U.C.L.A. J. INT'L L. & FOREIGN AFF. 259, 262 (1997).

6. Paul R. Krugman, *Introduction: New Thinking About Trade Policy*, in STRATEGIC TRADE POLICY AND THE NEW INTERNATIONAL ECONOMICS 1, 15 (Paul R. Krugman ed., 1986) [hereinafter STRATEGIC TRADE POLICY] (explaining how the current trade policy can no longer be based on the classical model and mentioning that this complexity raises the possibilities of “activist trade or industrial policy”).

United States trade policy.⁷ Both an evolving philosophy and a cultural movement, post-modernism is difficult to describe.⁸ According to Jean-François Lyotard, the leading French theoretician, post-modernism “designates the state of our culture following the transformations which, since the end of the nineteenth century, have altered the game rules for science, literature, and the arts.”⁹ In short, the history of ideas has been predominated by *metanarratives*, or, overarching theories that profess ultimate truths. Post-modernism or post-modernity¹⁰ explodes the myth that anyone, or any school of

7. See Ehrlich, *supra* note 5, at 260 (attempting to fuse the concepts of international relations theory and international economics theory by examining the importance of “new theories in international relations to problems in international trade and economics”). Several law review articles discuss the relationship between post-modernism and international affairs. See, e.g., G. Richard Shell, *Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization*, 44 DUKE L.J. 829, 835 (1995) (conceptualizing and critiquing three competing approaches to WTO legalism, each of which is grounded in international relations theory); J.A. Lindgren Alves, *The United Nations, Postmodernity, and Human Rights*, 32 U.S.F. L. REV. 479, 481 (1998) (stating that post-modernity pervades every field of human science, including the study of international relations).

8. See Linda Hutcheon, *Theorising the Postmodern Towards a Poetics*, in THE POST-MODERN READER 76, 76 (Charles A. Jencks ed., 1992). “[P]ostmodernism is a contradictory phenomenon, one that uses and abuses, installs and then subverts, the very concepts it challenges—be it in architecture, literature, painting, sculpture, film, video, dance, TV, music, philosophy, aesthetic theory, psychoanalysis, linguistics, or historiography.” *Id.* See generally JEAN-FRANÇOIS LYOTARD, *LE POSTMODERNE EXPLIQUÉ AUX ENFANTS* (1988) (responding to the question, “what is post-modernism?”); STEVEN CONNOR, *POSTMODERNIST CULTURE* (1989) (describing the role of post-modernism debate that exists in this subject in the areas of art, culture, drama, and popular cultural studies); CHARLES JENCKS, *WHAT IS POSTMODERNISM?* (1989) (defining the concept of post-modernism as it relates to architecture); FREDRIC JAMESON, *POSTMODERNISM, OR THE CULTURAL LOGIC OF LATE CAPITALISM* (1991) (arguing that “post-modern” as a theoretical underpinning can not accurately be used in this era of post-imperialism); TERRY EAGLETON, *THE ILLUSIONS OF POSTMODERNISM* (1996) (examining post-modernism as a whole and detailing the culture of the subject).

9. JEAN-FRANÇOIS LYOTARD, *THE POSTMODERN CONDITION: A REPORT ON KNOWLEDGE* xxiii (Geoff Bennington & Brian Massumi trans., 1994) (providing a background to Lyotard’s theory of post-modernism).

10. See STEVEN BEST & DOUGLAS KELLNER, *POSTMODERN THEORY: CRITICAL INTERROGATIONS* 2 (1991) (utilizing the term “post-modernity” to describe the “period which allegedly follows modernity”). The authors of this book distinguish “post-modernity” from “post-modernism.” See *id.* “Post-modernity” refers to the “supposed epoch that follows modernity,” and “post-modernism” describes the

thought, can have a monopoly on the truth.¹¹ There are, instead, competing narratives that all vie for their proper place in the history of ideas.¹²

Using deconstructionalist tools, post-modernists apply antifoundationalist epistemology, and soundly reject the post-Enlightenment project.¹³ The post-modernists distrust such constructs as reason, science, and other foundations of Western society, recognizing them as power plays. It is no wonder that some have criticized post-modernists for their nihilism and lack of grounded principles:¹⁴

[T]here is no unified postmodern theory, or even a coherent set of positions. Rather, one is struck by the diversities between theories lumped together as 'postmodern' and the plurality—often conflictual—of postmodern positions. One is also struck by the inadequate and undertheorized notion of the 'postmodern' in the theories which adopt, or are identified in, such terms.¹⁵

Despite these weaknesses in the theoretic underpinnings of post-modernism, it has received some treatment in the fields of interna-

"movement and artifacts in the cultural field that can be distinguished from modernist movements, texts, and practices." *Id.* at 5.

11. See GARY MINDA, POSTMODERN LEGAL MOVEMENTS: LAW AND JURISPRUDENCE AT CENTURY'S END 3 (1995) (noting that "[p]ostmodernism is an aesthetic practice and condition that is opposed to 'Grand Theory,' structural patterns, or foundational knowledges.").

12. See *id.* at 5. There is fascinating discourse over whether post-modernism is the natural step from modernism or whether something must first be post-modernist to become modernist. This discourse is the stuff of Parisian coffee-houses and philosophy lectures and shall not be discussed herein. Some theorists view post-modernism as a cultural movement which precedes modernism. See *id.* Other analysts see post-modernism as a metahistorical category cutting across eras of cultural history. See UMBERTO ECO, POSTSCRIPT TO THE NAME OF THE ROSE 67 (1983) "The postmodern reply to the modern consists of recognizing that the past, since it cannot really be destroyed, because its destruction leads to silence, must be revisited: but with irony, not innocently." *Id.*

13. For an examination into the discord created by the Post-Enlightenment, see generally Thomas D. Barton, *Troublesome Connections: The Law and Post-Enlightenment Culture*, 47 EMORY L.J. 163 (1998).

14. See generally, e.g., CHRISTOPHER NORRIS, WHAT'S WRONG WITH POSTMODERNISM (1990) (critiquing various exponents of the post-modern philosophy).

15. BEST & KELLNER, *supra* note 10, at 2.

tional relations and international economics. This global extension seems obvious to Charles Jencks, who stated that "[i]n the last ten years post-modernism has become more than a social condition and cultural movement, it has become a world view."¹⁶ Therefore, it is no surprise that the international system regulating international trade has been approached from a post-modern perspective. For Professor David Kennedy:

The international trade regime, even at its most imperious, does *not* see itself disabling the *mechanisms* of national or local legislation, does not aspire to replace the institutions of public law, still less to establish an international state. International economic law reorients us away from the *level* at which the regime operates and toward its substantive *spirit* or policy orientation.¹⁷

It is difficult to identify such a *spirit* given the "degree of intellectual inconsistency"¹⁸ that exists. Therefore, it should not be any surprise that United States policy shares this search for a policy orientation. When Stuart Eizenstat testified before the United States Senate Committee on Foreign Affairs, he outlined such a *spirit* in the government's foreign economic policy, stating that this spirit is "to

16. Charles Jencks, *The Post-Modern Agenda*, in THE POST-MODERN READER, *supra* note 8, at 10, 10.

17. David Kennedy, *Receiving the International*, 10 CONN. J. OF INT'L L. 1, 12 (1994) For a more detailed look into the new legal structure of United States federalism as it affects federal trade law, see Charles Tiefer, *Free Trade Agreements and the New Federalism*, 7 MINN. J. GLOBAL TRADE 45, 48 (1998). "In the 1990s trade agreement negotiations are no longer solely a matter of the national executive branch exercising a national government prerogative. Instead, negotiations now follow the new "partnering" approach between the executive branches and the states." *Id.*

18. See Brand, *supra* note 2, at 101 (asserting that "the relationship between the law and its intellectual underpinnings remains enigmatic"); see also Martti Koskenniemi & Marja Lehto, *The Privilege of Universality: International Law, Economic Ideology and Seabed Resources*, 65 NORDIC J. INT'L L. 533, 533 (1996) (asserting that the "new international economic order . . . displays the cunning of legal reason as it works to produce co-operation from diametrically opposed public positions and legitimacy from empty legal principles and institutions"). "Since 1945 there has been a movement of thought which seeks to understand an economic system by reference to hypothetical human beings with hypothetical ideas and aims, rather than by reference to the subjectivity, the ideas and aims, of actual human beings." Philip Allott, *The Nation as Mind Politic*, 24 N.Y.U. J. INT'L L. & POL. 1361, 1370 (1992).

lead in opening up the arteries of [international] trade, . . . support peace processes, . . . and to follow through in developing strong economic partnerships . . . around the world.”¹⁹ Due to the increasing globalization of economies, the economic health of the country depends considerably on its ability to have access to markets abroad. Ninety-five percent of the world’s consumers live beyond the borders of the United States.²⁰ Consequently, the United States government understands that it must foster freer trade internationally for domestic producers to expand their markets.

What the United States government does not clarify, however, is the manner in which freer trade is to be facilitated. In other words, what is the substantive *spirit* in trade? The United States does not know whether it wants to be a bilateral trader, a leader in a set of regional trading pacts, or part of the world’s multilateral trading regime. In reality, the United States wants to lead all and none of these efforts at the same time. For example, on April 30, 1993, the United States government threatened trade sanctions against Brazil, India, Japan, and other states.²¹ At the same time, however, President Clinton stated that he wanted to take all necessary steps to complete the Uruguay Round of General Agreement on Tariffs and Trade (“GATT”) negotiations.²² This demonstrates America’s post-modern policies. On one hand, the Clinton Administration sang the praises of global markets and pledged its commitment to the liberalization of trade regimes. On the other, it barked threats of sanctions if would-be partners did not open their borders to American products and competition. In short, American trade policy has become a cocktail of re-

19. *Statement for the Record by Ambassador Stuart E. Eizenstat Under Secretary-Designate for Economic, Business, and Agricultural Affairs: Nomination Hearing Before the Senate Comm. on Foreign Rel.*, 105th Cong. 2 (1997) (statement of Stuart Eizenstat) (on file with *American University International Law Review*) [hereinafter Eizenstat Testimony]. Stuart Eizenstat is currently Undersecretary of State for Economic, Business, and Agricultural Affairs. He is the former Undersecretary of Commerce for International Trade, and United States Ambassador to the European Union.

20. *See id.*

21. *See Drift Over Trade*, *ECONOMIST*, May 8, 1993, at 18 (noting that the Clinton trade policy only makes sense if the threatened sanctions are carried out).

22. *See id.* (explaining that President Clinton tried to advance the Uruguay Round talks through his support of the GATT’s new Director-General, Peter Sutherland).

constructed bilateralism and hyper-regionalism mixed with cautious multilateralism. The ingredients are all competing narratives vying for the predominant position in the trade policy formulation process.

This Article examines the three strands that form United States trade policy. Part I considers multilateralism, as evidenced by the conclusion of the Uruguay Round GATT talks and the recent spate of World Trade Organization ("WTO") dispute resolution procedures to which the United States government has subscribed. The Clinton Administration has significantly played the multilateralism card, putting stock into rules-based collective solutions to issues of international trade.

Part II analyzes the trend of regionalism and the march towards regional trading blocs. As the European Union and Japan move towards consolidating their respective trading power bases, the United States also is in overdrive in its effort to carve out new regional trading blocs. Building on the success of the North American Free Trade Agreement ("NAFTA"),²³ the United States is intent on expanding American trade to the rest of Latin America through the Free Trade Area of the Americas ("FTAA").²⁴ Looking to the Pacific Rim, the United States has lead efforts to increase the role of the Asia-Pacific Economic Cooperation ("APEC")²⁵ forum as a legitimate trading bloc.

Part III turns to the increased use of unilateral measures, irrespective of current negotiations in multilateral and regional contexts and their emerging arrangements. On the unilateral front, the United States has pushed the limits of international law through the extraterritorial application of American laws and through the enforcement of United States trade legislation, perhaps to the detriment of long-term relations with traditional trading partners. Threats of trade wars, be it with the European Union, Japan, Brazil, or India, abound. The United States government's negotiating style has taken a decisively

23. Dec. 17, 1992, Can.-Mex.-U.S., 32 I.L.M. 289 and 32 I.L.M. 605.

24. See Summit of the Americas: Declaration of Principles and Plan of Action, Dec. 11, 1994, 34 I.L.M. 808, 811 (1995) (noting that the United States planned to increase world trade by reducing barriers to trade and investment).

25. See APEC SECRETARIAT, ASIA-PACIFIC COOPERATION, SELECTED APEC DOCUMENTS, 1995, at 1 (stating the treaty's purpose is to open trade with Asia and the Pacific).

robust tenor as the United States Trade Representative acts like a spoiled child if the United States does not get its way.

Part IV examines the intellectual inconsistency of international trade policy in general and that of the United States in particular. In an era of competing constituencies and a cornucopia of options, the seemingly diverse and counter-indicating *spirits* that emanate from the United States government concerning trade policy may not be post-modern at all. The one over-arching theme that brings together the trifurcated approach is American self-interest. But as these policies merge, there is often discord felt in world markets, government negotiators, foreign businesses, and traditional allies. Events can often spin out of control and unfold so quickly that a truly focused, cohesive, and consistent response is close to impossible. This may be the Clintonian "just in time" practice of management—the mainstay of his administration to date.²⁶ After all, these are millennial days in which everything appears post-modern.

I. MULTILATERALISM: A POST-MODERN APPROACH TO UNITED STATES TRADE POLICY

On May 1, 1997, Stuart Eizenstat told the United States Senate Foreign Relations Committee that:

[T]he United States must continue to lead in opening up the arteries of trade in the international trading system . . . Our continuing leadership in opening markets is essential to enhancing the prosperity and security of the American people in the 21st century and binding the peoples of the world together in a chain of prosperity and shared interests.²⁷

This statement correctly defines the Clinton Administration's current trade policy: multilateralism.

The United States' faith in multilateralism is apparent on several fronts. First, the United States government has maintained a strong belief in the world-trading regime as the cornerstone process of trade

26. See James M. Cooper, *Creative Problem Solving and the Castro Conundrum*, 28 CAL. W. INT'L L.J. 391, 398 (1998) (examining foreign policy in light of United States relations with Cuba). President Clinton's policy is calibrated; small shifts in Cuban policy are met with small shifts in American policy. See *id.*

27. Eizenstat Testimony, *supra* note 19, at 2.

liberalization. Second, the United States appears eager to test the dispute mechanisms of the WTO, the very process that simultaneously legitimates and regulates the rules-based multilateral trade regime. Third, the United States continues to push for liberalization. As markets open in new sectors of the global economy and the WTO reduces barriers to trade, it is clear that the United States remains a strong advocate of the multilateral process.

A. HISTORY OF THE WORLD TRADING SYSTEM

Before the Second World War, all trading states had erected trade barriers because of worldwide depression and subsequent protectionist policies. The six years of armed conflict that engulfed the world further exacerbated this system.

Subsequently, the free movement of goods and services was a fundamental pillar of the post-war architecture created during the Bretton Woods Conference in 1944. Since that time, the United States has been the world's leader in pushing for international freer trade flows. Successive United States Presidents, both Republican and Democratic, and concurrent Congresses, have led the effort to force open foreign markets to international competition, which really means United States firms. In the post-1945 era, the GATT²⁸ has been the main tool of American foreign policy to accomplish open markets globally.²⁹

Free trade and economic interdependence would avert war in the future, with the GATT system assisting in that endeavor.³⁰ The non-Communist trading states of the world could engage in this highly structured multilateral process. Clearly, free marketry and the trans-

28. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194 [hereinafter GATT 1947].

29. See KENNETH W. DAM, *THE GATT: LAW AND INTERNATIONAL ECONOMIC ORGANIZATION* 10 (1970) (asserting that the GATT was both a product of United States planning, as well as predominant American economic ideology in the post-World War II era).

30. *But see* PATRICK J. BUCHANAN, *THE GREAT BETRAYAL: HOW AMERICAN SOVEREIGNTY AND SOCIAL JUSTICE ARE BEING SACRIFICED TO THE GODS OF THE GLOBAL ECONOMY* 61 (1998) ("GATT was the Magna Carta of the multinationals."). "In the global arena, politics trump economics, and it is relative, not absolute, power that counts. Nations will abide by the rules of an international system as long as that system works to their advantage." *Id.* at 65-66.

parency of open borders for trade assisted United States geopolitical goals. With the world divided into two camps, American policymakers pursued such multilateral endeavors believing that there would be strength in numbers.

The end of the Cold War gave impetus to form a new trade organization—one with rules, dispute settlement mechanisms, and sanctions.³¹ Through eight GATT negotiating rounds, the United States has been able to reduce trade barriers around the world in a systematic fashion.³² The resulting framework is the culmination of half a century of multilateral negotiations.

Although formal negotiations began in the Reagan era, the Bush Administration initiated a new era of GATT talks—the Uruguay Round.³³ The United States was the strongest proponent of the Uruguay Round. This effort involved more than the traditional reduction of tariff rates.

With financial and other services accounting for 70 percent of the American GNP, American agriculture in serious trouble, and rising protectionist pressures in Congress, the United States demanded that other nations open their economies to American service industries, including American multinationals, remove agricultural export subsidies, and write down rules preventing the piracy of patents, trademarks, and other forms of intellectual property rights.³⁴

In the face of French intransigence during the Uruguay Round, the resolution of issues involving agricultural trade proved virtually

31. See DANIEL VERDIER, *DEMOCRACY AND INTERNATIONAL TRADE* 288 (1994) (arguing that “[t]he collapse of the Soviet bloc in 1990 knocked away the security-issue foundations of the postwar trading system”). The need for a united west to guard against the Soviet threat is no longer an adequate justification for the GATT. See *id.*

32. See generally JOHN JACKSON, *WORLD TRADE AND THE LAW OF GATT* (1969) (compiling GATT laws and negotiations).

33. See General Agreement of Tariffs and Trade 1994, Apr. 15, 1994, art. 1(a), Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, FINAL ACT EMBODYING THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 23, 33 I.L.M. 1140, 1154 (1994) [hereinafter GATT 1994]. The result of the Uruguay Round was the GATT 1994. See *id.*

34. ROBERT GILPIN, *THE POLITICAL ECONOMY OF INTERNATIONAL RELATIONS* 199, 200 (1987).

impossible.³⁵ America's other trading partners, however, knew that if the Uruguay Round was not successfully completed, a protectionist trade policy in the United States would result. Ultimately, the nations struck a last minute deal, and the international trading regime was expanded and strengthened.

