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The Promotion of Free-Trade Areas Viewed in Terms of Most-Favored-Nation Treatment and Imperial Preference

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THE PROMOTION OF FREE-TRADE AREAS VIEWED IN TERMS OF MOST-FAVORED-NATION TREATMENT AND "IMPERIAL PREFERENCE"†

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I. INTRODUCTION

In recent years, the United States has given priority to the creation of free-trade areas by negotiating agreements with selected countries.[1] In terms of the global trade policy of the United States, in particular its policy toward the World Trade Organization (WTO), the negotiation of these free-trade agreements demonstrates that the United States is not confining its diplomatic efforts to the pursuit of multilateral negotiations under the aegis of the WTO.[2] Indeed, the free-trade areas thus created represent exceptions to the basic WTO principle of most-favored-nation (MFN) treatment, which originated in 1947 as a fundamental feature of

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1. On U.S. policy concerning free-trade agreements, see, *e.g.*, Robert B. Zoellick, Editorial, *When Trade Leads to Tolerance*, N.Y. TIMES, June 12, 2004, at A13.

2. On the current multilateral negotiations under the aegis of the WTO known as the Doha Round, see, *e.g.*, Frances Williams & Guy de Jonquières, *Top WTO Nations Hail Deal on Doha* , FINANCIAL TIMES, Aug. 2, 2004, at 1.

the General Agreement on Tariffs and Trade (GATT), and later found expression in the General Agreement on Trade in Services (GATS).[3]

Application of the MFN principle requires each member of the WTO to treat each of its WTO trading partners on terms that are no less favorable than the terms accorded by that member to any of its other WTO trading partners. For example, the goal of universal MFN treatment is to assure that, with respect to any given member of the WTO (here, *Country A*), and with respect to any given product or service (here, *Product X* or *Service Y*), every other member of the WTO receives the benefit of the most advantageous terms of trade accorded by *Country A* to any other WTO member with respect to *Product X* or *Service Y*.[4]

Recent agreements entered into by the United States to create free-trade areas constitute a significant and growing departure from the goal of universal MFN treatment. Some of these U.S.-sponsored agreements involve regional free-trade areas and comprise three or more trading partners. Other U.S.-sponsored agreements create bilateral free-trade areas that, in each case, are limited to the United States and one other country.[5] Many of these agreements are comprehensive and detailed, and

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3. On the origin of the GATT as both an agreement and an institution, see ANDREAS F. LOWENFELD, INTERNATIONAL ECONOMIC LAW 23–26 (John H. Jackson ed., 2002). The texts of the GATT and the GATS are found, respectively, in Marrakesh Agreement Establishing the World Trade Organization, Annexes 1A–1B, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 31 (1994), 33 I.L.M. 1153 (1994) [hereinafter Agreement Establishing the WTO].

4. *See* RAJ BHALA, INTERNATIONAL TRADE LAW 249–85 (2d ed., 2001); SYDNEY M. CONE, III, INTERNATIONAL TRADE IN LEGAL SERVICES § 2.5.1 (1996).

5. Examples of free-trade agreements involving the United States and two or more other countries are the North American Free-Trade Agreement (United States, Canada, Mexico), and the United States-Dominican Republic-Central America Free-Trade Agreement (United States, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua). Examples of countries with which the United States has concluded bilateral free-trade agreements are: Australia, Bahrain, Chile, Israel, Jordan, Morocco, and Singapore. Examples of countries with which the United States has concluded bilateral Trade and Investment Framework Agreements, which often offer the prospect of concluding bilateral free-trade agreements with the United States, are: Algeria, Brunei, Egypt, Ghana, Indonesia, Kuwait, Malaysia, Mongolia, New Zealand, Nigeria, Oman, Pakistan, the Philippines, Qatar, Saudi Arabia, Sri Lanka, Tunisia, Turkey, United Arab Emirates, Uruguay, and Yemen. The United States has also concluded such framework agreements with a group of five Central Asian countries, and with the Common Market for Eastern and Southern Africa. Examples of countries with which the United States is negotiating free-trade agreements are: Botswana, Lesotho, Namibia, South Africa, Swaziland (South African Customs Union); Columbia, Ecuador and Peru (the Andean region, to which Bolivia may be added), Panama (bilateral),and Thailand (bilateral). The United States has concluded a bilateral trade agreement with Vietnam. Perhaps the most ambitious effort by the United States consists of negotiations designed to achieve a Free Trade Area of the Americas. The foregoing data are available at: Office of the United States Trade Representative Website, *at* http://www.ustr.gov; The White House Website, *at* http://www.whitehouse.gov; The United States Department of State Website, *at* http://www.state.gov.

cover not only trade in goods and services—that is, the spheres covered by two of the basic WTO agreements (GATT and GATS) that embody the MFN principle—but also other spheres such as investment, intellectual property, agriculture, textiles, dispute resolution, and government procurement.[6] These are subjects which, at the global level, are typically dealt with in multilateral agreements that were entered into to define the purview of the WTO.[7] To the extent that these subjects are also covered by a growing number of free-trade agreements, there are likely to be parallel bodies of law governing international trade, one being global and engaging the responsibility of the WTO, the other being more dispersed because it is lodged in the workings of a multiplicity of agreements relating to a multiplicity of free-trade areas.[8]

This Article will first examine the relevant WTO provisions that permit free-trade agreements as exceptions to MFN treatment. It will then situate current U.S. policy in the context of the history and purpose of those provisions. Next, the discussion of history and purpose will take up a key debate in the original GATT negotiations, in which the United States championed MFN treatment, while European countries, in particular, Great Britain, sought to retain preferential trading arrangements—arrangements once associated with the rubric of "imperial preference." Against this background, the article will explore the question of whether current U.S. policy represents a reversion to preferential trading arrangements which can be understood by analogy to "imperial preference." Finally, the article will consider the implications of the phenomena of free-trade areas and agreements for the WTO and the agreements administered by it, as well as for the United States.

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6. WTO agreements on the subjects mentioned in the text are found in Annexes 1, 2, and 4 to the Agreement Establishing the WTO, *supra* note 3.

7. On the purview of the WTO, see LOWENFELD, *supra* note 3, at 21–198.

8. *See, e.g.*, Report by the Consultative Board to the Director-General, *The Future of the WTO* 21–23 (Dec. 2004), *available at* http://www.wto.org/english/thewto_e/10anniv_e/10anniv_e.htm [hereinafter Consultative Board Report]; WTO Secretariat, *The Changing Landscape of Regional Trade Agreements*, WTO Seminar on Regional Trade Agreements and the WTO (Nov. 14, 2003), *available at* http://www.wto.org/english/tratop_e/region_e/sem_nov03_e/sem_nov03_prog_e.htm; WTO Negotiating Group on Rules, Compendium of Issues Relating to Regional Trade Agreements, WTO Doc. TN/RL/W/8/Rev.1, (Aug. 1, 2002), *available at* http://docsonline.wto.org [hereinafter Compendium of Issues]; Kyung Kwak & Gabriella Marceau, *Overlaps and Conflicts of Jurisdiction Between the WTO and RTAs*, Conference on Regional Trade Agreements (Apr. 26, 2002). *See also* ANTHONY J. VENABLES, TRADE BLOCS (2000).

II. FREE-TRADE AREAS UNDER THE WTO AGREEMENTS

As mentioned above, the original GATT was based on the principle of universal MFN treatment. This principle, which has been referred to as the "golden rule" of the GATT,[9] is so fundamental that it is set out in the very first paragraph of Article I of the GATT. With respect to imports and exports, MFN treatment requires that "any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties."[10] Similarly, almost fifty years after the original GATT had been negotiated, the GATS, covering trade in services, was drafted to include a provision stating that "each [WTO] Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country."[11]

The general rules of both the GATT and the GATS contain qualifications under which a WTO member that meets certain conditions may be eligible for specified exceptions to the requirement of granting MFN treatment to all WTO members.[12] One of these exceptions relates to free-trade areas and is found in Article XXIV of the GATT, as well as in Article V of the GATS. The exception was originally drafted for customs unions, but was expanded to include free-trade areas in the course of negotiations.[13] According to the WTO Secretariat, the Article XXIV exception for customs unions and free-trade areas is "*the* major exception" to the "fundamental GATT principle" of MFN treatment.[14]

Pursuant to Article XXIV (5) of the GATT, so long as certain conditions are met, the provisions of the GATT "shall not prevent, as between the territories of contracting parties, the formation of a customs union or of a free-trade area or the adoption of an interim agreement necessary for the formation of a customs union or of a free-trade area . . . ." Article V of the GATS is a somewhat simplified version of Article XXIV of the GATT. Entitled "Economic Integration" and premised on "economic integration or trade liberalization among the countries concerned[,]" Ar-

9. On MFN treatment being "the golden rule of the GATT," see Andreas F. LOWENFELD, *Remedies Along with Rights: Institutional Reform in the New GATT*, 88 AM. J. INT'L L. 477, 478 (July 1994). *See also* Consultative Board Report, *supra* note 8, at § 58.

10. GATT, *supra* note 3, art. I.

11. GATS, *supra* note 3, art. II (1).

12. *See* LOWENFELD, *supra* note 3, at 30–42, 117–18.

13. WTO SECRETARIAT, REGIONALISM AND THE WORLD TRADING SYSTEM 11–12 (1995) [hereinafter WTO-REGIONALISM].

14. *Id.* at 5 (emphasis in original).

ticle V states that, provided certain conditions are met, the GATS "shall not prevent any of its Members from being a party to or entering into an agreement liberalizing trade in services between or among the parties to such an agreement . . . ."

As mentioned, neither Article XXIV nor Article V authorizes free-trade areas unless certain conditions are met. To understand the theory of these conditions, it is necessary to go back to the language of Article XXIV (5) (quoted above), which uses the phrase, "the formation of a customs union or of a free-trade area." When the GATT was being negotiated in 1947, very much in the mind of the negotiators was the simultaneous negotiation of the customs union called the European Economic Community—the predecessor to the European Union. The United States at that time had two relevant goals: encouraging the Europeans to create the European Community in order to foster economic growth and political stability in Europe;[15] and promoting MFN treatment as the basis for the GATT.[16]

The conditions set out in Article XXIV of the GATT and substantially repeated in Article V of the GATS represent an effort to reconcile the objectives of encouraging a European customs union while insisting on MFN treatment. Although (as indicated in the texts quoted above) Article XXIV (5) added "or of a free-trade area" after "customs union" and although Article V uses generic language in respect of "economic integration," for many years following the adoption of the GATT, the Article XXIV paradigm was a full-blown customs union such as the European Economic Community (today, the European Union). The paradigm thus implied not merely an area in which internal restrictions on trade had been removed, but also a union of countries that had adopted a common external tariff, as well as other common policies governing trade and economic policy.[17]

Even so, as a formal matter, the question of whether the European Community/European Union meets the conditions set out in Article XXIV (and, perforce, Article V) remains unresolved.[18] More generally, as of March 1995, difficulties had been encountered in establishing an

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15. *See* GEORGE W. BALL, DIPLOMACY FOR A CROWDED WORLD, 278–79 (1976). *See also* LOWENFELD, *supra* note 3, at 39–40; GERARD CURZON, MULTILATERAL COMMERCIAL DIPLOMACY 280 (1965).

16. *See* CURZON, *supra* note 15, at 62–69.

17. *See* WTO-REGIONALISM, *supra* note 13, at 7–8 (discussing the origins of Article XXIV of the GATT, this document says: "[E]ven the United States, vigorously opposed to preferences, accepted from the beginning the case for *customs unions* in which participating countries would adopt a common trade policy , including a common external tariff.").