The most comprehensive trade agreement to date, the Uruguay Round not only freed up a number of markets, but also created the WTO.³⁶ President Clinton inherited this legacy of free trade and his administration has sought to open markets abroad in a similarly multilateral fashion.

B. THE WTO DISPUTE SETTLEMENT UNDERSTANDING

The United States, along with other trading states, has long sought an effective, rules-based system for dealing with trade conflicts.³⁷ Historically, the United States invoked the GATT dispute settlement procedures to challenge alleged wrongful trading policies more frequently than any other country.³⁸ The pre-Uruguay Round GATT

35. See *Unraveling: Uruguay Round*, ECONOMIST, Dec. 26, 1992, at 91 (noting that as the seventh year of GATT talks commenced, France had already begun proposing a number of amendments to the GATT text); see also *King Peter*, ECONOMIST, June 12, 1993, at 78 (discussing the difficult task of negotiating the GATT, and noting French resistance to reducing subsidized farm exports).

36. Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, FINAL ACT EMBODYING THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 9, 33 I.L.M. 1125, 1143 (1994).

37. See FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* 283 (1992). Establishing a system with "teeth" does not mean using force in trade disputes. Force is not an option, according to Fukuyama: "The industrial democracies are today effectively linked in a web of binding legal agreements which regulate their mutual economic interactions. While they may engage in political struggles over beef quotas . . . the use of force to settle such disputes among the democracies themselves is totally unthinkable." *Id.*

38. See David A. Gantz, *U.S., Europe Most Active in Trade Court*, ARIZ. BUS. GAZETTE, Feb. 19, 1998, at 4 (stating that the United States is the most frequent plaintiff of the WTO members). Article 23 of GATT 1947 provided for consultation between Contracting Parties in any dispute. See GATT 1947, *supra* note 28, art. 23. If this step yielded no settlement, the parties in conflict could refer the dispute to the GATT Contracting Parties. Under Article 23(2), the Contracting Parties would act jointly in investigating the matter, making recommendations, and ruling on the dispute. See *id.* art. 23(2). If the Contracting Parties ruled in favor of the complainant, they could authorize retaliation. Retaliation meant the suspension of the application of some of the concessions or obligations the complainant had

dispute resolution mechanisms proved unproductive and inefficient, angering the world's largest economy and leader of the free world.³⁹ When a GATT Panel found that a government's complaint of an alleged GATT violation was justifiable, the defending country could indefinitely block adoption of the Panel's report, leaving the matter unresolved.⁴⁰ In essence, this consensus-driven process allowed a Contracting Party to veto a GATT panel report with which it disagreed, including a panel report against the Contracting Party itself.⁴¹

When a new round of GATT negotiations began, it was no surprise that American lawmakers made their objectives clear: "Congress made the negotiation of a more effective GATT dispute settlement system a principal United States negotiating objective in the Uruguay Round."⁴² Thus, a major part of the new WTO system is its dispute settlement mechanism.⁴³

against the violating Contracting Party. *See id.*

39. *See* Robert A. Green, *Antilegalistic Approaches to Resolving Disputes Between Governments: A Comparison of the International Tax and Trade Regimes*, 23 YALE J. INT'L L. 79, 82 (1998) (commenting that the pre-Uruguay Round GATT "contained only a skeletal dispute settlement procedure").

40. *See* Robert E. Hudec, *GATT Dispute Settlement After the Tokyo Round: An Unfinished Business*, 13 CORNELL INT'L L.J. 145, 173 (1980) (noting that if a defending government did not agree with the complaint, the complaining government could encounter going forward with the complaint); *see also* Phillip R. Trimble, *International Trade and the "Rule of Law,"* 83 MICH. L. REV. 1016, 1037 (1985) (stating that the implementation of the recommendations of the GATT Council is based on the "engagement of regular national political processes").

41. *See* JOHN H. JACKSON ET AL., *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS: CASES, MATERIALS AND TEXT* 345-57 (2d. ed. 1989) (discussing Article 23 of the GATT and its weaknesses). In fact, authorization under Article 23 of GATT 1947 was granted only once. *See id.* This allows a prevailing party to suspend concessions owed to the party in violation of a GATT rule. *See id.* The Netherlands was allowed to suspend concessions to the United States as a result of American quotas on Dutch agricultural products. *See id.*

42. URUGUAY ROUND TRADE AGREEMENT, STATEMENT OF ADMINISTRATIVE ACTION, UNDERSTANDING ON RULES AND PROCEDURES GOVERNING THE SETTLEMENT OF INTERNATIONAL DISPUTES, H.R. Doc. No. 103-780, at 1008 (1994) [hereinafter URUGUAY ROUND].

43. *See generally* Shell, *supra* note 7 (critiquing the normative approaches of the WTO dispute resolution system); *see also* Thomas J. Dillon Jr., *The World Trade Organization: A New Legal Order for World Trade?*, 16 MICH. J. INT'L LAW 349, 375-392 (1995) (discussing dispute settlement procedures under the WTO).

Designed to be the cornerstone of the international trading regime that emerged from the Cold War, the Dispute Settlement Understanding ("DSU")⁴⁴ ensures fairness, consistency, and compliance. As such, the new dispute settlement process for complaints does not require a vote of the Members of the WTO.⁴⁵ The DSU provides for the use of unilateral sanctions against a WTO Contracting Party who refuses to cease an illegal trading action.⁴⁶ The United States government, however, has demonstrated the importance it places on the multilateral process by using the WTO dispute resolution process as a first resort on a regular basis, instead of unilateral sanctions.

The Bananas Dispute with the European Union is a shining example of the American government's commitment to the multilateral trading system. Certain European Union countries provided their respective ex-colonies in Africa, the Caribbean, and the Pacific with preferential access for their banana exports.⁴⁷ This unwieldy system, made up of patchwork national policies, resulted in the discrimination against "dollar" bananas from Central America.⁴⁸ The United

44. See Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, art. 19, para. 1, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, FINAL ACT EMBODYING THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 353, 33 I.L.M. 1125, 1226 (1994) [hereinafter DSU].

45. See URUGUAY ROUND, *supra* note 42, at 1010-17 (discussing the dispute settlement process). The DSU provides that a complaining party must first attempt to reach a solution through consultation, conciliation, or mediation before requesting that the Dispute Settlement Body ("DSB") form a complaint panel. The panel, if established, generally has six months from the time the panel is established to prepare a report. If neither party wishes to appeal, the adjudication process is complete. Alternatively, a disputing party may appeal the panel decision to a three-person appellate panel that will review the legal issues in the panel report. If the defending party does not conform to the prescribed action within a brief, stipulated time frame, it faces the possibility that the DSB may authorize the complainant to withdraw benefits or take retaliatory actions. See *id.*

46. See *id.* at 1017 (noting that the complaining government should "consider trade in the relevant sector or agreement as well as broader economic considerations").

47. See *Expelled from Eden*, ECONOMIST, Dec. 20, 1997, at 35, 36 (commenting that until this year, Europe thought that it would be able to retain banana preferences as a "political and economic bulwark for its former colonies").

48. See Guy de Jonquières, *Bananas Battle Goes to the Brink*, FIN. TIMES, Nov. 11, 1998, at 6 (stating that although France and Britain gave preferential treatment to their ex-colonies, other European Union countries allowed unrestricted trade).

States government complained twice to the old GATT dispute panel, to no avail.⁴⁹

As the European Union neared completion of its internal market in 1993, it decided to amalgamate this patchwork of preferential import schemes into one larger system called the European Union Banana Regime.⁵⁰ The European Union Banana Regime regulates imports in two ways. It applies a tariff to imports from countries that were not ex-colonies, and it allocates licenses for European preferential marketshare for imports from former colonial lands.⁵¹ This restrictive trade regime costs European Union consumers almost two billion dollars annually.⁵²

Instead of imposing unilateral sanctions, Ecuador—the world's leading banana exporter—Guatemala, Honduras, Mexico, and the United States⁵³ joined in 1996 to challenge the European Union Banana Regime in a procedure before the WTO.⁵⁴ According to the WTO decision, the European Union Banana Regime was to cease by the end of 1998.⁵⁵ The European Union was either to comply with this decision, or face the threat of legal trade retaliation by the United States and Central American banana producers. Throughout 1998, the United States disputed whether the European Union had suffi-

49. See *id.* (reporting that the European Union used the "GATT's elastic procedures" to deflect the earlier complaints).

50. See *Expelled from Eden*, *supra* note 47, at 36 (noting that the European Union decided to combine the various systems of banana preferences into one, rather than reform them individually).

51. See *id.* (discussing the two principal components of the Banana Regime).

52. See *id.* (noting the burden the Banana Regime placed on consumers).

53. See Guy de Jonquières, *Trade Goes Bananas*, FIN. TIMES, Jan. 26, 1999, at 15 (commenting that while there is "something irresistibly comical" about the banana dispute, it has become the crucial test of international trade rules). It is interesting to note that the United States is involved in a dispute with the European Union over products that it does not even export. The United States claims, however, that the Banana Regime discriminates against American distributors of cheaper Latin American fruit. See *id.*

54. See *Banana Split*, FIN. TIMES, Dec. 18, 1998, at 19 (describing the WTO's role in the dispute over the Banana Regime as "the closest there is to a global economic court").

55. See *Expelled from Eden*, *supra* note 47, at 36 (commenting that no one was surprised that the Banana Regime was condemned).

ciently modified the regime to comply with the WTO panel ruling.⁵⁶ The European Union claimed that it had, while the United States maintained the opposite and threatened retaliation in the form of unilateral sanctions under its Super 301 mechanism.⁵⁷ On November 10, 1998, the United States Trade Representative ("USTR") published a list of European products on which one hundred percent tariffs would be imposed if the banana regime was not altered.⁵⁸

On January 14, 1999, the USTR notified the WTO Dispute Settlement Body ("DSB") that the United States intended to suspend concessions on particular products totaling almost \$520 million in trade.⁵⁹ The United States government argued that its actions were in accord with WTO procedures,⁶⁰ and asserted the desire to negotiate a solution through formal WTO mechanisms.⁶¹ The United States approach in this regard demonstrated the Clinton Administration's strong belief in the multilateral trading system as well as the WTO dispute settlement system.

The United States attempted to present its unilateral measures per the DSU, but faced a number of procedural delays from other Contracting Parties.⁶² The United States repeatedly requested an acceler-

56. See de Jonquières, *supra* note 53, at 15 (reporting the criticism that the United States is rushing retaliation since the WTO has not yet ruled on the legality of the European Union's revised regime).

57. See *infra* notes 197-208 and accompanying text (discussing the Super 301 mechanism); see also Guy de Jonquières, *Nerves are Taut as Leaders Hint at an European Union-US Trade War*, FIN. TIMES, Nov. 9, 1998, at 3 (commenting that Sir Leon Brittan, Europe's Trade Commissioner, tried unsuccessfully to dissuade USTR Charlene Barshefsky from threatening sanctions to retaliate against the European Union Banana Regime).

58. See Stephen Fidler & Neil Buckley, *US Threatens 100% Tax on European Union Exports in Banana Trade War*, FIN. TIMES, Nov. 11, 1998, at 1 (including cheese, clothing, cosmetics, electronic goods, paper, and wine among the products threatened with tariffs).

59. Office of the United States Trade Representative, *United States to Apply its WTO Retaliatory Rights in Bananas Case*, DOC. 99-01 (visited Jan. 23, 1999) <<http://www.ustr.gov/releases/1999/01/99-01.pdf>> [hereinafter USTR Doc. 99-01].

60. See *id.*

61. See *id.* (noting USTR Barshefsky's comment that "the purpose of the WTO is to resolve disputes, not to engage in protracted legal battles").

62. See Frances Williams, *US Postpones Sanctions on European Union over*

ated panel hearing on the issue, but faced European intransigence from the outset. USTR Charlene Barshefsky wrote a letter to WTO Director-General Renato Ruggiero, confirming that the United States was prepared to ask the original WTO panel to decide whether the new regime instituted by the European Union complied with its original ruling.⁶³ The European Union stated that it would only agree to a renewed panel if the United States dropped its threat of sanctions against European Union products.⁶⁴

The European Union requested WTO arbitration to review the sanctions proposed by the United States. Thus, in accordance with WTO rules, the United States delayed tariff suspensions for thirty days to give the WTO arbitrators time to complete their investigation.⁶⁵ On March 2, 1999, the arbitrators requested further information on the actual harm caused to American exports by the Banana Regime.⁶⁶

On March 3, 1999, the USTR announced that the United States will begin imposing 100% duties on over \$500 million of selected products imported from the European Union.⁶⁷ The United States will not begin collecting these higher duties until after final release of the arbitrators' report, and then will do so only to the extent necessary to

Bananas, FIN. TIMES, Jan. 31, 1999, at 4 (stating that after the European Union asked for arbitration, the WTO suspended over five hundred million dollars in United States trade sanctions until March 1999).

63. See Frances Williams, *European Union and US Locked in Negotiations*, FIN. TIMES, Nov. 26, 1998, at 7 (noting that the WTO panel review was conditioned on the premise that it be completed in time to allow the United States to adhere to its established timetable for sanctions against the European Union).

64. See Neil Buckley, *European Union Will Accept Peace Offer If US Drops Threat*, FIN. TIMES, Nov. 24, 1998, at 4 (adding that the European Union planned to launch a separate challenge to United States 301 legislation as a violation of WTO rules).

65. See Office of the United States Trade Representative, Press Release 99-17, *United States Takes Customs Action on European Imports* (visited Mar. 12, 1999) <<http://www.ustr.gov/releases/1999/03/99-17.html>>.

66. See *id.*

67. See *id.*; see also Guy de Jonquières & Nancy Dunne, *A Partnership in Peril*, FIN. TIMES, Mar. 8, 1999, at 19 (likening the United States and the European Union to "a middle-aged couple frustrated by the trials of co-habitation" in light of the bananas dispute).

offset the harm to American interests as determined by the WTO.⁶⁸ In support of the United States' position, Special Trade Negotiator, Ambassador Peter Scher stated:

[w]e do not take these steps lightly, and it is only after exhausting every opportunity thus far to try to resolve this dispute that we have reached this position. We must conclude that it is time for the EU to bear some of the consequences for its complete disregard for its GATT and WTO obligations.⁶⁹

It is not just with respect to bananas that the United States is showing more faith in the WTO's DSU. The United States often appears to favor the WTO for trade complaints, rather than imposing unilateral sanctions. For example, at the height of the 1995 confrontation with Japan over access to American automobile parts, the United States threatened to file a WTO case against Japan.⁷⁰ Similarly, in June 1996, a yearlong investigation into Japan's photographic goods industry showed that Fuji, Japan's largest film producer, tightly controlled distribution. Because the Japanese government was doing little to open domestic markets to foreign filmmakers, the United States filed its complaint with the WTO.⁷¹ While the United States lost in that case,⁷² it argued and won a case before the WTO challenging Canadian legislation protecting cultural

68. See Office of the United States Trade Representative, Press Release 99-17, *United States Takes Customs Action on European Imports* (visited Mar. 12, 1999) <<http://www.ustr.gov/releases/1999/03/99-17.html>>.

69. *Id.*; see also de Jonquières & Dunne, *supra* note 67, at 19 (considering the positions of the United States and the European Union in the bananas dispute and asserting that the conflict is putting global trade order at risk). Republican Congressman Jim Kolbe, responding to the United States decision to impose sanctions stated, "[i]f the EU won't abide by WTO decisions on bananas, how will we ever get them to agree to anything else down the road?" See de Jonquières & Dunne, *supra* note 67, at 19.

70. See Peter Morton, *World Trade in 1995: Much Ado About Nothing*, FIN. POST, Dec. 23, 1995, at 51 (stating that the United States and Japan finally "hammered out" a deal to increase American car imports into Japan).

71. See *War Cancelled*, ECONOMIST, June 28, 1996, at 72 (commenting that the United States' choice not to impose unilateral sanctions signals its unwillingness to violate its international obligations).

72. See Marc Selinger, *Japanese Limit Film Market, U.S. Says*, WASH. TIMES, Aug. 20, 1998, at B7 (reporting that the United States continues to charge Japan with limiting its film market, despite losing its claim at the WTO).

industries—specifically a Canadian law limiting the use of magazine split-print runs.⁷³ The United States government also won before a WTO panel a case wherein the United States had claimed that Canada's dairy programs are inconsistent with its WTO obligations.⁷⁴

Clearly, as the world's leading trading state, it is important to the United States that the rule of law established by the new dispute resolution system is respected. Recently, the United States government announced its compliance with a WTO ruling against the American ban on imported shrimp from countries whose fishing fleets do not use turtle excluder devices in their shrimp nets.⁷⁵ The United States fought long and hard for a dispute resolution system that had form, function, and most importantly, measurable and enforceable results. The United States, therefore, increasingly turns to the dispute resolution panels under the WTO to enforce international trade treaties.

C. ENFORCING THE WTO REGIME AND OTHER MULTILATERAL AGREEMENTS

Under the Clinton Administration, the American government has renewed its focus on enforcement of international treaties to which the United States is a party. In the first Clinton term, Stuart Eizenstat,

73. See Report of the WTO Appellate Body, *Canada-Certain Measures Concerning Periodicals*, WTO Doc. WT/DS31/AB/R, at 37-38 (June 30, 1997) (recommending that Canada bring the measures, found by the panel to be inconsistent with its obligations, into conformity). See generally Oliver R. Goodenough, *Defending the Imaginary to the Death? Free Trade, National Identity, and Canada's Cultural Preoccupation*, 15 ARIZ. J. INT'L & COMP. L. 203 (1998) (examining the treatment of culture under the NAFTA and the Canada-U.S. Free Trade Agreement); John A. Ragosta, *The Cultural Industries Exemption from NAFTA—Its Parameters*, 23 CAN.-U.S. L.J. 165 (1997) (discussing the cultural aspect of the NAFTA from an American perspective).