18. *See id.* at 11 (reporting that "strong objections" were raised as to whether the European Community complied with the conditions found in Article XXIV, and that as a formal matter the question was never resolved).

effective mechanism for deciding whether a given customs union or free-trade agreement met those conditions.[19] In 1996, the WTO created a Committee on Regional Trade Agreements with the mandate of reviewing agreements referred to it in order to determine if they were compatible with Article XXIV. In this capacity, the Committee has reviewed a significant number of regional and bilateral free-trade agreements to determine whether they meet the conditions set out in Article XXIV.[20] The principal conditions for a free-trade area can be summarized as follows:

- The freeing of trade through the elimination of duties and other restrictions on trade must apply to "substantially all" of the trade between the countries constituting the free-trade area (GATT Article XXIV (8)(b));
- Once the free-trade area is in existence, duties and other restrictions on trade imposed by the countries constituting the free-trade area on WTO members that are outside the free-trade area must not be "higher or more restrictive than the corresponding duties" and restrictions imposed on those WTO members by the free-trade-area countries "prior to the formation of the free-trade area" (GATT Article XXIV (5)(b)); and
- Any interim agreement "leading to the formation of a free-trade area" must include a "plan and schedule for the formation of [the] free-trade area within a reasonable length of time" (GATT Article XXIV (5)(c)).[21]

As mentioned above, the WTO has created the Committee on Regional Trade Agreements to determine whether a given free-trade agreement meets these and other relevant conditions. If the Committee finds that the

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19. *See id.* at 12–16; Consultative Board Report, *supra* note 8, at §§ 76–77 (pp. 21–22) (stating that "there are now just too many WTO Members with interests in their own regional or bilateral arrangements for a critical review of PTA [preferential trade agreement] terms to take place and for consensus on their conformity to be found").

20. The mandate and history of the Committee in respect of Article XXIV are found in Part XXV of the WTO Analytical Index: GATT 1994, *available at* http://www.wto.org/english/res_e/booksp_e/analytic_index_e/gatt1994_09_e.htm. Agreements that have been submitted for review by GATT Working Parties (a total of 20 agreements) and by the Committee (a total of 75 agreements) are listed in Annexes to this document. *See also* WTO Committee on Regional Trade Agreements, *Mapping of Regional Trade Agreements*, WT/REG/W/41 (Oct. 11, 2000), *available at* http://www.wto.org/english/tratop_e/region_e/region_e.htm.

21. In GATT, *supra* note 3, art. XXIV (5) and (8), there are almost identical provisions for customs unions. GATS, *supra* note 3, art. V, has similar provisions couched in terms of "economic integration."

necessary conditions have been met, then the free-trade area can be said to be in compliance with the requirements of Article XXIV. The process by which the Committee makes its determinations has been described as being "political" rather than "judicial" in nature, and as constituting "executive" action "having possible legal effect in later judicial review."[22] To date, there has been little if any judicial review of Article XXIV determinations by the Committee or by earlier GATT Working Parties.[23]

Even when a free-trade area called, say, *FTA Alpha*, comprising, say, Countries A and B, has been found to meet, or not to be in violation of, the conditions of Article XXIV, the basic fact remains that *FTA Alpha* constitutes an exception to universal MFN treatment. Thus, although Countries A and B have eliminated trade restrictions as between themselves, they will not be required to accord equally favorable treatment to other countries that are members of the WTO but are not members of *FTA Alpha*. With respect to non-members of *FTA Alpha*, although Countries A and B may not impose restrictions *higher* than their pre-existing restrictions,[24] A and B may maintain their pre-existing restrictions and are not required to eliminate them as A and B have done as between themselves. This discrimination against non-members of *FTA Alpha* is the essence of creating a free-trade area. The countries forming the free-trade area do so at the expense of those countries that are outside the free-trade area. *FTA Alpha* may confer relative advantages on its members, Countries A and B, but by the same token it confers corresponding disadvantages on all countries that are not members of *FTA Alpha*. Viewed globally, the creation of the free-trade area comes at a price—which is paid by the outsiders denied universal MFN treatment.

In the context of WTO members taken as a whole, each free-trade area represents a form of preferential treatment and constitutes its own preferential system of trade. In the above example involving *FTA Alpha*, Countries A and B have avoided the principle of universal MFN treatment in that they need not extend their preferential system to other

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22. JAMES H. MATHIS, REGIONAL TRADE AGREEMENTS IN THE GATT/WTO 227–29 (2002).

23. *See* WTO Appellate Body Report, Turkey—Restrictions on Imports of Textile and Clothing Products, WTO Doc. WT/DS34/AB/R (Oct. 22, 1999) (supporting the principle that Article XXIV determinations are subject to review by WTO panels and the WTO Appellate Body). The case itself involved the somewhat tangential Article XXIV issue of whether Turkey, by virtue of the customs union between Turkey and the European Community, could properly impose quantitative restrictions on textiles imported into Turkey from India. The WTO Appellate Body found that the formation of the customs union would not be prevented if Turkey did not impose these quantitative restrictions, that they were otherwise in violation of the GATT, and that the mere existence of the customs union did not justify them.

24. GATT, *supra* note 3, art. XXIV (5)(b) (quoted in the 2nd bullet point, *supra* note 21).

countries. The possibility exists, of course, that Country C, excluded from the preferential trading system, *FTA Alpha*, will join another preferential trading system called, say, *FTA Beta*, allowing it to compensate for its exclusion from *FTA Alpha*. Obviously, however, the reckoning up of relative gains and losses from the inclusions and exclusions that are a function of numerous free-trade areas of disparate composition can be both complex and fraught with risk.[25] Equally obvious is the plight of Country D if it is excluded from all such preferential trading systems. At no point can the great leveler of universal MFN treatment be counted on to negate the disadvantage of being excluded from such a preferential trading system.

III. Historical Attitudes Toward Preferential Trading Systems

When the original GATT came into effect, it permitted the continuation of certain pre-existing preferential trading systems which included preferences that were in force on April 10, 1947.[26] While the United States accepted these departures from MFN treatment in order to secure the adhesion of Great Britain and other European countries to the GATT, the preferential trading systems then in force became a diminishing factor in international trade, and the pre-existing preferences themselves went into decline in economic terms.[27] In the early years of the GATT, then, pre-existing preferences were tolerated for political reasons but, as it turned out, they did not become a major factor in terms of the global economy.

Notwithstanding the post-1947 decline of the relative importance of pre-existing trading preferences, they were of political and economic importance prior to their decline. Indeed, their political importance is underscored by the very fact that (as mentioned above) certain European countries insisted that the GATT accommodate these preferences through specific exceptions to MFN treatment. Moreover, some of these preferences found expression in an arrangement that became troublesome after 1947. This was the preferential trading arrangement entered into between the European Community, on the one hand, and former colonies or overseas territories of particular Member States of the Euro-

25. *Cf.* Compendium of Issues, *supra* note 8, at 27–29. When parties to a free-trade agreement (such as Countries A and B) promise to accord MFN treatment to each other, third parties are not entitled to the benefits of that provision. A multiplicity of such intra-FTA, non-universal MFN provisions in a large number of free-trade agreements can add to the complexity of determining overall gains and losses.

26. GATT, *supra* note 3, art. I (2)–(4).

27. *See* Lowenfeld, *supra* note 3, at 31; Curzon, *supra* note 15, at 65–67, 75–76.

pean Community, on the other hand. According to a 1958 GATT report, this agreement allowed for the admission of products from former European colonies and territories into the European Community duty-free, while the European Community's common external tariff applied to competing products from other countries. This arrangement—a continuing exception to MFN treatment that posed a problem for countries seeking to uphold the integrity of GATT—could only be regarded as the creation of a new, large preferential trading system.[28]

There can be no doubt that the economic consequences were often serious for non-European countries whose products were excluded from this preferential system developed by the European Community with its associated overseas trading partners.[29] There can also be no doubt that maintaining the preferential system was of major political importance for certain Member States of the European Community. France, for example, following World War II, relied on its imperial relationships to enable it "to play another hand at great-power politics."[30] France pursued its great-power ambitions despite evidence that its preferential trading arrangements with former colonies and overseas territories may have adversely affected the economic health of France herself in terms of the efficient allocation of resources in metropolitan France, and in terms of enabling France to become internationally competitive.[31]

Great Britain was another, if not the foremost, European country that had established preferential trading arrangements with its colonies and overseas territories. In the 1920s, support had been voiced for an "ideal" referred to as "Imperial Free Trade," meaning the transformation of the British Empire into a free-trade area having complete free trade internally, but with tariffs imposed on imports from outside the area of Imperial Free Trade.[32] Soon thereafter, Great Britain and other countries in the British Empire laid the basis for a preferential trading system at the Imperial Economic Conference held in Ottawa in 1932.[33] There, the

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28. GATT Document L/805/Rev. 1 (Apr. 17, 1968), analyzed in CURZON, *supra* note 15, at 276–82.

29. *See* CURZON, *supra* note 15, at 276–82 (listing countries and products adversely affected by the European Community's preferential trading system for products from former colonies and overseas territories).

30. Edward Peter Fitzgerald, *Did France's Colonial Empire Make Economic Sense? A Perspective from the Postwar Decade, 1946–1956*, 48 J. ECON. HIST. 373, 373 (1988).

31. *Id.* at 384.

32. *See* R.M. Campbell, *Empire Free Trade*, 39 ECON. J. 371 (1929) (suggesting that Imperial Free Trade would be a "clear gain" for consumers and would be of benefit to the British Empire).

33. *See* David L. Glickman, *The British Imperial Preference System*, 61 Q. J. ECON. 439, 442–51 (1947). *See also* Donald MacDougal & Rosemary Hutt, *Imperial Preference: A Quantitative Analysis*, 64 ECON. J. 233, 257 (1954) (concluding in part, that the result of the 1932 Ottawa Conference was the "intensification of Imperial Preference" in two respects: a

principal efforts of the United Kingdom were directed toward increasing markets for British exports. As a result of the conference, the United Kingdom agreed to grant preferences to "Empire imports," meaning, principally, imports from Australia, Canada, India, New Zealand and South Africa. Thus, specified products from those countries were subjected by Great Britain to lower duties than those that it imposed on competing imports from outside the Empire; and Empire products were exempted from quantitative restrictions imposed on certain non-Empire products. In return, those five countries granted preferential tariff treatment to a large number of products manufactured in Great Britain. Subsequently, those five countries signed reciprocal trading agreements with each other; and other British territories received, and in turn granted, preferences favoring Empire products.[34]

It would seem that, in the beginning, the preferential trading system established in Ottawa in 1932 benefited the United Kingdom in terms of increased British exports, and also was of benefit to the other participants in that system.[35] Over time, however, the decreased imports by the United Kingdom from *non-Empire* sources reduced the amount of British currency available to those sources, and thus reduced their ability to purchase British goods. This reduced ability may have resulted in an adverse comparative disadvantage for British exports, because the Empire countries used their British currency in part to amortize indebtedness and to purchase British-held investments, whereas, had this currency been available to non-Empire countries, they might have used it to purchase British goods. In addition, it seems that, over time, "the United Kingdom was becoming more dependent on the Empire for markets, while at the same time the dependence of the Empire on the United Kingdom as a source of supply was actually diminishing."[36]

Meanwhile, certain non-Empire countries were put at a competitive disadvantage by the Empire preferences. The United States, for example, through the curtailment of its potential exports, is said to have suffered "severe damage" to its foreign trade as a result of the Empire preferences.[37] Moreover, India reached the conclusion that its exports to Empire countries had not met its expectations, "and that preferences ac-

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substantial increase in the proportion of trade between Great Britain and the other Commonwealth countries—both exports from and imports into Great Britain—that enjoyed preferential treatment; "and many old preferences had been increased").

34. Glickman, *supra* note 33, at 442–46.
35. *Id.* at 446–50.
36. *Id.* at 450–51, 468–69.
37. *Id.* at 452.

corded Empire products in the Indian market built up prejudice in non-Empire countries against Indian products."[38]

The "ideal" of Imperial Free Trade (referred to above) envisioned a free-trade area, comprising countries that eliminated trade barriers as between themselves, but not as against countries outside the free-trade area. Imperial Free Trade was, therefore, an "ideal" that was fundamentally inconsistent with the principle of universal MFN treatment. Insiders had their intra-area trade barriers reduced or removed; but outsiders received no comparable benefits. To the extent that Imperial Free Trade found expression in pre-existing preferential trading arrangements when the GATT was originally negotiated, it was tolerated, and it can be argued that these old trading arrangements, by themselves, no longer pose a serious challenge to the principle of universal MFN treatment. Rather, the question for today is whether the conclusion of a large and growing number of new agreements creating free-trade areas represent a significant departure from the principle of MFN treatment akin to the "ideal" of Imperial Free Trade.