74. See Office of the U.S. Trade Rep., *Press Release: United States Wins WTO Case Challenging Canadian Dairy Practices* (Mar. 23, 1999), available in <<http://www.ustr.gov/releases/1999/03/99-26.html>>

75. See WTO Dispute Panel Report on *United States-Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc. WT/DS58/R, at 300 (May 15, 1998) (finding no justification for the measures in dispute); WTO Appellate Body Report on *United States-Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc. WT/DS58/AB/R, at 76 para. 187(c) (Oct. 12, 1998) (upholding the Panel's conclusions); see also Williams, *supra* note 63, at 7 (noting the United States' willingness to comply with the WTO ruling).

with the assistance of then-USTR Mickey Kantor, opened the Trade Compliance Center. This institution is devoted to monitoring foreign compliance with international trade agreements.⁷⁶ Indeed, enforcement is an essential component of international trade.⁷⁷ Eizenstat testified before the Senate that "[t]o maintain the current bipartisan consensus for free trade, we must effectively and visibly enforce our trade laws and agreements. We must demonstrate to our workers that we intend to enforce the market opening commitments foreign countries have made with us in bilateral and multilateral agreements."⁷⁸

Increasingly, however, the Clinton Administration must convince the American workforce and other free trade skeptics of the value of free trade. There is growing suspicion about the domestic benefits of free trade, and increasing pressure to ensure that American products reach as many markets as possible. In his State of the Union Address on January 19, 1999, President Clinton told the American people that:

[w]e ought to tear down barriers, open markets, and expand trade. But at the same time, we must ensure that ordinary citizens in all countries actually benefit from trade—a trade that promotes the dignity of work, the rights of workers, and protects the environment. We must insist that international trade organizations be more open to public scrutiny, instead of mysterious, secret things subject to wild criticism.⁷⁹

To accomplish this goal, the United States government has taken an aggressive leadership position concerning the liberalization of trade in new areas, such as financial services, information technology, and telecommunications. The United States continues to press developing countries to make offers of reasonable market openings as a condition of any agreement. Minimum standards for market ac-

76. See Eizenstat Testimony, *supra* note 19, at 4 (stressing the importance of effective and visible enforcement of United States trade law).

77. See *id.* (proffering China's improved intellectual property rights enforcement as an example of the effectiveness of American trade law enforcement efforts).

78. *Id.* at 3-4.

79. Address Before a Joint Session of the Congress on the State of the Union, 35 WEEKLY COMP. PRES. DOC. 78, 83-4 (Jan 19, 1999) [hereinafter State of the Union Address].

cess are the entrance fee for negotiations, since access to the United States market is a highly sought after prize.

D. A NEW ROUND OF WTO NEGOTIATIONS?

In his State of the Union address in 1999, President Clinton called for a new round of global trade talks.⁸⁰ Furthermore, Vice President Al Gore called for new trade talks, with radical liberalization in agriculture as the centerpiece of a future deal.⁸¹ For Eizenstat, new world trade talks would be designed "to reassert United States leadership in continuing to keep arteries of trade open and not succumbing to the backlash arising from some of the negative forces of globalization."⁸² The very format of the future talks is up for grabs; however, Washington favors a more sectoral approach to global trade talks to avoid delay in one area by lack of accord in another.⁸³

Regardless of the format, Fast Track negotiating authority is a critical element of the United States entering such negotiations.⁸⁴ President Clinton pleaded with United States lawmakers to grant him Fast Track authority during his State of the Union address. Asserting

80. See *id.* (encouraging export expansion in the services, manufacturing, and farm products sectors); see also Deborah McGregor, *Call for New Round of World Trade Talks at Top of Agenda*, FIN. TIMES, Jan. 20, 1999, at 4 (noting that a new round of global trade talks are proposed to fight protectionism worldwide); Frances Williams & Guy de Jonquières, *Brittan Welcomes Clinton Call for Talks*, FIN. TIMES, May 20, 1998, at 6 (noting that Brittan has already called for a "Millennium Round" of new trade negotiations); *European Union to Push for Millennium Trade Round*, FIN. TIMES, Mar. 31, 1998, at 6 (stating that the European Union trade ministers announced the need for broad talks, although they failed to discuss exactly what would be included); Frances Williams, *Brussels Outlines its Agenda for Global Trade Talks*, FIN. TIMES, Sept. 24, 1998, at 10; *Brittan Seeks Backing for Millennium Round*, FIN. TIMES, Apr. 15, 1998, at 8.

81. See Guy de Jonquières, *US Call for Farm Trade Reform*, FIN. TIMES, Jan. 30-31, 1999, at 4.

82. McGregor, *supra* note 80, at 4.

83. See *id.* (quoting Eizenstat's comment that the United States will encourage trading partners to break off "pockets" of agreement, rather than piecing them all together into one universal deal); Williams, *supra* note 80, at 10 (stating that European Union and Japanese resistance to agricultural trade liberalization held up the Uruguay Round).

84. See Harold Hongju Koh, *The Fast Track and United States Trade Policy*, 18 BROOK. J. INT'L LAW 143, 143 (1992) (discussing the United States' use of Fast Track procedure in trade policy).

the need for "a new consensus on trade," the President called for Fast Track authority, characterizing it as both "overdue and necessary."⁸⁵

Approaching international trade policy in a multilateral fashion is indeed a worthy geopolitical strategy. As Eizenstat stated, the United States must strengthen its economic partnerships by opening markets, reducing barriers to American goods and services, and encouraging international economic behavior based on United States values and ideals.⁸⁶

Breaking open traditionally protectionist economies does more than provide business opportunities for American firms: it locks in the free market as a fundamental institution throughout the world. Multilateralism is truly a post-World War II phenomenon, and an arena in which the United States has come to excel. Moreover, the United States is unlike other major Western trading states in that American dominance is not the result of new trade thinking or neo-colonial trading preferences:

In Britain and France, pressure politics and party politics since World War II have structured the chief components of the trade debate—the allocation of subsidies. Only in the case of the United States does trade policymaking remain closely tied to the international multilateral trading regime.⁸⁷

The century that is quickly closing can actually be termed an American half-century. International trade issues continue to assume greater importance in the United States. Trade has never been more important to the national well-being of the United States than it is today. More than eleven million people owe their jobs to foreign sales of American-made products.⁸⁸ Additionally, trade accounts for over twenty-five percent of total gross domestic product.⁸⁹ The dominion that the United States created is truly the result of the multilateral

85. State of the Union Address, *supra* note 79.

86. See Eizenstat Testimony, *supra* note 19, at 2.

87. VERDIER, *supra* note 31, at 288.

88. See Eizenstat Testimony, *supra* note 19, at 2 (characterizing the Clinton Administration as extraordinarily successful at creating American jobs by opening foreign markets).

89. See *id.*

trading regime that followed the end of the Second World War. Among the other pillars of financial architecture that emerged from the Bretton Woods conference, the United States has pursued trade policy with the *spirit* of multilateralism.

II. REGIONALISM: A POST-MODERN APPROACH TO UNITED STATES TRADE POLICY

On May 1, 1997, Undersecretary Eizenstat told the United States Senate Foreign Relations Committee that:

[T]he United States must continue to lead in opening up the arteries of trade in the international trading system . . . Our continuing leadership in opening markets is essential to enhancing the prosperity and security of the American people in the 21st century and binding the peoples of the world together in a chain of prosperity and shared interests.

This statement correctly defines the Clinton Administration's trade policy: hyper-regionalism.

This new hyper-regionalism has played a large role in United States trade policy. As the European Union and Japan move towards consolidating their respective trading power bases,⁹¹ the United States appears to be fervently carving out new regional trading blocs. Since 1993, the Clinton Administration has aggressively entered America in a host of regional trade agreements. Building on the suc-

90. Eizenstat Testimony, *supra* note 19, at 2.

91. See *Are Regional Trade Agreements A Good Idea?: Alphaghetti Spaghetti*, ECONOMIST, Oct. 3, 1998, at 21 (suggesting that proliferation of regional pacts may in fact be counterproductive to the development of any one pact individually). Jagdish Bhagwati has referred to regional trade areas as "stumbling blocks," rather than "building blocks" in the liberalization of global trade. See *id.*; see also Jagdish Bhagwati, *Challenges to the Doctrine of Free Trade*, 25 N.Y.U. J. INT'L L. & POL. 219, 227-34 (1993) (discussing past and current changes to the free trade system); *Spoiling World Trade*, ECONOMIST, Dec. 13, 1996, at 15 (discussing potential problems with the cumulative effect of multiple trade agreements). The proliferation of regional trade agreements, liberalizing trade among members, means that "the WTO is but one cook among many stirring the free-trade broth." *Id.*; see also Nancy Dunne, *WTO Chief's Warning on Trade Groups*, FIN. TIMES, Apr. 16, 1998, at 6 (noting that trade regionalism can impede efforts to liberalize trade at the global level). Renato Ruggiero, WTO Director-General, has warned against the proliferation of regional trade agreements, stating that they must not become an alternative to the multilateral system. See *id.*

cess of the NAFTA, the United States intends to expand American trade to the rest of Latin America, through the FTAA.⁹² In the Pacific Rim, the United States led efforts to increase the role of APEC as a legitimate trading bloc. In the wake of the economic turmoil that has ravaged Asia, there is now momentum to engage Europe in a transatlantic trading bloc.⁹³ In short, it appears that the United States is eager to secure its primacy in regional trading arrangements around the world.

A. BUILDING ON THE "SUCCESES" OF NAFTA: IS CHILE NEXT?

For the United States, the NAFTA first manifested the *spirit* of regionalism. A watershed in Pan-American trade, the NAFTA was designed to increase trade, investment, and economic activities among the three member countries—Canada, Mexico, and the United States.⁹⁴ The Clinton Administration convinced the American public of the need for the NAFTA by arguing that the creation of a free trade area was in the best interest of United States' security.

Despite ratification by Congress, the NAFTA appeared to be on the defensive from the start. On the day it was to enter into force, the Zapatista guerrilla campaign in Chiapas began.⁹⁵ The Mexican peso crisis followed later that year.⁹⁶ The United States government put together a \$20 billion aid package both to save Mexico from financial collapse and, in the process, to save Texas and California from a

92. See Editorial, *The Importance of Chile*, J. COM., Feb. 26, 1997, at 6A (reporting Clinton's view that Chile's accession to the NAFTA is the first big step towards a FTAA).

93. See Guy de Jonquières, *US and European Union Consider New Trade Deal*, FIN. TIMES, Feb. 21, 1998, at A1 (stating that the United States considers Europe a more stable export market).

94. See Editorial, *At the End of the Rainbow*, IND. STAR, Feb. 2, 1999, at A6 (commenting on the purposes of the NAFTA).

95. See Linda Diebal, *Mexico's Most Wanted Man Speaks Out About His War*, TORONTO STAR, Apr. 9, 1994, at A1 (reporting that the Zapatista campaign began on January 1, 1994).

96. See James F. Smith, *Free-Trade Treaty Sought By Mexico*, E.U., L.A. TIMES, Dec. 9, 1997, at A1 (detailing Mexico's eventual recovery from the 1994 peso crisis).

deluge of illegal immigrants. This monetary infusion ensured the viability of the newest market for American-made consumer goods.⁹⁷

Despite this early success, the NAFTA came under fire from both liberal Democrats and conservative Republicans in Congress shortly after coming into force.⁹⁸ The former group sees the NAFTA and other trade agreements with Latin America as attempts by United States companies to flout labor and environmental standards.⁹⁹ Conservatives make strange bedfellows,¹⁰⁰ concerned with certain regimes' human rights records and the "giant sucking sound" of jobs going south.¹⁰¹ Some free trade advocates view the trade diversion

97. See Finlay Lewis, *U.S., Mexico Strike Deal, \$20 Billion in Aid Swapped for Belt-Tightening Vows*, SAN DIEGO UNION-TRIB., Feb. 25, 1995, at A1 (stating that the IMF supplied an additional \$30 billion in economic aid to the ailing country); Ewell E. Murphy, Jr., *Proceedings of the Canada-United States Law Institute Conference: NAFTA Revisited: Seeing NAFTA Through Three Lenses*, 23 CAN-U.S. L.J. 73, 81 (1997) (describing the severity of the Mexican recession and explaining Mexico's relatively rapid recovery). In January 1997, Mexico finished repaying its entire peso-bailout debt. See *id.*

98. See Address by President William Jefferson Clinton to the People of Mexico in Mexico City, 33 WEEKLY COMP. PRES. DOC. 666, 667 (May 7, 1997). "Many people in both our countries painted a dark picture of lost jobs and boarded-up factories should NAFTA prevail. Well, they were wrong. NAFTA is working—working for you and working for the American people." *Id.*; see also BUCHANAN, *supra* note 30, at 74.

NAFTA with Mexico means the gradual merger of the two economies. Eventually there must come a demand for open borders and a single currency. Make no mistake. We are in the betrothal stage of a courtship at the end of which comes a union of America and Mexico—and that is the end of the nation we grew up in.

BUCHANAN, *supra* note 30, at 74 (alleging that America will soon face the same difficulties now faced by the nations of Europe). See generally DONALD L. BARLETT & JAMES B. STEELE, *AMERICA: WHO STOLE THE DREAM?* (1996).

99. See Editorial, *supra* note 92, at 6A (stating that Democrats want environmental and labor standards written into any further free trade agreements).

100. See BUCHANAN, *supra* note 30, at 107.

Like a shipwrecked, exhausted Gulliver on the beach of Lilliput, America is to be tied down with threads, strand by strand, until it cannot move when it awakens. 'Piece by piece,' our sovereignty is being surrendered. By accession to NAFTA, GATT, the UN, the WTO, the World Bank, the IMF, America has ensnared itself in a web that restricts its freedom of action, diminishes its liberty, and siphons off its wealth.

Id.

101. See Editorial, *No Sucking Sound*, HOUS. CHRON., Dec. 20, 1996, at A46 (arguing that the NAFTA has had neither a significantly positive, nor a signifi-

that occurs with regional pacts like the NAFTA as an obstacle to efficiency.¹⁰² Other critics point to the financial instability that follows the United States' close ties to a Latin American economy.

After the NAFTA, the collapse of the Mexican peso put more than just the Mexican economy at risk.¹⁰³ Classic protectionists and economic nationalists alike question whether being stung once by the instability of a Latin American country should not prevent further forays into the region.¹⁰⁴ Notwithstanding these criticisms, President Clinton proclaims the NAFTA a success, declaring that both the United States and Mexico benefit from the agreement.¹⁰⁵

There is some rhetoric directed towards expanding the NAFTA to include other Latin American countries. USTR Barshefsky acknowledged the *spirit* of regionalism when she stated that "Chile is the first

cantly negative effect on the American economy).

102. See generally ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (R.H. Campbell & A.S. Skinner gen. eds., 1976); DAVID RICARDO, THE PRINCIPLES OF POLITICAL ECONOMY AND TAXATION (Edward C.K. Gonner ed., 1966); MICHAEL E. PORTER, COMPETITIVE ADVANTAGE: CREATING AND SUSTAINING SUPERIOR PERFORMANCE (1990). Trade pacts can sometimes cause neighbors to trade with one another when it would be more efficient for them to export to, and import from, more distant countries. On the other hand, while the United States is Mexico's largest trading partner, the inverse is not the case for the United States, or Canada for that matter, notwithstanding the existence of the NAFTA. This so-called trade diversion is a phenomenon that can distort traditional efficiencies brought about by comparative advantage. See generally SMITH, *supra*; RICARDO, *supra*; PORTER, *supra*. But see Robert W. Benson, *Free Trade As an Extremist Ideology: The Case of NAFTA*, 17 U. PUGET SOUND L. REV. 555, 557-78 (1994) (critiquing Smith and Ricardo's arguments).

103. See James F. Smith, *Mexico Maintains Even Keel Despite Brazilian Storm*, L.A. TIMES, Feb. 20, 1999, at C1 (reporting that Mexico's 1994 peso crisis rippled through markets elsewhere).

104. See Geoff Dyer, *Washington on Red Alert over Brazil*, FIN. TIMES, Sept. 29, 1998, at 10 (suggesting that the economic fragility of Latin America in the wake of Brazil's financial crisis does nothing to encourage further trade integration between the two regions).

105. See Remarks Prior to Discussions with President Ernesto Zedillo of Mexico and an Exchange with Reporters, 33 WEEKLY COMP. PRES. DOC. 1801, 1803 (Nov. 14, 1997). See generally Michelle A. Kaiser, *The Impact of NAFTA on the United States Computer Industry: Why Trade Reforms Will Spark Increased Exports to Mexico*, 12 J. MARSHALL J. COMPUTER L. 467 (1993) (applauding the opportunity that the NAFTA provides for the United States, Canada, and Mexico to compete successfully in the global economy).

step.”¹⁰⁶ President Clinton confirmed this view during the 1994 Summit of the Americas, where he announced support for expansion of the NAFTA, with Chile as the next state invited to enter the agreement.¹⁰⁷ Chile could accede either through the NAFTA or through a bilateral agreement.¹⁰⁸ Notably, “[a]ccession to NAFTA by any country or bloc will not occur without the political will of the United States, NAFTA’s most powerful member.”¹⁰⁹ With new economic nationalism in the United States, Congress has some cause for concern and has delayed bringing Chile into the NAFTA, or even into a bilateral trade pact. Moreover, the United States Congress has been reluctant to provide President Clinton with Fast Track authority to negotiate any trade deals.¹¹⁰

106. *Trade Priorities in the Clinton Administration: Hearings Before the Comm. On Int’l Relations*, 105th Cong. 10 (1997) [hereinafter *Trade Priorities*] (statement of USTR Charlene Barshefsky).