IV. Imperial Free Trade, Hegemony, and Today's Free-Trade Areas

Imperial Free Trade did not exist in a political vacuum. On the contrary, it was a forceful contributor to the imperial ambitions of Great Britain.[39] Even when sizable portions of the British Empire were directly governed by Great Britain, British imperial ambitions were often advanced—perhaps most effectively—through indirect policies that did not involve the actual governance by Great Britain of particular areas.[40] The "ideal" of Imperial Free Trade could thus be achieved in areas that were not subject to direct British rule. Among the terms used to describe the nature of the process that enabled Great Britain to pursue Imperial Free Trade are "British paramountcy" and "a policy of commercial hegemony."[41]

Thus used, the concept of hegemony signifies the capacity of a government or State to exercise paramount influence or authority, and further signifies that an essential feature of Imperial Free Trade was the hegemonic role of Great Britain. It therefore seems reasonable to postulate that, today, a country might play an analogous hegemonic role in a

38. *Id.* at 467.

39. For the political nature of the economic policies pursued by Great Britain, see John Gallagher & Ronald Robinson, *The Imperialism of Free Trade*, 6 Econ. Hist. Rev. 1 (1953).

40. *See id.* at 4–7.

41. *Id.* at 8.

contemporary free-trade area. Moreover, as a conceptual matter, it seems possible that the question of whether a given country in a given free-trade area exercises hegemonic influence or authority in that area is a question that can be considered without debating the existence or non-existence of an "empire" that could be said to subsume the free-trade area. That is, it seems possible that the sometimes contentious notion of "empire" may be of marginal relevance to, or may even detract from, the analysis of whether a given country plays a hegemonic role in a particular free-trade area.[42]

At this writing there appear to be over a hundred free-trade areas, and agreements to establish additional ones are under negotiation. Some of the existing free-trade areas are regional (*e.g.*, the Association of Southeast Asian Nations), and many are geographically separated (*e.g.*, Israel and Mexico; Panama and Taiwan).[43] This Article focuses on free-trade areas of which the United States is a member because the United States is (variously) "the only superpower," or the country with the world's largest gross domestic product, or the only country that has ascended to "hyperpower" status.[44] As a consequence, the ability to sell products into the U.S. market is of enormous value, and trading rights which confer that ability are correspondingly valuable. The United States therefore occupies an especially strong position to exercise hegemonic influence when negotiating the terms of a free-trade area of which it is to be a member.

Three examples will be mentioned of bilateral free-trade areas comprising the United States and one other country. Each of these other countries is of relatively significant economic strength when compared with other countries with which the United States has concluded bilateral trade agreements.[45]

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42. For a highly useful (and somewhat different) analysis of "Hegemony and Empire," see NIALL FERGUSON, COLOSSUS 7–13 (2004) .

43. To review free-trade areas existing or under negotiation in Aug. 2004, the websites of the following sources were among those consulted: U. S. Trade Representative Website, *at* http://www.ustr.gov; SICE (Foreign Trade Information System), Organization of American States Website, *at* http://www.sice.oas.org; Canadian Dep't of Foreign Affairs and Int'l Trade Website, *at* http://www.dfait-maeci.gc.ca; Mexican Ministry of the Economy Website, *at* http://www.economia.gob.mx; Caribbean Community's Secretariat Website, *at* http://www.caricom.org; Ass'n of Southeast Asian Nations Website, *at* http://www.aseansec.org; Chilean Nat'l Customs Serv. Website, *at* http://www.aduana.cl; EUROPA (European Union) Website, *at* http://www.europa.eu.int; Central European Free Trade Agreement Website, *at* http://www.cefta.org; EFTA Secretariat Website, *at* http://secretariat.efta.int; Channel News Asia Int'l Website, *at* http://www.channelnewsasia.com; Taipei Times Website, *at* http://www.taipeitimes.com.

44. *See* FERGUSON, *supra* note 42, at 8, 231, 262.

45. *See* listing of bilateral agreements entered into by the United States, *supra* note 5.

A. *Australia*

The first example is Australia where, in the context of the negotiation of the United States-Australia Free Trade Agreement,[46] one Australian writer on economics was not shy about mentioning the implications of, first, American hegemony and, second, departing from the principle of universal MFN treatment.[47] Regarding U.S. hegemony, this commentator referred to the possibility of the free-trade area being seen as part of "a new U.S. imperial trading bloc."[48] The phrasing of misgivings about not extending MFN treatment to countries outside the free-trade area was even more forceful (if less elegant). After calling for a reform of applicable WTO rules, the commentary made this observation:

> The alternative [to reform, that is] of continuing with a system of aggressive negotiations based on the entirely false economic assumption that the gains from trade come from screwing your trading partners is more dangerous than ever in a world split by bitter divisions over the war in Iraq. In such a world, it risks trade following the flag into a series of hostile trading blocs. The 1930s tell us where that leads.[49]

B. *Chile*

The second example is the free-trade agreement between Chile and the United States.[50] As regards this agreement, the Chilean National Customs Service commented on the importance of enabling Chilean products to gain greater access to the world's largest economy (the United States). The Chilean comment compared the United States with Chile, noting that the former has a much larger population, and that the per capita income in the United States is eight times that in Chile. The Chilean comment then added the following: "This means that the U.S. market represents 148 times our market. Our total annual exports are 72% of U.S.A.'s exports in a week. Besides, to put our exports on a level

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46. United States-Australia Free Trade Agreement, May 18, 2004, *available at* http://www.ustr.gov/Trade_Agreements/Bilateral/Australia_FTA/Section_Index.html (last visited March 14, 2005) [hereinafter U.S.-Australia FTA].

47. Alan Wood, *Beware the new imperialism where trade again follows the flag*, THE AUSTRALIAN, Mar. 18, 2003, at 11; *see also* James Brooke, *Free Trade Debate in Australia*, N.Y. TIMES, Aug. 5, 2004, at W1 (reporting opposition to the U.S.-Australia FTA in Australia based on "suspicion of the United States, an economic giant that already enjoys a healthy trade surplus with Australia").

48. Wood, *supra* note 47.

49. *Id.*

50. United States-Chile Free Trade Agreement, June 6, 2003, *available at* http://www.ustr.gov/Trade_Agreements/Bilateral/Chile_FTA/Section_Index.html [hereinafter U.S.-Chile FTA].

with U.S.A.'s exports during a month, we would need 6 years of our total exports."[51] The foregoing comment quantifies for one country a manifest and important goal of a typical country entering into a free-trade agreement with the United States, namely, increasing that country's exports into the U.S. market.

C. *Singapore*

The third example, the free-trade agreement between Singapore and the United States,[52] is similar to the agreement with Chile. The Chilean agreement was to be signed by the United States prior to the signing of the agreement with Singapore. The order of signing was reversed, however, because Singapore had supported the United States in its war with Iraq, while Chile, in the international diplomatic negotiations preceding that war, had refused to support the United States in the United Nations Security Council. The Singapore agreement was signed at a ceremony at the White House in a display of "working with friends," and the signing of the Chilean agreement was postponed as part of a policy "to punish those nations that did not support the United States in the war."[53]

The U.S.-Singapore agreement accords Singapore preferential access to the U.S. market for some fifty categories of clothing apparel pursuant to rather detailed provisions covering "apparel goods" that originate outside Singapore if the goods are assembled in Singapore.[54] Some commentators have criticized the U.S.-Singapore agreement for its "Integrated Sourcing Initiative" because this Initiative allows products from the Indonesian islands of Bintan and Batam to be treated as though they were of Singaporean origin despite the fact that, with respect to products from those islands, neither Indonesia nor Singapore is required to assume any of the labor or environmental requirements of the U.S.-Singapore agreement.[55] The provisions relating to labor and to the envi-

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51. Chilean Nat'l Customs Serv., *Free Trade Agreement Chile-USA*, *at* http://www.aduana.cl/p4_principal_eng/site/artic/20040121/pags/20040121172653.html.

52. United States-Singapore Free Trade Agreement, May 6, 2003, *available at* http://www.ustr.gov/Trade_Agreements/Bilateral/Singapore_FTA/Section_Index.html [hereinafter U.S.-Singapore FTA].

53. Elizabeth Becker, *Bush Signs Trade Pact With Singapore, a Wartime Ally*, N.Y. TIMES, May 7, 2003, at C4 (reporting that "administration officials made it clear there was nothing subtle about the policy").

54. U.S.-Singapore FTA, *supra* note 52, art. 2.12 and Annex 2B.

55. Sandra Polaski, *Serious Flaw in U.S.-Singapore Trade Agreement Must Be Addressed, Issue Brief*, CARNEGIE ENDOWMENT OF INT'L PEACE (2003), *available at* http://www.ceip.org/files/Publications/Polaski-Singapore.asp?p=43&from=pubdate; John Audley, *Evaluating Environmental Issues in the U.S.-Singapore FTA, Issue Brief*, CARNEGIE ENDOWMENT FOR INT'L PEACE (2003), *available at* http://www.carnegieendowment.org/publications/index.cfm?fa=view&id=1248; AFL-CIO, *Global Fairness 2003, Fact Sheet #2*, *available at* http://www.citizen.org/documents/AFLCIOfactsheet2SCtradeimpact.pdf. *Com-*

ronment in the Chilean and Singapore agreements have been subjected to criticism for two further reasons: they do not set out international standards, but leave it to Chile and Singapore to enforce their own national labor and environmental laws that may be in effect from time to time;[56] and the maximum annual monetary assessment for an infraction is $15 million (adjusted for inflation).[57] It should be noted that substantially identical provisions are found in the U.S-Australia agreement.[58] This cap, it has been argued, is too low to constitute a deterrent.[59]

D. *Australia, Chile, and Singapore: Investment Aspects*

In addition to dealing with market access for goods and services, the bilateral free-trade agreements between the United States and each of Australia, Chile, and Singapore (like other free-trade agreements negotiated with the United States) resemble bilateral investment treaties.[60] Thus, those three agreements cover in considerable detail the areas of investment, intellectual property rights, and financial services.[61] The addition of these categories of cross-border activity is suggestive of the dynamics of negotiations in which, in return for granting favorable access to the U.S. market for goods and services on terms that were not granted to other countries (terms that were not subject to the principle of universal MFN treatment), the United States obtained favorable provisions governing U.S. investment, U.S. intellectual property rights, and U.S. financial services in Australia, Chile, and Singapore.[62]

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pare Jagdish Bhagwati, Testimony before Senate Finance Committee, The Jordan Free Trade Agreement: The Wrong Template (March 20, 2001) (opposing the inclusion of provisions on labor and the environment in free-trade agreements concluded by the United States).

56. U.S.-Chile FTA, *supra* note 50, arts. 18.3 and 18.6(7) (labor), and 19.2 and 19.6(8)(environment); U.S.-Singapore FTA, *supra* note 52, arts. 17.2 and 17.6(5) (labor), and 18.2 and 18.7(5)(environment).

57. U.S.-Chile FTA, *supra* note 50, art. 22.5; U.S.-Singapore FTA, *supra* note 52, art. 20.7.

58. U.S.-Australia FTA, *supra* note 46, arts. 18.2 and 18.6(5)(labor), arts. 19.2 and 19.7(5)(environment), art. 22.16(2) ($15 million cap).

59. The cap has been estimated as corresponding to less than 0.24% of annual United States trade with Chile, and less than 0.05% of annual United States trade with Singapore. AFL-CIO, *Global Fairness 2003, Fact Sheet #3*, *available at* http://www.citizen.org/documents/AFLCIOfactsheet3SClabor.pdf.

60. On bilateral investment treaties generally, see LOWENFELD, *supra* note 3, at 473–88.

61. *See* U.S.-Australia FTA, *supra* note 46, chs. 11 (Investment), 13 (Financial Services), and 17 (Intellectual Property); U.S.-Chile FTA, *supra* note 50, chs.10 (Investment), 12 (Financial Services), and 17 (Intellectual Property); and U.S.-Singapore FTA, *supra* note 52, chs.10 (Financial Services), 15 (Investment), and 16 (Intellectual Property).