107. See David E. Sanger, *Chile is Admitted a North American Free Trade Partner*, N.Y. TIMES, Dec. 12, 1994, at A8 (commenting that admitting Chile to the NAFTA should pressure other South and Central American countries to open their markets and expand trade with the United States); see also Frank J. Garcia, *NAFTA and the Creation of the FTAA: A Critique of Piecemeal Accession*, 35 VA. J. INT’L L. 539, 549 (1995) (noting that piecemeal accession is an appropriate step for Latin American countries, such as Chile, to take). See generally Rafael X. Zahradin-Aravena, *Chilean Accession to NAFTA: U.S. Failure and Chilean Success*, 23 N.C. J. INT’L LAW & COM. REG. 53 (1997) (examining the issues surrounding Chile’s entry into the NAFTA). But see Brandy A. Bayer, *Expansion of NAFTA: Issues and Obstacles Regarding Accession by Latin American States and Associations*, 26 GA. J. INT’L & COMP. L. 615, 634 (1997) (reporting that “since 1994, the enthusiasm by the United States for expansion of NAFTA has waned considerably”).

108. See David Gilmore, *Expanding NAFTA to Include All of the Western Hemisphere: Making Chile the Next Member*, 3 J. INT’L L. & PRAC. 413, 413 (1994) (advocating Chilean accession into the NAFTA).

109. Bayer, *supra* note 107, at 634.

110. See *Chile is not in Rush to Join NAFTA Foreign Minister Says*, Int’l Trade Daily (BNA) D-6 (Jan. 17, 1997). In the meantime, Chile has signed pacts with Canada, Mexico, and the Mercado Común del Sur (“Mercosur”), a common market project that includes Argentina, Brazil, Paraguay, and Uruguay. See *id.*; see also David A. Gantz, *The United States and the Expansion of Western Hemisphere Free Trade: Participant or Observer*, 14 ARIZ. J. INT’L & COMP. L. 381, 400 (1997) (discussing Chile’s agreements with Mercosur and Canada). Chilean accession to the NAFTA may be hindered by Chile’s free trade agreement with Mercosur. Thomas Andrew O’Keefe, *Potential Conflict Areas in any Future Negotiations Between Mercosur and the NAFTA to Create a Free Trade Area of the Americas*,

Despite the inability to win Fast Track negotiating authority from Congress, President Clinton is still pushing ahead with negotiations. During his visit to Santiago, he asked the Chilean people to "be patient with [the United States]." ¹¹¹ Furthermore, the President noted that the United States would launch the FTAA talks even in the absence of Fast Track authority. ¹¹²

Despite this rising protectionist sentiment in the United States, there remains a feeling that it may be better to participate in the world trade forum from a position of greater regional solidarity. Even protectionists agree. Pat Buchanan remarked: "Rather than global free trade, the United States should promote regional trading zones. . . . Nations inside these blocs are far more compatible than, say, America and China. . . . A regional trading bloc is more natural and organic than a global regime, and nations within these zones are in similar stages of development." ¹¹³

Moreover, some in the Clinton Administration see the WTO as an increasingly unmanageable forum for trade regulation and international agreements. It is not surprising then that United States trade policy focuses on regional agreements like the FTAA. Particularly in the Latin American region, the United States has both the *spirit* and the extended history of regionalism.

14 ARIZ. J. INT'L & COMP. L. 305, 305 (1997). The Chilean government maintains that it will not negotiate with the United States unless the President secures Fast Track authority. *See id.*

111. Remarks to Businesses and Community Leaders in Santiago, 34 WEEKLY COMP. PRES. DOC. 658, 659 (Apr. 16, 1998).

112. *See id.* Some analysts believe that even if the United States Congress passes Fast Track legislation to negotiate with Chile, it will be insufficient for the United States government to move toward obtaining a FTAA. *See Proceedings of the Canada-United States Law Institute: NAFTA Revisited: Discussion After the Speeches of M. Jean Anderson and Richard Dearden*, 23 CAN.-U.S. L.J. 243, 246 (1997) (statement of M. Jean Anderson) (stating that Fast Track authority to negotiate with Chile is not sufficient to allow negotiation of a FTAA).

113. BUCHANAN, *supra* note 30, at 284 (characterizing countries in the same region as sharing geography, economic and social systems, history, and culture).

B. NEW DOMINIONS: THE FREE TRADE AREA OF THE AMERICAS

The United States exports more to the Western Hemisphere than to any other region of the world.¹¹⁴ Latin America is a very important market for the United States and promises to grow even more so in the future. Notably, forty-five percent of American exports are to FTAA countries, and exports to Latin America have nearly doubled in the past five years.¹¹⁵

Given this, it is not surprising that the Clinton Administration, like the Bush Administration before it, believes that a Pan-American free trade pact to create one market from Alaska to the Tierra del Fuego is necessary and appropriate.¹¹⁶ The cornerstone of United States foreign policy for Latin America is geared towards continued economic integration through implementation of the FTAA.¹¹⁷ Such a continental trade pact will account for fifty-two percent of all international trade. In a world where the Japanese and Europeans are quickly overtaking United States competitive positions in trade, there may be

114. See Sidney Weintraub, *US-Latin American Economic Relations*, 39 J. INTERAMERICAN STUD. & WORLD AFF. 59, 66 (1997).

115. See Peter Costatini, *Trade-Outlook: NAFTA Slouches Toward FTAA*, INTER PRESS SERVICE, Dec. 20, 1998, p. unavail. online (noting the importance of trade between Latin America and the United States, but emphasizing that Washington's "political paralysis on trade" may delay further trade integration). The European Union's more moderate approach to economic integration makes it an attractive trading partner for Latin America. See *id.*

116. See Gantz, *supra* note 110, at 395 (explaining how the NAFTA can be used as a starting point for other hemispheric agreements). The author concludes that "it is becoming increasingly evident that the NAFTA as presently structured is too complex and ponderous an instrument to expand to a large group of additional state parties." *Id.* at 401; see also Richard G. Dearden, *Implications of NAFTA's Extension to Chile and Other Countries—A Canadian View*, 23 CAN.-U.S. L.J. 235, 236-38 (1997) (commenting on Pan-American trade liberalization from the Canadian perspective and recognizing the need for trade rules that can govern countries that may not know the rule of law); Frederick M. Abbott, *Foundation-Building For Western Hemispheric Integration*, 17 NW. J. INT'L L. & BUS. 900, 943-46 (1997) (observing that the successful negotiation of a FTAA depends on a confluence of interests among the countries who will be parties to the agreement); Carol Stump, *Free Trade Area of the Americas (FTAA)*, 4 J. INT'L L. & PRAC. 153, 170 (1995) (stating that the FTAA is to be a compilation of preexisting regional, bilateral, and multilateral trade agreements).

117. See Miguel Otero-Lathrop, *Mercosur And NAFTA: The Need for Convergence*, 4 NAFTA: L. & BUS. REV. AM. 116, 119 (1998).

more control, and hence opportunity to remain a hegemonic power in one's own hemisphere.¹¹⁸

It took time for the idea of a Pan-American free trade pact to be taken seriously.¹¹⁹ Since the Alliance for Progress ran its course in the 1960s, the United States government has had no effective economic policy in the region.¹²⁰ American foreign policy developed in a Cold War vacuum and focused on eliminating the Communist threat from the hemisphere.¹²¹ Consequently, United States industries and service providers were slow to understand the value of the Latin American region as a market. With the implementation of the NAFTA, providing free trade with Canada and Mexico, the rest of Latin America seems the next natural extension of United States trade policy.¹²² Support for a regional free trade pact now exists in every country in the Americas except for Cuba. This regional agreement will create a free trade zone of nearly one billion consumers, with a gross domestic product reaching at least \$9 trillion by the year 2005.¹²³

118. Cf. William C. Plouffe, Jr., *Sovereignty in the "New World Order": The Once and Future Position of the United States, a Merlinesque Task of Quasi-legal Definition*, 4 TULSA J. COMP. & INT'L L. 49, 62 (citing FRANCES H. STEPHENS, *WE THE PEOPLE* 43 (1997)) (characterizing the Monroe Doctrine as "a formal political statement that the United States considers itself to be the primary influence within the American continents"). The Monroe Doctrine stated that any threat to the security of the Western Hemisphere was a threat to the United States. See Ediberto Roman, *Empire Forgotten: The United States's Colonization of Puerto Rico*, 42 VILL. L. REV. 1119, 1149 n.135 (citing JAMES R. FOX, *DICTIONARY OF INTERNATIONAL AND COMPARATIVE LAW* 289 (1992)).

119. The Americas are such an emerging economic power that even *The Economist* reorganized its magazine sections to reflect this recognition. See *Rediscovering the Americas*, *ECONOMIST*, May 17, 1997, at 15 (stating that the regular section that was once called "American Survey" was renamed "United States," while a new section "The Americas" was created to cover Canada, the Caribbean, and Latin America—areas formerly covered in the "International" section). It would take a British publication to recognize the fact that the term "American" means more than the United States. It would also take an insightful forward-thinking periodical to trumpet the change.

120. See Weintraub, *supra* note 114, at 66.

121. See *id.* at 67.

122. See *id.* at 66.

123. See *Second Summit of the Americas, Declaration of Santiago, Santiago de Chile April 18-19, 1998* (visited Feb. 6, 1999) <<http://www.summit-americas.org/chiledc.htm>> [hereinafter *Declaration of Santiago*] (explaining that following the Summit of the Americas in Santiago, Chile, the leaders of the thirty-

The FTAA would do to Latin America what Simon Bolivar was unable to do—unite the continent.¹²⁴ Evidenced by the success of Mercosur,¹²⁵ the participating countries have used liberal economics to unite the region, instead of using the military. There has been a significant paradigm shift throughout the continent: all countries of the hemisphere, except for Cuba, have done away with their protectionist past and have taken measures towards open markets as the path towards sustained economic growth. Even the United Nations Economic Commission for Latin America and the Caribbean, the philosophic parent of import substitution, began to advocate open markets and freer regional trade.

It will take more than this, however, to get the negotiations moving. Certain Latin American countries have internal economic circumstances that prevent enthusiastic support for the hemispheric trade agreement advocated by the United States. Notably, after spending five years struggling and nearing economic stability,¹²⁶ Brazil is currently reeling from its currency devaluation in mid-January 1999.¹²⁷ As the Brazilian economy grew during the mid-1990s, the country had to absorb the impact of a unilateral trade opening that saw imports rise dramatically with a concurrent trade deficit deepening. Consequently, although Brazil supports development of the FTAA, the country's main priority continues to be the strengthening and enlargement of its South American commercial links within

six states continued to press for negotiations to conclude by 2005).

124. See Ruperto Patino Manffer, *The Future of Free Trade in the Americas*, 10 CONN. J. INT'L L. 639, 640 (1995) (recognizing that the FTAA is an important step toward economic integration and "toward the birth of an American Union").

125. Argentina-Brazil-Paraguay-Uruguay: Treaty Establishing A Common Market, Mar. 26, 1991, 30 I.L.M. 1041 [hereinafter Mercosur Treaty]. Formed in 1991, Mercosur boasts a combined gross domestic product GDP of one trillion dollars, and a population of two hundred million spread over twelve million square kilometers. See Ana María De Aguinis, *Can Mercosur Accede to NAFTA? A Legal Perspective*, 10 CONN. J. INT'L L. 597, 598 (1995).

126. See *Storm Clouds From Brazil*, ECONOMIST, Jan. 16, 1997, at 17.

127. *Id.* (stating that the country's \$10 billion trade surplus in 1994 quickly deteriorated into a \$5.5 billion deficit in 1996). The deficit continued to grow as the Brazilian currency remained artificially pegged against the American dollar; this changed on January 13, 1999, when the *real* was allowed to float freely. See *Still a Big Risk*, ECONOMIST, Jan. 23, 1999, at 16 (asserting that a floating currency may exacerbate Brazilian economic problems).

Mercosur. Brazil and its Mercosur partners want more time to become competitive before trade barriers fall.¹²⁸ As a result, Mercosur prefers three stages of negotiations on the FTAA, starting with "business facilitation" issues, like better customs procedures, and moving on to tariff-cutting matters only after 2003.¹²⁹

The United States initially wanted to start the negotiations with market-opening measures, evidencing the *spirit* of hyper-regionalism. Notwithstanding the United States' approach, Mercosur continues to balk at fast-paced negotiations. In so doing, the Southern Cone is proving that it is a real competitor to the United States in uniting the Americas.¹³⁰ Initially, only the four original Mercosur members made up the Southern Cone. Chile, Latin America's fastest growing economy, joined as an associate member in October 1996;¹³¹ Bolivia has signed a commercial accord. In mid-September 1996, the five members of the Andean Community announced their intention to follow suit.¹³² Mercosur has signed its own trade agreement with the European Union.¹³³ Even Canada indicated that it wanted to start "conversations" on some kind of free trade deal with Mercosur.¹³⁴

128. See Bayer, *supra* note 107, at 635 (explaining Brazil's plan to expand Mercosur into an organization with the ability to negotiate with the NAFTA as an equal).

129. See Stump, *supra* note 116, at 156.

130. See *The End of the Beginning*, ECONOMIST, Oct. 12, 1996, at S3 (characterizing the Southern Cone as an integrated, open, and growing market of almost 250 million people). Argentina, Bolivia, Brazil, Chile, Paraguay, Peru, and Uruguay form the Southern Cone. See *id.*; see also *The Race to Bridge Borders*, ECONOMIST, Oct. 12, 1996, at S18.

131. See *Chile's MERCOSUR Membership Takes Effect*, 13 Int'l Trade Rep. (BNA) 1576 (Oct. 9, 1996).

132. See *Chile Joins Southern Cone Common Market as Andean Nations Agree to Multilateral Free-Trade Negotiations with MERCOSUR*, NOTISUR-LATIN AM. POL. AFF., Oct. 4, 1996, available in WESTLAW, Latnews Database, 1996 WL 8089443. The members of the Andean Community are Bolivia, Columbia, Ecuador, Peru, and Venezuela. See *id.*

133. See *European Union Foreign Ministers Endorse Latin American Agreements*, EUR. REP., Dec. 6, 1995, available in WESTLAW, 1995 WL 13285591 (stating that European Union foreign ministers agreed to guidelines for a Free Trade Agreement with Mercosur). The countries set a timetable for liberalization talks. See *id.*

134. See Dearden, *supra* note 116, at 237.

It is clear that the interests of the United States and the leading trading states, Brazil and Argentina, that make up the Southern Cone trading bloc are different. The United States worries that Mercosur poses a potential protectionist obstacle and may become a strong competitor to uniting the Americas under a free trade pact. Latin American countries, on the other hand, fear that open commercial competition with the United States could harm their newly liberalized economies. These burgeoning economies have only recently beaten down inflation and begun to privatize traditionally state-run industries protected from external competition.

In the Joint Ministerial Declaration of Belo Horizonte, ministers from thirty-four FTAA signatory countries agreed to launch formal hemispheric free trade talks in March 1998.¹³⁵ The thirty-four states agreed upon the entire negotiating structure—from 1999 to 2005—as well as the following issues: The decision-making process will be based on consensus; any agreement will be compatible with the rules of the WTO in Geneva; countries may negotiate and join the FTAA individually or as members of a group; and special attention should be given to the needs, economic conditions, and opportunities of the smaller economies to ensure their full participation in the FTAA process.¹³⁶ The April 1998 Summit of the Americas in Santiago furthered this work and talks have begun in earnest.¹³⁷

Once considered merely a dream, the FTAA may soon become a reality. FTAA supporters now speak of the agreement's "increasing irreversibility." "There will be a free trade area of the Americas," proclaimed the USTR in the true *spirit* of regionalism, before her departure for the Second Summit of the Americas.¹³⁸

135. See Michael Christie, *Brazil Says Progress Made on Americas Free Trade*, REUTER EUR. UNION COMMUNITY REP'T, May 15, 1997, p. unavail. online. Belo Horizonte is the Brazilian city where the FTAA talks took place on May 16 and 17, 1997.

136. See Frank J. Garcia, *Decisionmaking and Dispute Resolution in the Free Trade Area of the Americas: An Essay in Trade Governance*, 18 MICH. J. INT'L L. 357, 359 (1997) (examining the theoretical and structural issues still to be resolved for the creation of the FTAA's governing institutions).

137. See *Declaration of Santiago*, *supra* note 123; Second Summit of the Americas, *Plan of Action* (visited Mar. 15, 1999) <<http://www.summit-americas.org/chileplan.htm>>.

138. See Office of the Press Secretary, White House, *Press Briefing by National*

Many options remain to secure the FTAA given the number of regional trading blocs existing in the Americas.¹³⁹ In addition to the NAFTA and Mercosur, the region is home to the Caribbean Common Market,¹⁴⁰ the Latin America Integration Association,¹⁴¹ the Andean Common Market,¹⁴² and the Central American Common Market,¹⁴³ a free trade zone. Will the FTAA be an extension of the NAFTA¹⁴⁴ or a brand new framework encompassing all the constituent blocs in a super bloc?¹⁴⁵ According to Secretary of State Madeleine Albright these details can be worked out over time:

Security Adviser Sandy Berger, Special Envoy for the Americas Mack McLarty, United States Trade Representative Charlene Barshefsky, Apr. 13, 1998 (visited Feb. 7, 1999) <www.pub.whitehouse.gov>.

139. See Garcia, *supra* note 136, at 358 (noting that institutional development is one of the most challenging issues facing the FTAA supporters).

140. The Caribbean Common Market was created through an Annex to the Treaty Establishing the Caribbean Community, July 4, 1973, B.D.I.E.L. 647. Caribbean Common Market members include Belize, the Dominican Republic, Guyana, Jamaica, Suriname, and Trinidad. See *id.*

141. See Treaty of Montevideo Establishing the Latin American Integration Association, Aug. 12, 1980, 20 I.L.M. 672 (1980). Latin American Integration Association members include Argentina, Bolivia, Brazil, Chile, Columbia, Ecuador, Mexico, Paraguay, Peru, Uruguay, and Venezuela.

142. See Agreement on Andean Subregional Integration, May 26, 1969, Bol.-Colom.-Chile-Ecuador-Peru, 8 I.L.M. 910 (explaining that Venezuela participated but did not initially sign the agreement). Chile later denounced the Andean Common Market. See GENERAL SECRETARIAT OF THE ORGANIZATION OF AMERICAN STATES, Jan. 1, 1974, I.A.T.C. 360 (1985).