62. *See* Brooke *supra* note 47 for comments suggestive of these dynamics; *see also* Consultative Board Report, *supra* note 8, at § 87.

An illustration of these dynamics is found in the provisions on investment in these three agreements. Each agreement contains the U.S. formula (first announced in 1938 and more recently incorporated in bilateral investment treaties) that, in the event of the expropriation of a foreign investment by a host State, the foreign investor will be entitled to "prompt, adequate, and effective compensation" by the host state. This feature of the Australian, Chilean, and Singaporean free-trade agreements with the United States stands in contrast to formulations by the United Nations General Assembly of the compensation that host states must pay to expropriated foreign investors—formulations that are less investor-oriented and that look to "just compensation" or "appropriate compensation" (with, in some instances, the ability of the appropriating state to pay compensation being taken into account).[63] From the perspective of direct foreign investment by U.S. investors, a bilateral free-trade agreement can have the virtue of also being a bilateral investment treaty.

E. *Reactions in Latin America, Europe, Japan*

These indicia of U.S. hegemonic influence may account for political reactions in other countries that depart from policies advocated by the United States. For example, Brazil has indicated that it is in no hurry to achieve a Free Trade Area of the Americas as proposed by the United States, choosing instead to focus on its position as the "dominant country" in the Latin American customs union known as Mercosur (comprising Argentina, Brazil, Paraguay, and Uruguay).[64] In addition, Mercosur has entered into an Interregional Framework Cooperation Agreement with the European Union that looks to the eventual creation of "a political and economic interregional association" governing trade and investment.[65] Were such an association to be achieved and limited to Mercosur and the European Union, it could represent not only Latino-European aspirations but also a reaction to hegemonic trade policies on the part of the United States.[66]

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63. The provision on "prompt, adequate and effective compensation" is art. 11.7(1)(c) in the U.S.-Australia FTA, *supra* note 46; art. 10.9(1)(c) in the U.S.-Chile FTA, *supra* note 50; and art. 15.6(1)(c) in the U.S.-Singapore FTA, *supra* note 52. On past and current international law on compensation for expropriation, see LOWENFELD, *supra* note 3, at 395–415.

64. SIDNEY WEINTRAUB, DEVELOPMENT AND DEMOCRACY IN THE SOUTHERN CONE 40–41 (2000).

65. Council Decision 1999/279/EC on the Interregional Framework Cooperation Agreement between the European Union and Mercosur, 1999 O.J. (L 112) 65, 66. The language quoted in the text is from one of the agreement's recitals.

66. For European criticism of the exclusion of the United States from an EU-Mercosur association, see Jean-Michel Blanquer and Carlos Quenan, *L'enjeu de Guadalajara*, LE MONDE, May 29, 2004, at 18 (observing that, for the Mercosur countries, the U.S. market is

Another consequence of U.S. promotion of free-trade areas is found in recent changes in the trade policies of Japan, which has sought to establish its own network of bilateral free-trade agreements. It has concluded that, were it to restrict its trade strategy to WTO multilateralism, "its negotiating power and the competitiveness of Japanese corporations would be severely curtailed."[67] Japan has calculated that its greatest benefits will come from bilateral free-trade agreements with countries in East Asia, because they account for high percentages of Japanese trade and they also have relatively high tariffs, and because it is here that Japan can create a "regional system."[68] Progress has been reported in negotiating such agreements with these countries, where a "regional system" could provide Japan with a sphere of influence, and also in negotiating a bilateral free-trade agreement between Japan and Mexico.[69]

V. CONCLUSION

In conclusion, three topics will be covered. The first is the development of two parallel systems of jurisprudence as a result of the establishment of numerous free-trade areas. The second involves the political ramifications of the emphasis by the United States on creating free-trade areas in which, in many cases, it is not just *a* member but *the* hegemonic member. The third is the issue of whether in the long term the interests of global trade, or for that matter, of the United States itself, will be well served by a shift from universal MFN treatment to policies reminiscent of imperial preference.

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substantially more important than the EU market, and calling for a trilateral relationship that would include the United States).

67. *See* Yun Chunji, *Japan's FTA Strategy and the East Asian Economic Bloc*, *available at* http://www.iwanami.co.jp/jpworld/text/FTA01.html.

68. JAPAN MINISTRY OF FOREIGN AFFAIRS (ECONOMIC AFFAIRS BUREAU), JAPAN'S FTA STRATEGY (SUMMARY) § 5(2) (2002).

69. *See, e.g.*, Toshio Aritake, *Japan to Begin FTA Talks With Thailand, Malaysia, the Philippines Early Next Year*, 21 INT'L TRADE REP. 25 (2004); Toshio Aritake, *Facing Full Agenda, Japan Trade Ministry Reorganizes to Expand Staff of FTA Office*, 21 INT'L TRADE REP. 363 (2004); Toshio Aritake, *Japan to Repeal Tariffs on Textiles From Three of Asian FTA Candidates*, 21 INT'L TRADE REP. 1201 (2004); Toshio Aritake, *Japan and Malaysia Hold FTA Negotiations; Hope to Conclude Agreement by Year's End*, 21 INT'L TRADE REP. 1240 (2004); and Toshio Aritake, *Japan, Mexico Work Out Final Details For 2005 Implementation of Bilateral FTA*, 21 INT'L TRADE REP. 1471 (2004).

A. *Parallel Legal Systems*

As mentioned in Part I above,[70] the creation of free-trade areas results in two parallel systems of law governing global trade—one being the unified WTO system for the settlement of trade disputes, and the other being an uncoordinated congeries of dispute-settlement arrangements found in a large number of free-trade agreements. Given the random nature of dispute settlement under those agreements, a comprehensive code of the law governing global trade does not seem achievable. True, the unified WTO system has the potential for producing a comprehensive code of law for countries *in their capacity as members of the WTO* because, within the WTO, the WTO Appellate Body has express authority to resolve issues of trade law and to impose jurisprudential discipline on the panels constituting the WTO decision-makers of first instance.[71] In contrast, however, no similar source of authority or discipline exists as between the WTO system and the various free-trade arrangements, or amongst those arrangements considered in their heterogeneous entirety.