143. See General Treaty of Central American Economic Integration, Dec. 13, 1960, El Sal.-Guat.-Hond.-Nicar., 455 U.N.T.S. 3 (entered into force June 4, 1961). Costa Rica later acceded to the Central American Common Market. See GENERAL SECRETARIAT OF THE ORGANIZATION OF AMERICAN STATES, Nov. 9, 1963, I.A.T.C. 417 (1985).

144. See Bayer, *supra* note 107, at 624 (noting that "the text of NAFTA allows for the possibility of accession"); see also Robert F. Housman, *Symposium: NAFTA at Age One: A Blueprint for Hemispheric Integration? I. The Environment Side Agreement: The Treatment of Labor and Environmental Issues in Future Western Hemisphere Trade Liberalization Efforts*, 10 CONN. J. INT'L L. 301, 321-23 (examining the pros and cons of the "NAFTA Plus" accession approach); Secretary of State Madeleine K. Albright, *Advancing Hemispheric Cooperation: The Summit of the Americas*, DIARIO LAS AMERICAS, Apr. 5, 1998, at 5-A (asserting that the FTAA will go beyond the agreements already in place).

145. See Sam Laird, *Latin American Trade Liberalization*, 4 MINN. J. GLOBAL TRADE 195, 215-16 (1995) (exploring the evolution of Latin American trade policy).

The hemispheric community is committed to creating the Free Trade Area of the Americas (FTAA) by 2005. FTAA would be step beyond agreements already in place, such as NAFTA and the Central American Common Market. FTAA, coupled with the regional pacts and rooted in liberal market reforms, would not only expand economic integration, but also create jobs and raise living standards by removing barriers to investment and trade within the Western Hemisphere.¹⁴⁶

Even with the pan-Hemispheric *spirit* supporting the FTAA, policymakers and analysts must navigate through the myriad of complicated issues of power, sovereignty, subsidiarity, and the relative decline of the nation-state in this negotiating process.¹⁴⁷ It is for all those reasons that the United States must define its future leadership role. The United States government must capitalize on the Latin American states' commitments to open regionalism and ensure that their economies do not move back towards import substitution. Because many of the sub-regional groups of Latin America currently exclude the United States, the Clinton Administration must take all necessary steps to ensure the United States leads the process and the prosperity of the entire hemisphere.¹⁴⁸

C. INCREASING THE ROLE OF APEC

Through much of the Cold War, the United States focused its attention on Europe. Today, the focus is on Asia and the Pacific. The Pacific Rim has long been viewed as the source for future gains in international trade. According to Raj Bhala, "already we are living in

146. Albright, *supra* note 144, at 5A.

147. See Stephen Zamora, *Allocating Legislative Competence in the Americas: The Early Experience under NAFTA and the Challenge of Hemispheric Integration*, 19 HOUS. J. INT'L L. 615, 619 (1997). "If we do achieve a Free Trade Agreement for the Americas, with a much greater degree of economic and social integration, it will be even more difficult to separate local concerns from national concerns, and national concerns from international concerns." *Id.*

148. See Gantz, *supra* note 110, at 410 (asserting that "the U.S. faces the loss of a once-in-a-generation opportunity to influence the shape of Western Hemisphere economic integration in a manner that broadly benefits and protects U.S. interests"); see also Shirley Christian, *Latin American Trade Relations*, 39 J. INTERAMERICAN STUD. & WORLD AFF. 71 (1996) (describing how the United States either must deal with Latin America on an equal basis or see the region move forward on its own).

the 'Pacific Century.'"¹⁴⁹ The Asian region is home to large and growing markets, but also to countries with relatively high trade barriers. An emerging trading bloc in the Pacific Rim, APEC is heralded to portend future prosperity for all members, including the United States.¹⁵⁰ United States leadership in APEC and other emerging institutions in the Pacific Rim is a hedge for the future of the region and United States hegemony in it.

Taking their lesson from the European Union, APEC members initially wanted to avoid the costs and bureaucracy that come with Brussels-like machinery. APEC's main preoccupation was to take the lead in global liberalization, and in doing so, its trade ministers developed a joint offer in late 1993 that assisted in bringing the Uruguay Round to a successful conclusion.¹⁵¹ More recently, the Asia-Pacific countries are moving to transform APEC from an informal group to a regional organization that will sidestep the WTO and set the agenda on opening global markets to goods and services. APEC is committed to assuring non-members that it would not become a discriminatory and protectionist trading bloc, thus countering inward-looking regionalism everywhere—particularly in the trading blocs of North America and Europe.

Since its establishment in 1989, APEC has become the primary regional vehicle for promoting open trade and practical economic cooperation.¹⁵² Part of the APEC Economic Leaders' Declaration stated that "[w]e remain convinced that open markets bring significant benefits and we will continue to pursue trade and investment liberalization that fosters further growth."¹⁵³ Another of APEC's

149. See RAJ BHALA, *INTERNATIONAL TRADE LAW: CASES AND MATERIALS* 35 (1996).

150. See *Proceedings of the Canada-United States Law Institute Conference*, *supra* note 112, at 244 (comments of Rep. Cunningham) Some analysts believe that the APEC is the first priority of the United States regional trade policy. See *id.* These analysts assert that FTAA will languish as the United States pursues its goals in the Pacific. See *id.*

151 See *About APEC* (visited Jan. 25, 1999) <<http://www.apec.govt.nz/aa/index.htm>> (providing the history of APEC and remarking on its role in successfully completing the Uruguay Round negotiations).

152. See *id.*

153. APEC Secretariat, *APEC Economics Leaders' Declaration: Connecting the APEC Community* (Nov. 25, 1997), reprinted in *APEC Leaders Meet in Vancou-*

goals is to advance Asia-Pacific economic dynamism and foster a sense of community.¹⁵⁴ The twenty-one APEC members, which include the United States and Canada, account for close to forty-seven percent of the world's imports and more than forty-five percent of its exports, the latter totaling \$1.9 trillion annually.¹⁵⁵ With a combined Gross Domestic Product ("GDP") of over \$16 trillion in 1995 and forty-four percent of global trade,¹⁵⁶ APEC promises to be a powerhouse regional bloc even in the midst of Asia's economic turmoil.

Currently, APEC is a less-visible, less-structured organization than the WTO, and reaches non-binding decisions by consensus. Flexibility is a principle enshrined in the forum, but that may soon change. Following a meeting in Montreal, on May 10, 1997, the members of APEC agreed to eliminate global tariffs for as many as fifteen new economic sectors, ranging from automobiles to environmental technology, chemicals to pulp and paper products.¹⁵⁷ Moreover, APEC states have set two deadlines for free trade—2010 for the developed countries and 2020 for developing states.¹⁵⁸

The first area for new initiatives will be information technology. APEC ministers stated that they favor expanding the range of products covered in a 1997 agreement by forty states representing ninety-three percent of the \$1 trillion world trade in computers and software.¹⁵⁹ APEC plans to end tariffs on cash registers, photocopying, and automated teller machines.¹⁶⁰ APEC will then set its sights on the liberalization of financial services so that banks and insurance companies would be better able to compete globally.¹⁶¹

ver, *Address Economic Crisis, Challenge of Globalization*, 9 FOREIGN POL'Y BULL., Jan.-Feb. 1998, at 105, 105.

154. *See id.*

155. *See No Action, No Agenda: Trade in the Pacific*, ECONOMIST, Nov. 25, 1995, at 75.

156. *See id.*

157. *See* Laura Eggertson, *APEC Takes on Key Trade Role, Asia-Pacific Nations Agree to Move Quickly to Open Matters in up to 15 Economic Sectors*, GLOBE & MAIL, May 12, 1997, at B1.

158. *See id.*

159. *See id.*

160. *See id.*

161. *See id.*

Initially, the United States government appeared not to take the role of APEC in world trade very seriously. President Clinton canceled his attendance at an APEC summit meeting in Osaka in November 1995 at the last minute. Likewise, he failed to appear at the Kuala Lumpur meeting in November 1998 because of the emerging crisis with Iraq, but sent Vice President Gore in his place.¹⁶²

By putting more stock into the APEC framework, the Clinton Administration can avoid criticism from Congress and right-wing Republicans like Pat Buchanan for surrendering sovereignty to the WTO. Because economic liberalization in the Asian region is occurring on a voluntary basis, the United States has the opportunity to ensure that it actively guides the liberalization process to its advantage. Moreover, agreements among APEC members to cut tariffs may be used by the United States to negotiate lower trade barriers in other regions like the European Union. Thus, by positioning APEC as the apex of drafting trade deals, the Clinton Administration may avoid some political heat.

The last APEC meeting in Kuala Lumpur, Malaysia, however, was relatively unsuccessful as attempts to liberalize nine export sectors, including forestry and fisheries, fell through in the wake of Japanese resistance.¹⁶³ United States negotiators joined other industrialized countries in advocating these liberalization measures, to no avail. Although the tariff reduction package was meant to be the centerpiece of the APEC summit, comments by Vice President Gore calling for more democracy in Malaysia became the main story of the summit.¹⁶⁴ Diplomatic protests over American interference in Malay-

162. See Indira A.R. Lakshmanan, *Gore Shocks Malaysian Host, Backs Ouster Call*, SAN DIEGO UNION-TRIB., Nov. 17, 1998, at A12 (reporting that Vice President Gore traveled to the Osaka summit meeting in President Clinton's place).

163. See Peter Montagnon & Sheila McNulty, *Attempts at APEC Deal Fail as Japan Resists Tariff Cuts*, FIN. TIMES, Nov. 16, 1998, at 18.

164. See Lakshmanan, *supra* note 162, at A1. Vice President Gore told the leaders of the assembled APEC members: "Democracies have done better in coping with economic crisis than nations where freedom is suppressed . . . we continue to hear calls for democracy . . . among the brave people of Malaysia." *Id.* at A12. Canada also became embroiled in the civic unrest surrounding the summit by calling for greater human rights protection in Malaysia, much to the consternation of Dr. Mahatir Mohammed's regime. See Peter Montagnon & Sheila McNulty, *Canada Takes Stand on Human Rights at APEC Summit*, FIN. TIMES, Nov. 16, 1998, at 3 (reporting the Canadian argument that "it is impossible to divorce trade liberali-

sian domestic affairs followed, and the summit ended in a state of disarray.¹⁶⁵

Despite this setback, the *spirit* of regionalism still pervades United States policy in the Pacific Rim. The United States government must remain vigilant as another main regional bloc, encompassing many APEC members, expedites discussions towards trade liberalization among themselves. The Association of Southeast Asian Nations ("ASEAN") approved a broad set of proposals to open markets for trade and investment among its nine members.¹⁶⁶ It is a race to the finish line to determine which free trade deal can be completed first and achieve the most trade liberalization. With the continued economic turmoil in Asia and increased popular resistance against certain totalitarian governments, the outcome is uncertain. Nevertheless, the United States government must continue to pursue its regional policies actively.

D. THE TRANSATLANTIC MARKETPLACE WITH THE EUROPEAN UNION

In the wake of the international financial crisis, the traditional allies now face new responsibilities. According to USTR Barshefsky, the United States and the European Union must lead the effort to resolve the global financial turmoil. "The world is looking to us for leadership and responsibility in ways neither the United States nor Europe have seen for many years; perhaps not since the post-war generation. And both of us must respond."¹⁶⁷

The European Union and United States are mutually dependent—their direct investments in each other's economies in 1997 exceeded \$750 billion.¹⁶⁸ Next to the United States, the European Union is the largest economy in the world. By the mid-1990s, more than half of

zation from other freedoms").

165. See Lakshmanan, *supra* note 162, at A12.

166. See Jonathan Birchall, *ASEAN Seeks Speedy Trade Liberalisation*, FIN. TIMES, Dec. 14, 1998, at 6.

167. *Testimony of Ambassador Charlene Barshefsky, U.S. Trade Representative, Before the House Ways and Means Comm. on Trade Relations with the European Union* (visited Jan. 10, 1999) <http://www.ustr.gov/testimony/barshefsky_21.pdf> [hereinafter Barshefsky Testimony].

168. See *id.*

the United States' entire direct investment abroad was in Europe.¹⁶⁹ It is also a major import market for United States products. United States exports to the European Union were \$141 billion in 1997 and accounted for 1.3 million United States jobs that year.¹⁷⁰

Clearly, the economic relationship between these traditional trading partners is important. According to USTR Barshefsky, "[t]he partnership between Europe and the United States has been the bedrock of peace and prosperity for the last fifty years; and it can continue to play that role for the next century."¹⁷¹ In addition to the role that the North Atlantic Treaty Organization played in maintaining security in Europe, relations among these traditional allies have resulted in scientific, technological, and other industrial breakthroughs. In 1997, President Clinton identified the European Union as one of the "most valued partners" of the United States for the twenty-first century.¹⁷² Clinton was referring not only to the enormous size of the trade and investment relationship—the biggest in the world—but also to Europe's importance in helping the United States promote the international economically liberalizing agenda of the United States.

Stuart Eizenstat testified before the Senate that specific economic policy goals should be part of a new transatlantic agenda with Europe,¹⁷³ one that is intended to foster even better trade relations with Europe.¹⁷⁴ Notably, the United States government is working

169. See *In Need of Fastening U.S.-European Relations*, ECONOMIST, May 27, 1995, at 15.

170. See Barshefsky Testimony, *supra* note 167.

171. *America's Trade Agenda in Europe, Remarks of Ambassador Charlene Barshefsky, United States Trade Representative, to the European Union Committee of the American Chamber of Commerce, Brussels, Belgium, October 19, 1998* (visited Jan. 29, 1999) <http://www.ustr.gov/testimony/barshefsky_21.pdf> (stating that the United States' "trade agenda with Europe is quite full").

172. See The President's News Conference with European Union Leaders in The Hague, The Netherlands, 33 WEEKLY COMP. PRES. DOC. 782 (May 28, 1997) [hereinafter President's News Conference in The Hague].

173. See Eizenstat, *supra* note 19; President's News Conference in The Hague, *supra* note 172 (noting that the new transatlantic agenda was created in Madrid in 1995 to foster cooperation on a broad range of challenges common to both the United States and Europe).

174. See President's News Conference in The Hague, *supra* note 172 (asserting that the purpose of the transatlantic agenda is to bring down trade barriers, fight international crime, terrorism, and nuclear proliferation).

with the European Union to reduce barriers to transatlantic trade through the negotiation of Mutual Recognition Agreements aimed at reducing testing and certification costs of United States products.

Following the Asian financial crisis, both the United States and European Union made some efforts to reduce further the barriers of transatlantic trade and investment. In early 1998, both sides toyed with the idea of free trade talks between the two traditional trading partners. The United States and the European Union were to decide by April 1998 where to open formal negotiations aimed at a broad free trade agreement.¹⁷⁵ Dangers, however, exist in such a pact. Critics have warned that a regional pact combining the two most powerful economic powers in the world would lead to favoritism among the most developed states by less developed countries. The European Union itself is attempting to shore up new partners in its quest to be the reigning regional economic power. To this end, the European Union has entered into negotiations with a number of major trading states and regions worldwide.¹⁷⁶

175. See Guy de Jonquières, *US and European Union Consider New Trade Deal: Asian Crisis Has Helped Refocus Attention on Europe's Attractions*, FIN. TIMES, Feb. 2, 1998, at A1.

176. See *Mexico and European Union Start Talks on Free Trade Accord*, FIN. TIMES, July 15, 1998, at 6. (stating that an European Union-Mexico joint council will meet annually to review progress on trade talks); Andrea Mandel-Campbell, *EU and Mexico hope for fastest free trade pact*, FIN. TIMES, Mar. 9, 1999, at 8. It is not surprising that Latin America finds trade relations with the European Union more valuable than those with the United States. A study by the Getulio Vargas Foundation, a Brazilian think tank, suggests that a free trade deal between Mercosur and the European Union would add more growth in both Brazil and Argentina than would a FTAA. See *The Americas: The Road From Santiago*, ECONOMIST, Apr. 11, 1998, at 25 (contemplating the impact of a free trade deal between Mercosur and the European Union). The European Union has long been Mercosur's biggest trading partner and in 1996, the European Union replaced the United States as Mercosur's largest source of foreign investment. See INST. FOR EUROPEAN-LATIN AM. RELATIONS, DOC. NO. BRF-97/7-TRA, EUROPEAN UNION-LATIN AMERICAN TRADE: AN UNEVEN RELATIONSHIP (1997); see also INST. FOR EUROPEAN-LATIN AM. RELATIONS, DOC. NO. BRF-88/7-TRD, TRADE BETWEEN THE EUROPEAN UNION AND LATIN AMERICA: RECENT TRENDS AND PENDING PROBLEMS (1998). The European Union is also working towards a free trade relationship with South Africa. See *S. Africa Edges Towards European Union Pact*, FIN. TIMES, Sept. 16, 1998, at 4. For three years, Pretoria and Brussels have pursued talks to open 90% of the European Union-South African market in approximately ten years. See Guy de Jonquières, *European Union & S. Africa Close to Trade Deal*, FIN. TIMES, Jan. 31, 1999, at 4; Neil Buckley, *Hopes for S. Africa Trade Pact with European Un-*

Clearly, the *spirit* of regionalism is manifesting itself globally.¹⁷⁷ The Europeans are attempting to consolidate their trade relations with individual Latin American states as well as with Mercosur. Likewise, Japan's investment strategy targets Asian states as well as Latin America. It is only natural for regionalism to be the dominant policy orientation of the United States government in the trade arena. The multiplicity of trade policies endorsed by American policymakers demonstrates the multitude of benefits that come with such an orientation. It also verifies that the United States is currently attending to many trading initiatives with zeal. With the momentum towards a Pan-American free trade area, the APEC forum, and the prospects of a new Transatlantic Marketplace, *hyper-regionalism* is clearly the preferred strategy of the United States government. This is clearly beneficial for trade worldwide and trade opportunities for the United States in particular.

ion, FIN. TIMES, Dec. 7, 1998, at 7; Michael Smith, *European Union Urges Final Push for S. Africa Trade Deal*, FIN. TIMES, Dec. 14, 1998, at 4.

177. See Jeanette M.E. Tramhel, *Free Trade in the Americas: A Perspective from the Organization of American States*, 19 HOUS. J. INT'L L. 595, 613 (1997) (arguing that despite warnings by theorists and diplomats against hyper-regionalism, such a proliferation of regional trading blocs can benefit overall efforts towards global trade liberalization). What seems insurmountable at the multilateral level can be achieved at the regional or subregional level. See *id.* A negative consequence of hyper-regionalism may be the creation of a "multitude of regional and subregional agreements with conflicting obligations." *Id.* Regional agreements do not weaken the multilateral system, but rather promote the development of trade law. See *id.* Even in cases where trade diversion does occur, regional trade pacts do not impede broader efforts to reduce trade barriers at a multilateral level. See *A Question of Preference: Do Regional Trade Agreements Encourage Free Trade?*, ECONOMIST, Aug. 22, 1998, at 62 (discussing effects of regionalism on efforts to liberalize the global economy). There is no definite answer as to whether trade agreements encourage free trade or create more boundaries through *proto-protectionist* conduct among regional bloc members. See *id.* (concluding that regionalism is neither good nor bad for free trade). What is clear, however, is that there is no shortage of regional pacts dealing with trade. See *id.* (stating that there are now at least eighty regional pacts). Nor is there a dearth of opportunities for hyper-regionalism involving the United States. For the Clinton Administration, any move towards trade liberalization, be it at a bilateral, regional, or global level, particularly in an era where a global recession appears around the corner, is a good thing.

III. UNILATERALISM: A POST-MODERN APPROACH TO UNITED STATES TRADE POLICY

On May 1, 1997, Undersecretary Eizenstat told the United States Senate Foreign Relations Committee that:

[T]he United States must continue to lead in opening up the arteries of trade in the international trading system . . . Our continuing leadership in opening markets is essential to enhancing the prosperity and security of the American people in the 21st century and binding the peoples of the world together in a chain of prosperity and shared interests.¹⁷⁸

This statement correctly defines the Clinton Administration's trade policy: unilateralism.

Although unilateral trade policies appear defeating to multilateral and regional policies, it is only natural that the ground of the trade policy debate has shifted in this manner.

[T]he suggestion that fair trade must be pursued as an explicit policy objective has forced the United States government into bilateral and unilateral actions in the trade field, going beyond or simply ignoring GATT rules. This implies that multilateral provisions and processes have been unable to produce equitable outcomes, and all that is left is self-help.¹⁷⁹

As Eizenstat rightfully points out, United States policy is about "enhancing the prosperity and security of the American people in the 21st century," not any other people.¹⁸⁰ Despite the encouraging economic numbers that President Clinton provided to the American people in his State of the Union address, there is bad news on the international trade front.¹⁸¹ The United States trade deficit continues to widen to record levels. For 1998, the United States overall trade deficit reached \$233.4 billion¹⁸²—an all time high—which is a 50.4%

178. Eizenstat Testimony, *supra* note 19, at 2.

179. PATRICK LOW, *TRADING FREE: THE GATT AND U.S. TRADE POLICY* 28 (1993) (analyzing United States trade policy following the Uruguay Round of GATT talks).

180. See Eizenstat Testimony, *supra* note 19, at 2.

181. See State of the Union Address, *supra* note 79.

182. See Martin Crutsinger, *U.S. trade deficit surges to record high in '98*, SAN DIEGO UNION-TRIB., March 12, 1999, at C2 (remarking that "the United States has

increase over the old mark of \$153.4 billion set in 1997.¹⁸³ 1999 looks like it will be no better as the monthly United States trade deficit increased to a record \$17 billion for the month of January 1999.¹⁸⁴ In light of this, it is no surprise that the United States is reacting in a unilateral fashion.

After all, the same thing happened in the 1980s.¹⁸⁵ To counter an internal economic decline, the United States borrowed heavily, turned toward protectionism, and began a bilateral, and increasingly unilateral, approach to trade relations with other states.¹⁸⁶ The United

clearly become the importer of first resort with the continuation of the Asian financial crisis").

183. See *id.* Department of Commerce Secretary William Daley responded to the rise in the trade deficit:

Today's international trade figures continue to demonstrate the great strength of the U.S. economy in the midst of a weaker global economy. America is now in the longest ever peacetime economic expansion. The trade balance with Asia remains of greatest concern—especially China and Japan. . . . We remain concerned about our trade deficit even as the American economy continues to show remarkable strength under the policies of President Clinton.

Statement by Commerce Secretary William Daley on the U.S. International Trade Balance for November 1998, (visited Jan. 24, 1999) <<http://204.193.543.2/public.nsf/docs/international-trade-balance-for-November-1998>>.

184. See Bureau of Economic Analysis, U.S. Dep't of Commerce, *International Accounts Data* (visited Mar. 29, 1999) <<http://www.bea.doc.gov/bea/di/tradgs-d.htm#Balance>> (providing 1998 trade deficit data); Gautam Malkani, *US sees trade deficit hit record \$17bn*, FIN. TIMES, Mar. 19, 1999, at 5.

185. See generally DAVID CALLEO, *THE BANKRUPTING OF AMERICA* (1991) (detailing America's budget crisis of the 1980s). With the Reagan presidency, the 1980s saw a marked effort by the United States to reinvigorate itself. To counter the perceived Soviet threat—the so-called “Evil Empire”—the administration turned to the military-industrial complex for growth. In the long run, this build-up only worsened United States competitiveness. President Reagan's spendthrift policy undoubtedly encouraged a sharp fall in household savings and a sharp rise in federal deficits. At times, the United States economy was on the verge of insolvency. The United States domestic manufacturing base and exports in manufactured goods continued to shrink, leading some analysts to claim that the United States was experiencing “deindustrialization.” See BARRY BLUESTONE & BENNET HARRISON, *THE DEINDUSTRIALIZATION OF AMERICA* 6 (1982) (analyzing the personal and social costs of supply-side metaphysics of the Reagan Era); Guy de Jonquieres & Anatole Kaletsky, *The Enemy Within: Can America Make It?*, FIN. TIMES, May 11, 1997, at 24 (observing that “[a]fter almost a century as the world's pre-eminent industrial power, the US is being forced to acknowledge that its period of unchallenged leadership is over”).

186. See Tarullo, *supra* note 4, at 546.

States then began to shift away from concentrating on multilateral negotiating processes.¹⁸⁷ It consistently complained that the GATT failed to create a level playing field. To many reactionary members of the United States Congress, this system left United States firms facing increasingly stronger foreign competitors domestically, and protected competitors abroad. Consequently, Congress felt that unilateral measures were needed to stem the trend against United States manufacturers and fashioned a legislative response. This turn towards protectionism is a natural reaction to the United States' relative decline in the world economy.¹⁸⁸ The United Kingdom reacted similarly to its own decline in the early twentieth century. Jagdish

187. See JAGDISH BHAGWATI, *POLITICAL ECONOMY AND INTERNATIONAL ECONOMICS* 71 (1991) (concluding that due to the United States' economic decline, the Reagan and Bush Administrations naturally focused on bilateral, rather than multilateral, negotiations). In April 1985, the United States established a free trade agreement with Israel to eliminate all tariffs on bilateral trade within ten years. See *Free Trade Area Agreement*, Apr. 22, 1985, U.S.-Isr., 24 I.L.M. 653. The agreement eliminated all discrimination against United States exports caused by preferences awarded to Western European states under the 1975 European Community-Israel Free Trade Agreement. See *id.* Negotiations for the Free Trade Agreement with Canada began in May 1986, when the parties contracted to eliminate all tariffs on bilateral trade within ten years. See *Free-Trade Agreement*, Dec. 22, 1987-Jan. 2, 1988, U.S.-Can., 27 I.L.M. 281. It also created innovative dispute resolution mechanisms and pioneered to new approaches to liberalization in services and investment. See *id.* These two free trade agreements demonstrated the United States' chronic dissatisfaction with the GATT regime and the beginnings of its dual approach to international trade. Canada, too, continues to look to its traditional bilateral partner south of the border for deeper trade links. See Edward Alden, *Canada Steers to Deeper Trade Ties with U.S.*, FIN. TIMES, Nov. 6, 1998, at 4 (stating that Canada will focus on expanding its exports to the United States rather than diversifying its trading partners). In particular, the Canadian government encourages small, domestically-oriented companies to begin exporting to the huge market to the south. See *id.* But see Dearden, *supra* note 116, at 236-37 (explaining that not extending the NAFTA to Chile caused Canada to negotiate its own deal with Chile). Canada is considering expanding trade with Latin America further, and may become an associate member of Mercosur. See Dearden, *supra* note 116, at 236-37.

188. See *Yen Gains As Japan Decides Against Intervention*, NAT'L POST, Feb. 27, 1999, at C2 (tracking currency fluctuations over the past decade). The deterioration in American economic strength can be shown in the dollar's decline vis-à-vis the Japanese yen and the German mark over this past decade. In 1985, the dollar traded for approximately 250 yen. In the summer of 1995, it traded for less than 100 yen, hitting an all time low of 79.85 during the week of April 16, 1995. The dollar is currently trading at about 119 yen. See *id.*

Bhagwati, an economic theorist, calls this phenomenon the "diminished giant syndrome."¹⁸⁹

It is not surprising that the United States government has grown weary of the multilateral process; multilateralism is not a game that the United States has won. Historically, the United States ran current-account surpluses *vis-à-vis* the rest of the world, and any frustration with the GATT system was relieved by venting upon Japan. Now, the United States runs high and persistent current-account deficits, and a large portion of these deficits are with Japan. Most of the trade deficit with the Japanese emanates from the automobile sector; however, trade deficits exist across many sectors. Consequently, while the United States rapidly became the world's largest debtor state, Japan replaced the United States as the world's largest creditor state. Clearly, Japan's gain has been the United States' loss.

The Asian financial crisis has not changed the trade relationship between the United States and Japan. In October 1998, Japan's trade surplus with the United States rose thirty-two percent, compared with the prior year, totaling \$5.9 billion.¹⁹⁰ The rising trend in Japan's trade surplus with the United States is forecasted to lead to a record \$56.1 billion for 1999.¹⁹¹ In addition to putting new pressures on the American dollar, the Japanese trade surplus continues to open the door to renewed trade friction. Consequently, Japan may have to make further concessions to the United States.¹⁹²

The Clinton Administration has followed President Reagan's economic lead to a large degree. The biggest change in Clinton's trade

189. BHAGWATI, *supra* note 187, at 48 (explaining the rise in United States economic protectionism as a reaction to its relative decline in economic power).

190. See Michiyo Nakamoto, *Japan's Trade Surplus with US Rose 32% Last Month*, FIN. TIMES, Nov. 20, 1998, at 4 (indicating that Japan's overall trade surplus for October 1998 was up 23% since October 1997).

191. See *Japan's Trade Surplus Up 40.1% in 1998*, N.Y. TIMES, Jan. 25, 1999 (reporting that Japan's overall trade surplus rose 40.1 percent in 1998 from the surplus in 1997).

192. See generally Makoto Kuroda, *Strengthening Japan-US Cooperation and the Concept of Japan-US Free Trade Agreements*, in FREE TRADE AREAS AND U.S. TRADE POLICY 121 (Jeffrey Schott ed., 1989) (stating that although many economists believe that United States trade deficits are due overwhelmingly to macroeconomic imbalances and there is little trade policy can do to correct them, these imbalances are bound to occur periodically and will eventually self-rectify).

policy, and the most disturbing to traditional trading partners of the United States, is the use of United States power to bolster economic growth at the risk of destabilizing traditional alliances. In 1998, the Clinton Administration admonished Japan for not promoting sufficient growth in Japanese domestic demand, as well as for failing to restructure Japan's fragile financial market system and open Japanese markets to assist the region out of economic crisis. For example, during a diplomatic visit to Japan, President Clinton warned the country that it risked provoking a protectionist backlash if it did not dismantle its traditionally rigid trade barriers.¹⁹³ Moreover, President Clinton urged Japan to stop unfairly undercutting competitors in global markets.

While foreign policy pundits call this approach shortsighted, Clinton advisors see it as pragmatic. The result is, however, that the United States has angered many of its allies. Such an unrelenting focus on trade has managed to grind away the trust that Washington had fashioned with its allies when facing a common Soviet enemy. Such saber rattling by the Clinton Administration provoked Japan's Justice Minister, Shozaburo Nakamura, to comment angrily that "[United States] free-market capitalism is not free . . . [t]hey threaten you right away with things like the Super 301 trade bill."¹⁹⁴

A. THE SUPER 301 MECHANISM—UNILATERALISM *PAR EXTRAORDINAIRE*

Unilateral sanctions have always been an important weapon in America's arsenal of foreign trade policy actions.¹⁹⁵ The use of unilateral sanctions is, *prima facie*, not contrary to the international trade rules on dispute resolution. Not only does the DSU provide for

193. See Gerard Baker, *Clinton Warns Japan of "Retaliatory Protectionism" Because of Trade Policy*, FIN. TIMES, Nov. 21, 1998, at 25 (reporting remarks by President Clinton to United States and Japanese business people).

194. Michiyo Nakamoto, *Japanese Minister Says Sorry to US*, FIN. TIMES, Jan. 6, 1999, at 6 (reporting that Minister Nakamura later apologized for his remarks and withdrew them as inappropriate).

195. See generally ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* 27-54 (1984) (commenting that strategies of unilateral sanctions are sometimes referred to as "tit-for-tat"); Robert Axelrod, *The Emergence of Cooperation Among Egoists*, 75 AM. POL. SCI. REV. 306, 308 (1981) (explaining that this game of logic is similar to the "Prisoner's Dilemma").

“cross-retaliation,”¹⁹⁶ but unilateral actions remain the predominant tool of enforcing a Contracting Party’s rights under the GATT and the WTO. The threat of such retaliatory measures, however, has really embodied the unilateral *spirit* of United States trade policy.

The Trade Act of 1974 includes provisions that require an administration to self-initiate Section 301 investigations in specific cases, thus allowing special retaliatory measures.¹⁹⁷ The Super 301 Mechanism,¹⁹⁸ effected by The Omnibus Trade and Competitiveness Act of 1988,¹⁹⁹ is the most powerful tool authorizing the President unilaterally to impose trade sanctions against foreign governments. Section 301(a) mandates government action in cases where a foreign government violates an international trade agreement with the United States.²⁰⁰ In cases in which a foreign act, policy, or practice is “unreasonable or discriminatory and burdens and restricts United States commerce” but does not violate any international trade agreement, Section 301(b) provides for “discretionary” action.²⁰¹ In addition to

196. See DSU, *supra* note 44, art. 1.

197. See 19 U.S.C. sec. 2414(a)(1) (1994) (outlining the investigation procedure).

198. See Trade Act of 1974 sec. 301, 19 U.S.C. sec. 2411 (1994) [hereinafter Super 301 Mechanism]. After the use or threat of use of the Super 301 mechanism, the most egregious case of unilateralism concerns the use of extraterritorial laws to promote United States trade policies abroad. The United States government has promulgated laws that allow United States nationals to sue foreign firms that use property in Cuba confiscated from them after the 1959 revolution. See Cooper, *supra* note 26, at 392 (stating that the Helms Burton Act not only violates international norms, but it is also bad for foreign relations). The House of Representatives passed legislation similar to the Helms-Burton Act on June 19, 1996, aimed at restricting foreign firms from doing business in Libya and Iran. See Wynn H. Segall, *Running On Empty: U.S. Economic Sanctions and Export Controls in 1997*, 32 INT'L LAW. 271, 271 (1998) (detailing other extraterritorial measures). The United States also imposed extraterritorial legislation regarding trade with Burma and Sudan. See *id.* While a form of unilateralism, specific notions and practices of extraterritoriality are not within the scope of this Article.

199. Pub. L. No 100-418, 102 Stat. 1107 (1988) (codified at 19 U.S.C. sec. 2411).

200. 19 U.S.C. sec. 2411. Section 301(a) applies when the United States is unable to exercise its rights under any trade agreement, when a foreign country violates or denies the United States benefits under any trade agreement, or when a foreign country unjustifiably burdens or restricts United States commerce. See *id.* sec. 2411(a)(1) (delineating the mandatory actions of the USTR).

201. See *id.* sec. 2411(b) (delineating the discretionary actions of the USTR).

retaliation, the statute provides for a number of alternative possible actions, including negotiating agreements to eliminate the impugned practice or its harmful effect on United States commerce, or providing compensation to the United States in the form of trade concessions on other goods or services.²⁰²

Under the Super 301 mechanism, the USTR identifies "priority foreign country practices, the elimination of which is likely to have the most significant potential to increase United States exports."²⁰³ Moreover, the statute requires the United States government to publish an annual list of trading partners engaging in unfair trading practices, thereby putting targeted countries under pressure to alter their allegedly unfair trading behavior.²⁰⁴ Moreover, the statute provides for mandatory investigations of any "priority" trading states²⁰⁵ because of a "pattern" of trade-distorting practices and non-tariff trade barriers.²⁰⁶

The designation of priority status is often a precursor to unilateral trade sanctions or the threat thereof. For example, South Korea has taken extraordinary steps just to avoid receiving "priority" status on the annual list compiled under United States Super 301 legislation.²⁰⁷ South Korea negotiated to curtail its exports and bring its trade practices into line with demands made by the United States government,

202. See *id.* sec. 2411(c)(1)(D) (authorizing the USTR to "enter into binding agreements" with the violating country).

203. See *id.* sec. 2420(a)(1)(B) (providing the USTR with authority to identify trade expansion priorities).

204. See *id.* sec. 2241(b) (requiring the federal government to compile an annual report that identifies market barriers and unfair trade actions).

205. See 19 U.S.C. sec. 2420(b). In addition, the Super 301 mechanism requires the USTR to identify priority countries that deny "adequate and effective protection of intellectual property rights" and that are not taking the necessary measures to address the problem. See *id.* sec. 2242(b)(1) (explaining special rules for the identification of priority countries).

206. See *id.* sec. 2411(d)(3)(B)(IV)(ii) (outlining what persistent patterns of conduct trigger priority status).

207. See Deborah McGregor, *US Augments Weaponry for Trade Disputes*, *FIN. TIMES*, Jan. 27, 1999, at 6 (discussing the renewal of Super 301 authority and its use by the Clinton Administration as an effective tool to promote American economic interests).

reinforcing the effectiveness of Super 301 authority to policymakers in Washington.²⁰⁸

Despite the availability of such strong retaliatory sanctions under Section 301, the United States prefers to begin by threatening unilateral sanctions at the negotiating table.²⁰⁹ The Clinton Administration has proven that explicit threats of unilateral actions produce results and most certainly concessions. Those who use advocate these tactics "are not advocating protection *per se*, but they are willing to use protection as a bargaining threat—a bluff that they are presumably willing to see carried out, at least occasionally."²¹⁰

B. A NEGOTIATING TECHNIQUE – RESIDUAL UNILATERALISM AND THE FTAA

Before the conclusion of the Uruguay Round, the Clinton Administration claimed that Japan played the protectionist game. Then-USTR Kantor claimed that Japan discriminated against American firms in its public-sector procurement practices, and may have breached the 1990 bilateral agreement concerning the purchase of supercomputers.²¹¹ When Japanese Prime Minister Kiichi Miyazawa visited Washington in April 1993, President Clinton talked tough about market access.

This was the precursor to Kantor's biggest confrontation with Tokyo in the spring of 1995, which involved the United States' complaint that Japan's spare automobile parts market favored domestic

208. *See id.* (mentioning that a 1997 investigation under United States law into Korean barriers to imported motor vehicles led to a market access agreement). USTR Barshefsky proclaims that this market access agreement with Korea demonstrates the effectiveness of the Super 301 mechanism. *See id.*

209. *See* VERDIER, *supra* note 31, at 280.

210. PAUL KRUGMAN, *THE AGE OF DIMINISHED EXPECTATIONS* 106 (1990) (stating that some economists argue that some protectionism is necessary in order to lower the trade deficit).

211. *See* George Graham & Peter Norman, *US Acts Against Japan on Trade: Clinton Takes Tougher Stance to Force Opening of Foreign Markets*, FIN. TIMES, May 1, 1993, at 1 (characterizing Japan's response to the United States' threats as immediately hostile); Michiyo Nakamoto, *Tokyo Defies US Anger Over Supercomputer*, FIN. TIMES, Mar. 2, 1993, at 5 (reporting that Japan "brushed aside US criticism of its supercomputer procurement policy" and installed a Japanese-made supercomputer).

firms over foreign firms. The United States threatened to impose punitive tariffs on Japanese luxury car imports if Japan did not open its markets to more American car dealerships and American car parts.²¹² Just a few hours before the United States was due to impose punitive tariffs on imports of Japanese luxury cars, a deal was struck.²¹³ The Japanese seemingly gave in to United States demands and made amends.²¹⁴ The Japanese and United States governments had been through this routine before, avoiding trade wars each time.²¹⁵ The United States government thereby learned that it could pursue a hard-line confrontational strategy to get its way, under the guise of opening markets for “free and fair trade.”²¹⁶

The next big showdown should be steel imports from Japan, an issue that has raised the ire of steel manufacturers in the United States. In his State of the Union Address on January 19, 1999, President Clinton was clear: “We must enforce our trade laws when imports unlawfully flood our nation. I have already informed the government of Japan that if that nation’s sudden surge of steel imports into our country is not reversed, America will respond.”²¹⁷ The United States has responded. The United States House of Representatives voted on March 17, 1999, to pass a bill establishing quotas on steel imports to

212. See *Buy My Cars or Else: What Happened to America's Belief in Free Trade?*, ECONOMIST, May 13, 1995, at 16 (criticizing the United States tactic of threatening sanctions in order to open Japan’s automobile market); Gerard Baker, *Driven Off the Oriental Highway: Japan is Crowing Over its Victory in the US Car Clash*, FIN. TIMES, July 1, 1995, at 7 (noting that Japan’s refusal to bow to American pressure for explicit numerical targets won widespread global approval).

213. See *Clinton's Phoney Peace*, ECONOMIST, July 1, 1995, at 13 (reporting that the trade agreement between the United States and Japan narrowly avoided sanctions).

214. But see Baker, *supra* note 212, at 7 (observing that, at the heart of the dispute, the United States failed to force Japan to do anything it did not want to do).

215. See VERDIER, *supra* note 31, at 280 (stating that even the European Economic Community Commission preferred to deal with the Japanese via regulation, i.e., anti-dumping, local-content and origin rules). The United States’ propensity to negotiate arose from the unique configuration of the policy process—executive, with a pocket of pressure. See *id.* According to one academic, “[a]n active trade diplomacy derives from a subtle mixture of credibility and inflexibility.” *Id.*

216. See LOW, *supra* note 179, at 28 (elaborating that “the absence of fairness in trade relations bespeaks the need for greater intervention and planning in the domestic economy to avoid the privations that will follow from foreign foul play”).

217. State of the Union Address, *supra* note 79.

counteract the dumping of Japanese and other countries' steel in American markets.²¹⁸

Japan is not alone in raising the ire of the White House. There seems to be a constant flurry of trade war threats emanating from the White House. Brazil, China, India, Japan, and other states have been the subject of the rancor of the Clinton Administration. Currently, the European Union is in the sights of American unilateral trade policy for its Banana Regime.²¹⁹ Following the report of the Dispute Panel Board considering the European Union's impugned policy, the Clinton Administration maintained that the European Union had not altered the Bananas Regime. While the United States government asked the original WTO panel to decide whether the new banana import regime complied with earlier WTO rulings, the United States also threatened Super 301 sanctions²²⁰ and allegedly rebuffed entreaties from the European Union's Trade Commissioner.²²¹ After the USTR released a list of European products subject to unilateral retaliatory duties under the Super 301 mechanism, it became clear the United States government was playing hardball.²²² WTO concessions on certain products, covering trade of about \$520 million, were scheduled for suspension by the United States government.²²³ This value was designed, in accordance with the DSU, to equal the estimated amount of annual harm to the United States economy as a result of the European Union's Banana Regime.²²⁴

218. See Nancy Dunne, *House votes for quotas on steel imports*, FIN. TIMES, Mar. 18, 1999, at 4. At the writing of this Article, it appears that this bill may run into opposition in the United States Senate. See *id.* at 8.

219. See *supra* notes 47-69 and accompanying text (discussing in detail the Bananas Regime); see also Barshefsky Testimony, *supra* note 167, at 1 (stating that "[o]ur relationship with the European Union creates immense mutual benefit, which we can further strengthen; but it is marked by serious disputes which we must solve").

220. See Guy de Jonquières, *US Escalates Trade Dispute with European Union over Bananas*, FIN. TIMES, Dec. 22, 1998, at 1 (stating that the United States threatened sanctions upon sixteen types of European Union exports and planned to seek WTO authorization to implement them).

221. See de Jonquières, *supra* note 57, at 3.

222. See USTR DOC. 99-01, *supra* note 59.

223. See *id.*

224. See *id.*

There were a number of public criticisms of the United States resort to unilateral measures, particularly while the case was in the midst of the WTO dispute settlement process.²²⁵ The European Union warned that the retaliatory sanctions risked damaging transatlantic relations and the multilateral trading system, and that Europe would robustly respond to such sanctions.²²⁶ Sir Leon Brittan called the threatened sanctions list, "unilateralism at its worse."²²⁷ Jacques Santer, European Commission President, wrote a personal letter to President Clinton stating that Super 301 sanctions would be misguided.²²⁸ Subsequently, the European Union threatened to test the legality of the United States government's Super 301 mechanism in the WTO.²²⁹ After the European Union agreed to send the matter to WTO arbitration, Washington agreed to postpone its request for authorization of sanctions by the WTO. At the time of this writing, the sanctions continue to be looming as last-minute negotiations between United States and European Union officials continue at the WTO. They may get results. As one former United States trade official explained, "Super 301 can be more effective as a threat than anything else."²³⁰ The United States has also threatened the use of sanctions against the European Union under its Super 301 mechanism for the dispute over hormone-treated beef. Similar in exercise to the USTR's actions over the bananas dispute with the European

225. See Neil Buckley, *U.S. "Unilateralism" Attacked*, FIN. TIMES, Nov. 30, 1998, at 3 (reporting the European Union concern that the United States increasingly takes the law into its own hands).

226. See Neil Buckley, *European Union Promises A Fight if U.S. Imposes Sanctions Over Banana Battle*, FIN. TIMES, Nov. 10, 1998, at 1 (quoting a European Union official as stating: "[i]f the U.S. has a problem, it should use the proper channels").

227. de Jonquières, et al., *supra* note 220, at 1.

228. See Neil Buckley, *EC President Appeals to U.S. in Banana-Trade Dispute*, FIN. TIMES, Nov. 12, 1998, at 5 (reporting President Santer's response to the threat of Super 301 sanctions as advocating "shared leadership" between the United States and the European Union rather than sanctions-inspired divisiveness).

229. See Buckley, *supra* note 64, at 4.

230. *Id.* (quoting Bill Merkin, vice president of Strategic Planning, Inc., of Washington, D.C.).

Union, a preliminary "hit-list" of European Union exports liable to sanctions was released.²³¹

Regardless of the outcome, it is clear that the United States government has become intent on pursuing policies that further demonstrate its *spirit* of unilateralism. It is not just the retaliatory regime that comes with violations or impairments of trade benefits where unilateralism is exhibited. Such a *spirit* of unilateralism even pervades the multilateral and regional bargaining arena. The early FTAA negotiations are a case in point. Although initially intended to establish a launch date for formal negotiations for the world's largest regional trading bloc, the talks in Brazil erupted in a dispute between Washington and Mercosur over the speed of the negotiation process.²³² The United States wished to "rush ahead" with negotiations, while the Mercosur states preferred a slower-burn approach.²³³ As the conference wound down, USTR Barshefsky became so incensed by the Latin American trade representatives' intransigence that she heavily criticized the deputy ministers' draft declaration and threatened to leave unless an agreement was reached on the FTAA.²³⁴ In her attempts to bring a comprehensive trade pact more quickly, she nearly scuttled the whole concept.²³⁵

231. See Report of the Appellate Body on EC-Measures Concerning Meat and Meat Products (Hormones), Jan. 16, 1999, WTO Docs. WT/DS26/AB/R and WT/DS48/AB/R; Office of the U.S. Trade Rep., *Press Release: USTR Publishes Preliminary List of Products on Preparation to Exercise WTO Rights on Beef Trade Issue* (Mar. 22, 1999), available in <<http://www.ustr.gov/releases/1999/03/99-27.html>> (reporting the preliminary "hit-list"); see also Guy de Jonquières, *Transatlantic beef warriors steer clear of open conflict*, FIN. TIMES, Mar. 24, 1999, at 8.

232. See Christie, *supra* note 135.

233. See *id.*

234. See Michael Christie, *Mercosur Hails Americas Trade Talks Win Over US*, REUTERS WORLD SERVICE, May 17, 1997, p. unavail. online.

235. See Avinash K. Dixit, *Trade Policy: An Agenda for Research*, in STRATEGIC TRADE POLICY, *supra* note 6, at 283, 299 (discussing the impact of the United States during FTAA meetings in Brazil). Dixit commented that "[m]any actions of trade policy are influenced by explicit or tacit threats—that is, expectations of what some other country . . . will do if we do not take this action." *Id.* He adds that no systematic economic analysis of such threats has been completed and in-depth discussion is conjectural. See *id.*

Brazil, as Mercosur's *de facto* leader, has strategically avoided the term "hemispheric integration" and openly stated its intention to strengthen the Southern Cone before joining the FTAA. On May 17, 1997 Brazilian newspapers proudly ran headlines claiming that the United States had suffered a humiliating defeat at the hands of the South America's trade bloc in key ministerial Free Trade Talks.²³⁶ A front-page headline of the *Estado de Minas* daily gloated "The United States surrenders to Mercosur," while the national *O Globo* newspaper shouted, "Mercosur wins and the United States is defeated."²³⁷ The newspapers claimed that the Mercosur states withstood pressure from the United States for speedier progress during ministerial talks developing the FTAA.²³⁸

Formal negotiations establishing the FTAA were agreed upon in the Joint Ministerial Declaration of Belo Horizonte.²³⁹ The thirty-four FTAA signatory countries, however, did not shore up wide differences regarding the nature of the talks; they scheduled another ministerial meeting for the following year in Costa Rica, a postponement Washington opposed.²⁴⁰ The result was an agreement to continue talks, albeit not as quickly as the United States desired.

The Second Summit of the Americas in Santiago managed to clear up some negative sentiment, but the talk of winners and losers reflects a zero-sum game rather than strategic long-term relationships. An example of a zero-sum approach is evident in the United States unilaterally-influenced negotiation style, which is to demand liberalization in one sector, and claim that other countries' offers are not enough to justify opening the United States markets.²⁴¹ If states do not comply with demands, the United States then promptly withdraws from talks.

236. See Deborah McGregor, *U.S. to Reinstate Controversial Hitlist for "Unfair" Trading*, FIN. TIMES, Jan. 27, 1999, at 1; see also Christie, *supra* note 234.

237. Christie, *supra* note 234.

238. See *id.* (discussing obstacles in Mercosur and United States trade negotiations).

239. See Christie, *supra* note 135.

240. See Christie, *supra* note 234.

241. See Eggertson, *supra* note 157, at B2 (arguing that the United States lost an opportunity to reach an agreement on financial services by abandoning negotiations).

This negotiating style is part of a repeated unilateral *spirit* in United States government negotiations. For example, at the May 1997 APEC meeting in Montreal, USTR Barshefsky urged American trading partners to allow majority foreign ownership and branch banking access to their institutions and banks.²⁴² The USTR also warned that it would withdraw from scheduled talks if Latin American and Asian countries did not enhance their offers by July 1997.²⁴³ Additionally, in the 1998 Kuala Lumpur meeting of APEC, the summit ended with a row over Japanese intransigence over trade liberalization measures and outbursts from the USTR referring to Japanese checkbook diplomacy.²⁴⁴ It is little wonder that the last GATT/WTO trade agreement took seven years to conclude.

Arguably, use of United States trade laws to force open markets is a striking rejection of multilateral free trade. This strategy undermines the purpose of the GATT and the WTO, pushing countries into defensive, market-sharing pacts with the United States. The Clinton Administration has adopted what it calls "WTO-plus," maintaining that unilateral policies are consistent with—or even complementary to—the multilateral mechanism already in place. Irrespective of this stance, it is increasingly clear that the United States government is using unilateral measures, self-initiated and provided for under domestic legislation, to force its trade agenda abroad. Instead of relying on the multilateral framework of the WTO or the regional trading blocs to which the United States is a member, the Clinton Administration is demonstrating a unilateral *spirit*, which ensures that America always comes first.

IV. THE UNITED STATES' POST-MODERNIST APPROACH TO INTERNATIONAL TRADE

The world of international trade has long been filled with intellectual inconsistencies: "[t]rade policy is not a stable category across time and borders. It can be defined but only in the most general

242. *See id.*

243. *See id.*

244. *See* Peter Montagnon & Sheila McNulty, *Trade Liberalisation Accord Thwarted APEC: Japan & U.S. Exchange Blows at Asia-Pacific Summit*, FIN. TIMES, Nov. 16, 1998, at 3 (stating that the Japanese perceived USTR Barshefsky's remarks as "evil" and defamatory).

terms, as the policy that purports to affect trade flows between domestic and world markets. Any finer definition must concern itself with historically contingent events.²⁴⁵

The Cold War gave the capitalistic free world a meaning, a direction, and a purpose—all of which combined to provide a form of metanarrative that guided policymaking. With the end of the Cold War, and the rise of liberal democracies across the globe,²⁴⁶ the clash of the two modernist ideologies—the capitalist West and the socialist East—evolved into a more complex set of competing blocs.²⁴⁷ International trade policy in a multipolar world is much more difficult to manage than it was in a bipolar world. Today, few clear dividing lines exist; there are only competing narratives.

The United States' post-modern approach to trade policy has created a plethora of options and opportunities, thus accommodating all interests.²⁴⁸ For the United States, however, the flexibility of its interests depends upon balancing the maintenance of liberalization measures between Japan and the European Union and demands for concessions from these same trading partners.²⁴⁹ Most important is the *spirit* with which policymakers make choices in light of the post-modern world of numerous opportunities and threats.²⁵⁰ As Charles Jencks explains:

245. VERDIER, *supra* note 31, at 48.

246. See generally FUKUYAMA, *supra* note 37 (analyzing the sustainability of emerging liberal democracies post Cold War).

247. See Allott, *supra* note 18, at 1393 ("With the end of the Cold War, Russia reverted to an untidy genetic status, in which the sub-nation of Russia once again may come to imperialize some or all of the other sub-nations. The United States is left to struggle with its identity in new and especially difficult circumstances.").

248. See VERDIER, *supra* note 31, at 289 (discussing opportunities for domestic and exporting interests).

249. See *id.* (stating that this presents a new situation for the White House since there is no longer a communist threat); see also FUKUYAMA, *supra* note 37, at 283.

The United States and other liberal democracies will have to come to grips with the fact that, with the collapse of the communist world, the world in which they live is less and less the old one of geopolitics, and that the rules and methods of the historical world are not appropriate to life in the post-historical one.

Id.

250. See Kennedy, *supra* note 17, at 12.

[T]he post-modern *condition* . . . has as many negative as positive tendencies, and they come as a package. The increase in communication (and the information glut and advertisement), the growth of knowledge (and the consumer society), the rise of leisure (and of Disneyland simulacra), the flowering of Post-Fordism (and the insecurity of workers), the emergence of a new world order (and the *Pax Americana*), the EC, GATT and global economy (and the Third World debt and IMF riots)—for every positive post-modern trend there is a corresponding negative consequence.²⁵¹

The world depends on trade and cannot do without it. The global economy is a part of modern life and the flow of capital, technology, and labor at a *transnational* level continues to increase. With all this movement and the lack of a single, cohesive trade theory, however, there is growing consternation among United States lawmakers as to the fate and direction of United States trade policy.²⁵²

251. Jencks, *supra* note 16, at 13; see also Zamora, *supra* note 147, at 627 (citing BOAVENTURA DE SOUSA SANTOS, *TOWARD A NEW COMMON SENSE* (1995)). de Sousa Santos characterizes policies of the post-modern world as “transnationalization of nation-state legal regulation.” *Id.* The combination of domestic and international political forces concurrent with new forms of technologies and business organization makes for blurred lines of jurisdiction and control. See *id.* According to Professor Santos:

We may be witnessing the emergence of a new form of plurality of legal orders: partial legal fields constituted by relatively unrelated and highly discrepant logics of regulation coexisting in the same state legal system. As it loses coherence as a unified agent of social regulation, the state becomes a network of microstates, each one managing a partial dimension of sovereignty (or of the loss of it) with a specific regulatory logic and style.

Id.; see also James M. Cooper, *Towards a New Architecture: Creative Problem Solving and the Evolution of Law*, 34 CAL. W. L. REV. 297, 321-22 (1998) (stating that family, ethnicity, kin, language, and religion are traditions that bind citizens as much as traditional juriscapes, such as city, state, and country). Non-traditional juriscapes have their own system of enforcement and conduct exclusive of state control. See *id.*

252. See *Trade Priorities in The Clinton Administration: Hearings Before the House International Relations Comm.*, 105th Cong. 1 (1997) (statement of Rep. Gilman) (stating that “[b]oth critics and supporters of the administration’s trade policy agree that the trade policy agenda has lost its primacy in our overall foreign policy”). United States Senator Dan Coats, Chairman of the Senate Arms Services Subcommittee on Air and Forces, stated, “If there is a coherent, articulated foreign policy—I don’t know what it is . . . It appears that our actions do not match our rhetoric. It seems that the policy is constantly changing.” *Coats Questions Secretary of Defense and Chairman of Joint Chiefs on Military Readiness Issues*, News Release of United States Senator for Indiana Dan Coats, Washington, D.C., Oct. 6,

There are a number of competing interests in balancing American trade policy. According to Eizenstat:

Economics is certainly not the only element of our foreign policy, nor do I intend to view every foreign policy issue through a commercial prism. But in the post-Cold War world, economics is increasingly central to maintaining United States leadership, advancing the interests of the American people, and building a more stable and prosperous world.²⁵³

The Administration's trade policy is truly one of quantity, not quality. USTR Barshefsky explained that, "[a]s you look at the last year alone the number of major agreements (bilateral, sectoral, regional, multilateral) . . . demonstrates that this administration is as aggressively pursuing trade policy as part of foreign policy, as well as economic policy, as it has over the preceding three and a half years."²⁵⁴

In reality then, the trade policy appears as a combination of all three approaches. There are always elements of unilateralism in both multilateral and regional negotiating exercises, just as the regional process is multilateral in nature. While President Clinton is committed to opening markets, he has engaged in much more brinkmanship, by threatening unilateral measures, than his predecessors have.²⁵⁵ "The policy actions thus provoked blend increased protection in the domestic market and ever more strident demands for trade liberalization by trading partners. The threat of increased protection backs up the demands for trade liberalization."²⁵⁶

This method of conducting trade talks may not be such an odd strategy. There is some overlap between the unilateral, regional, and multilateral approaches to trade policy on the global level.²⁵⁷ For ex-

1998 (on file with *American University International Law Review*).

253. Eizenstat Testimony, *supra* note 19, at 1.

254. *Trade Priorities*, *supra* note 106, at 11.

255. See Guy de Jonquière, *US to Stay Firm on Trade Barriers*, *FIN. TIMES*, Feb. 1, 1999, at 6 (noting that the banana dispute between the United States and the European Union is a critical test in the enforcement of international trade rights).

256. Low, *supra* note 179, at 28.

257. See Kennedy, *supra* note 17, at 12 (characterizing international trade law regime as "a melange of law and non-law, institutions and non-institutions, a scattered array of obligations and sites for bilateral or multilateral engagement").

ample, Avinash Dixit suggests that the very negotiating process in a multilateral framework implies a certain element of unilateralism:

In reality the policy choices of two or more governments interact in many ways. The most visible example of this is the joint decision-making process consisting of the rounds of negotiations under GATT. More subtly, any one country, when evaluating its policy choices, must be mindful of the reaction or retaliations that are likely from other countries.²⁵⁸

To come to an agreement at any level, there must be agreement by the parties to the negotiations. A unilateral decision, internally driven, is the step that brings the external relations to fruition. Because of internal decision-making, consensus and bargains build international agreements. As Philip Allott explains:

International social progress comes, if at all, as an incidental external consequence of internal activities . . . and, especially, as a by-product of the wealth-creating and wealth distributing effects of international capitalism, including rudimentary cooperation among some of the governmental managers of international capitalism (in GATT, the IMF, OECD, the European Community, the Group of Seven).²⁵⁹

Overlap also exists in developing bilateral—or nascent regional—relationships and relationships that can be leveraged in an increasingly global multilateral trading system. In short, the *spirits* are blurred, as demonstrated by the relationship between the United States and the European Union. While both partners require participation and access to each other's markets for expanded global trade, there is always friction concerning trade relations. This friction occurs at all three levels as threats of unilateral action moves towards regional consolidation and the use of multilateral mechanisms, such as the DSU.

For example, when the European Union Banana Regime complaint was before the WTO, German Christian Democrat Peter Kitzmann urged a bilateral settlement with the United States similar to an agreement that prevented a clash in the WTO over the United States Helms-Burton law, which penalized foreign firms investing in

258. See Dixit, *supra* note 232, at 298.

259. PHILIP ALLOTT, INTERNATIONAL LAW AND INTERNATIONAL REVOLUTION: RECONCEIVING THE WORLD 17 (1989).

Cuba.²⁶⁰ At a European Union-United States meeting on May 28, 1997, President Clinton indicated to his European counterparts that the United States would like to resolve the WTO bananas case in such a way that protects the interests of the Caribbean exporters, while eliminating discrimination against other exporters. Here, the bilateral relationship, as part of the Transatlantic Marketplace, may become more regional once a free trade deal is signed and pose benefits for the entire multilateral system.

In the past, bilateral negotiations were critical for the success of GATT talks. From the initial Geneva Round in 1947 through the Dillon and Kennedy Rounds, much of the progress on tariff reduction was done through direct United States-Europe discussions.²⁶¹ Clearly, the European Union also believes that negotiation is the best approach for developing long-term partnerships.²⁶² The United States and the European Union rely on deal-making as the mainstay of trade relations between trading partners.

In fact, the entire world trading system relied on a last-minute bilateral deal between the two parties. On December 15, 1993, President Clinton notified congressional leaders that an agreement was reached to conclude the Uruguay Round of negotiations of the GATT. The United States Congress had previously imposed a deadline for the Clinton Administration to reach an agreement with the 116 other negotiating countries. Ultimately, the agreement incorporated more than five hundred pages and contained forty separate agreements. The crux of the matter, however, was a deal with the European Union over outstanding issues such as French government

260. *EU Says it has Grounds to Appeal WTO Banana Ruling*, REUTERS EUR. UNION COMMUNITY REP'T, May 14, 1997, p. unavail. online (describing Kittlemann's fear that if the United States won its case before the WTO, the WTO would be more likely to support overturning European Union import bans on meat from animals treated with growth hormones).

261. See ROBERT K. PATERSON, CANADIAN REGULATION OF INTERNATIONAL TRADE AND INVESTMENTS 25 (1986) (stating that GATT tariff bargaining tended to be an overwhelmingly bilateral affair, since there was often only one principal supplier of a given product imported by a Contracting Party).

262. See Kennedy, *supra* note 17, at 20 (describing the European Union as "the most developed international regime" that has a reciprocal negotiations structure in place to reduce impediments to the free movement of goods).

subsidies to the French film industry and the nation's farmers.²⁶³ In the end, the most important multilateral agreement was accomplished through bilateral talks, a method of trade policy negotiations the United States used consistently over the last six years.

Following the European Union-United States summit at The Hague, Deputy National Security Advisor James Steinberg trumpeted the mix of bilateralism for multilateral purposes:

I think the most important thing coming out of today's summit was the sense that the cooperation and the interaction that takes place in these summits now is not limited to or even necessarily focused solely on bilateral issues between the United States and the European Union, but rather on how the United States and the European Union and the European Union countries can cooperate on broader global and international issues.²⁶⁴

The United States-European Union relationship is not the only framework where a blurring among trade negotiation approaches exists. All the regional blocs have some recourse to the multilateral process of the WTO during negotiations conducted in their respective contexts. Many liberalization programs agreed upon during regional bloc talks have to pass through the WTO before a critical mass of support is gained, allowing for some of the larger trading partners to agree to cut their own tariffs. APEC summiteers recognize this process and provide for it in the declarations that follow their meetings:

The expansion of trade and investment remain essential elements of our economic recovery and we reiterate the need for liberal and open markets

263. See *Coup de Grace, Coup de Foudre: The Uruguay Round*, ECONOMIST, Nov. 28, 1992, at 70 (stating that France strongly insisted that the European Union's common agricultural policy be protected from reform in GATT negotiations); see also *From Uruguay to Marrakesh: World Trade*, ECONOMIST, Apr. 16, 1994, at 73 (citing disagreements between the United States and the European Union on issues of trade); *Standard Deviations*, ECONOMIST, Oct. 1, 1994, at G32 (examining unresolved trade issues in the third world such as environmental and labor standards).

264. Office of the Press Secretary, *Press Briefing by Deputy Nat'l Security Advisor James Steinberg and Assistant to the President for Int'l Economic Aff. at the Nat'l Economic Council Dan Tarullo, and Press Secretary Mike McCurry* (statement of Deputy National Security Advisor James Steinberg) (visited Mar. 6, 1999) <<http://www.pub.whitehouse.gov/uri-res/I2R?urn:pd:/oma.eop.gov.us/1997/5/28/5.text.1>>.

and an enabling environment for investment. We consider it particularly important that in the current circumstances, early progress be made on broad-based multilateral negotiations in the WTO, achieving an overall balance of interests of all members. We reaffirm our commitment to uphold and strengthen the multilateral trading system to ensure fair rules and benefits for all. We urge the prompt accession to the WTO of applicants in accordance with WTO rules, with a view towards achieving the universality of WTO membership.²⁶⁵

During the meeting in Kuala Lumpur, after efforts to reach an APEC trade liberalization agreement failed in nine sectors, the trade ministers decided to send the entire set of proposals to the WTO.²⁶⁶ In the face of Japanese intransigence, the synergy that exists among of regional and global trading regimes was on full display.

The FTAA endorses the use of a multilateral bargaining process to shape the talks that will end in 2005. No longer will there be a series of bilateral exercises where Latin American countries compete against each other and form an orderly line to accede to the NAFTA. The Clinton Administration during the First Summit of the Americas first envisaged this concept in Miami in 1994. Instead, the thirty-four countries will bargain together, with different countries presiding over nine negotiating groups that include sectors such as competition policy, investment services, and subsidies. Moreover, the venue selection is inherently multilateral, as the talks began in Miami, proceeded to Panama City, and then, finally, to Mexico City. The chairmen of the talks will rotate, while the United States and Brazil hold the last chair jointly. Multilateralism, then, becomes part of regionalism by its very definition.

Multilateral talks are consistently subject to other issues on the global agenda, some of which are not specifically trade-related. As a result, there are issues that may further divide global trading partners. Questions facing the trading partners include whether the GATT

265. APEC Economic Leaders' Declaration, Kuala Lumpur, Malaysia, *Strengthening the Foundations for Growth*, Nov. 18, 1998, para. 13 (visited Jan. 25, 1999) <http://www.apec.org/leaders_declaration.htm>.

266. Montagnon & McNulty, *supra* note 163, at 3 (speculating that trade relations between the United States and Japan may weaken after harsh exchanges by both parties).

should become involved in social policy, labor standards,²⁶⁷ and human rights;²⁶⁸ whether it should venture into competition policy and require certain minimum standards and movement towards harmonization; and, finally, whether new members like China, Saudi Arabia, and Russia will qualify as developing countries and play an effective role in the trading system.

Only flexible, non-traditional approaches can assist the United States in navigating its way through these difficult waters. In so doing, the plurality of United States trade policy continues to manifest itself. Although the Clinton Administration has announced its interest in multilateral solutions to international trade, unilateralism has been the predominant feature. It is then difficult to understand what is happening in the international trading arena if the United States is without a clear policy agenda.²⁶⁹ We are charged "to explain why new thinking about trade policy, thinking that may at times seems abstract and only distantly related to the real problems that arise on a daily basis, is important to practical people."²⁷⁰ Using a post-modern approach may not adequately answer this call.

Moreover, to label the Clinton Administration's approach "post-modern" may not be accurate. Simply, it may just be disorganized, haphazard crisis management. Then again, since post-modernism is described by what it is not—modernism—this may well be the case.

267. See generally Raj Bhala, *Clarifying the Trade-Labor Link*, 37 COLUM. J. TRANSNAT'L L. 11 (1998) (arguing that a link exists between workers' rights and a liberalized legal regime for international trade).

268. See BHALA, *supra* note 149, at xiii. "The WTO and Multilateral Trade Agreements and NAFTA, are examples of the broadening agenda in the field of international trade law. No longer is this field just about reducing tariff and non-tariff barriers." *Id.*

269. Krugman, *supra* note 6, at 17 (stating that "forward looking assessments are necessary for a successful trade policy").

270. *Id.* at 1; see also Allott, *supra* note 18, at 1370.

In the *economic* field, the field of social transformation of the material world with a view to human survival and prospering, those who control great systems of social power are obliged to watch and wait as a totalized economic system of a nation or of the world, which contains nothing but the willing and acting of human beings, alters direction or dynamic, perhaps cyclically, as if it were a slow-witted monster with instincts of its own, making and destroying human lives as random side-effects.

Allott, *supra* note 18, at 1370.

Perhaps the *metanarrative* may be the best option; the total *spirit* may well simply be to increase the economic well being of the United States. The trifurcated policies, ones that blend, blur, and often counter-indicate are tools to create an international trading regime that ensures a better future for the United States.

Presently, statistics and trends indicate that the United States is continuing to lose its trading primacy and economic power. Of course, this declining state may well be a function of old analysis to what is a new global economic world.²⁷¹ Indeed, "[c]hanging global circumstances and more sophisticated means of analysis demand that free-trade-minded economists overhaul their arguments in order to remain germane."²⁷²

No matter the methods of analysis or the modes by which we structure our understanding and, therefore, our policy, the United States government is not equipped to engage in the international trading regime. Since Congress will not provide the tools to allow the Administration to begin negotiations, negative consequences will ensue for future free trade talks, even with all the bravado about multilateral and regional efforts.²⁷³ When President Clinton pulled his Fast Track legislation from Congress in November 1997, it was clearly an embarrassment. The results of the November 1998 congressional elections were viewed as unhelpful in assisting Clinton's attempt to achieve his ambitious trade agenda.²⁷⁴

Fast track authority may well be an essential part of United States trade leadership. As it did in the aftermath of the Second World War, the United States must lead in expanding and liberalizing the international economic system. Washington should focus on stabilizing

271. See Dixit, *supra* note 232, at 283 (stating that "[r]ecent research contains support for almost all the vocal and popular views on trade policy that only a few years ago struggled against the economists' conventional wisdom of free trade").

272. Ehrlich, *supra* note 5, at 262.

273. See generally Craig VanGrasstek, *Is the Fast Track Really Necessary?*, 31 J. WORLD TRADE, Apr. 1997, at 97 (arguing that Fast Track, while an important tool in the United States trade policy, is not imperative).

274. See Nancy Dunne, *Clinton's Trade Agenda Still In Doubt: Poll Victory House of Representatives Is Still Key to Fast Track*, FIN. TIMES, Nov. 16, 1998, at 8 (finding that the Democrats failed to elect enough members to push through their trade initiatives).

and strengthening the multilateral trading system, ensuring compliance with economic agreements to which they are a party, and updating the international world trading system by including within its scope areas such as telecommunications and financial services. Congress should consider providing broad Fast Track authority to the President, thereby enabling the Clinton Administration to complete its necessary work.²⁷⁵ Federal Reserve Board Chairman Alan Greenspan endorses the need for an open market and the reduction of protectionism:

In this regard, drift toward protectionist trade policies, which are always so difficult to reverse, is a much greater threat than is generally understood. It is well known that erecting barriers to the free flow of goods and services across national borders undermines the division of labor and standards of living by impeding the adjustment of the capital stock to its most productive uses. Not so well understood, in my judgment, is the impact that fear of growing protectionism would have on profit expectations, and hence on the current values of capital assets. Protectionism was a threat to standards of living when capital asset values were low relative to income. It becomes particularly pernicious in a environment, such as today's, when that is no longer the case.²⁷⁶

With a hostile Congress, Clinton's authority to negotiate international treaties will continue to be negatively impacted, as will the leadership role the United States takes in the world. No one understands these issues better than Undersecretary Eizenstat. He has been the point man to cut diplomatic losses with the United States trading partners over the excesses of the Helms-Burton Act, and has studied United States policy over the Swiss banking scandal. As an avid student of the trading history of the United States, he was correct when he stated:

Looking ahead to the enormous opportunities and challenges of the global economy in the 21st century, one of our most important tasks is making

275. See *Trade Priorities*, *supra* note 106, at 9 (stating that "[t]he absence of Fast Track authority is the single most important factor limiting our capacity at this time to open markets and expand American exports.").

276. See *Outlook for the State of the United States Economy: Hearings Before the House Ways and Means Comm.*, 106th Cong. (1999) (visited Mar. 10, 1999) <<http://www.bog.frb.fed.us/boarddocs/testimony/current/199901120.htm>> (statement of Alan Greenspan, Chairman of the Board of Governors of the Federal System).

sure we communicate to the American people in a very clear and concrete fashion the ways international economic policy contributes to a more prosperous America and a more stable world."²⁷⁷

Perhaps he was right to start with Congress.²⁷⁸

277. Eizenstat Testimony, *supra* note 19, at 6.

278. See Jeffrey E. Green, *Congress Wages War on Free Trade*, N.Y. TIMES, May 28, 1997, at A21 (arguing that Congress should not attempt to further non-economic issues with trade).