An illustration of jurisprudential fragmentation is found in the provisions for the settlement of disputes in the three free-trade areas referred to above (those between the United States and, respectively, Australia, Chile, and Singapore). Each free-trade agreement contains provisions on dispute settlement, and although these provisions basically contain the same wording, to a certain extent they are dissimilar in form and substance.[72] Each provides for the creation of a forum for the settlement of disputes (a "dispute settlement panel" in the case of Australia and Singapore, an "arbitral panel" in the case of Chile).[73] Each provision states, in words that are somewhat dissimilar, that a dispute arising under the free-trade agreement and under another agreement may be taken, at the option of the complaining party, either to the panel provided for in the free-trade agreement or to another forum provided for in the other agreement.[74] Questions of procedure to one side, none of these free-trade

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70. *See supra* text accompanying note 8.

71. Agreement Establishing the WTO, *supra* note 3, Annex 2 (Understanding on Rules and Procedures for the Settlement of Disputes), art. 17 [hereinafter the DSU].

72. U.S.-Australia FTA, *supra* note 46, ch. 21, § B (Dispute Settlement Proceedings); U.S.-Chile FTA, *supra* note 50, ch. 22 (Dispute Settlement); U.S.-Singapore FTA, *supra* note 52, ch. 20 (Administration and Dispute Settlement).

73. U.S.-Australia FTA, *supra* note 46, art. 21.7; U.S.-Chile FTA, *supra* note 50, art. 22.6; U.S.-Singapore FTA, *supra* note 52, art. 20.4(4).

74. U.S.-Australia FTA, *supra* note 46, art. 21.4(1) (the other agreement must be "another *trade* agreement to which both Parties are party, *including* the WTO Agreement") (emphasis added); U.S.-Chile FTA, *supra* note 50, art. 22.3(1) (the other agreement must be "another *free trade* agreement to which both Parties are party *or* the WTO Agreement") (emphasis added); U.S.-Singapore FTA, *supra* note 52, art. 20.4(3)(a) (the other agreement must

agreements refers to the substantive jurisprudence either of the WTO or of any other trade agreement or organization.[75]

Thus, if a dispute relates to provisions of both a bilateral free-trade agreement and, say, a WTO agreement, the complaining party has the option of using either the forum provided for in the free-trade agreement or the forum provided for in the WTO Dispute Settlement Understanding.[76] These two options provide for two procedurally distinct approaches for settling the dispute. If the bilateral forum is chosen, the decision-maker is not subject to appellate review, and is free to select or disregard substantive law without regard to possible incompatibility with rulings made in respect of other agreements. That is, these free-trade agreements do not provide for review at the level of the WTO if a non-WTO forum is selected, or for review at the level of the free-trade area if a WTO forum is selected. This disjunction in the field of dispute settlement—leading a claimant into either a free-trade area approach or a WTO approach—has the potential for creating uncoordinated bodies of jurisprudence that purport to govern similar or even identical legal issues.

Even without the proliferation of dispute-settlement panels amongst a large number of free-trade areas, there exists a need to improve the dispute-settlement process at the level of the WTO by strengthening the way in which the WTO panels function, by lending support to the WTO's Appellate Body, and by developing institutional reforms that relate to WTO dispute settlement.[77] When, however, one adds to the WTO the separate, non-integrated approaches to dispute settlement found in free-trade agreements, one invites enfeebling the overall effort needed to bring to the field of trade disputes a reliable and respected method of prompt and effective adjudication resting on an accessible, understandable and thoughtful body of international economic law that both produces useful guidance and evolves with maximum coherence.

The parallel existence of dispute-settlement systems creates the possibility, if not the likelihood, that a given area of dispute will involve the potential for parallel disputes based on claimed violations of, or claimed failures to perform, provisions found not only in a free-trade agreement but also in a WTO agreement. In this situation, a decision reached under

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be "the WTO Agreement, *or any other* agreement to which both Parties are party") (emphasis added).

75. *Compare* the DSU, *supra* note 71, art. 3 (affirming adherence to the principles developed under the 1947 General Agreement on Tariffs and Trade).

76. The DSU, *supra* note 71.

77. *See* Consultative Board Report, *supra* note 8, §§ 253–68; Claus-Dieter Ehlermann, *Reflections on the Appellate Body of the WTO*, 6 J. INT'L ECON. L. 695 (2003); Sydney M. Cone, III, *The* Asbestos *Case and Dispute Settlement in the World Trade Organization*, 23 MICH. J. INT'L L. 103 (2001).

one dispute-settlement system might conceivably be challenged under a different dispute-settlement system, and a claimant's attempted recourse to the latter system might occur in the absence of clear rules for handling such a challenge. For example, a claimant dissatisfied with a decision at the level of a free-trade area might bring a new claim before the WTO on the basis of a WTO agreement, either openly challenging the original decision or else creating a challenge in the guise of an entirely new proceeding. Depending on the gravity and nature of the claim and relevant procedural considerations, the WTO, through its secretariat, its legal-affairs division, or a panel might, as a matter of self-imposed judicial restraint, decline to entertain the challenge; or, on the contrary, might decide that it merited recourse to the WTO dispute-settlement system.[78]

Arithmetically, it would seem that the greater the number of free-trade agreements that come into existence, each of which has its own dispute-settlement system, the greater is the risk that challenges of the type just described might be launched. Even if it may be going too far to conclude that these parallel systems are inherently anarchic, it would seem that their capacity to produce inconsistent results could lend itself to increased disorder in the settlement of trade disputes, and could do so at a time when the more appropriate and constructive approach might be to give heed to calls to improve the WTO dispute-settlement system.[79] Of course, the negotiation of changes to the relevant WTO agreement on dispute settlement[80] would be a highly political undertaking and, to the extent that it touched on free-trade areas, would involve the members of the WTO in assessing the political aspects of free-trade areas.

Whether or not changes are made to the WTO dispute-settlement system, the many systems engendered by free-trade agreements may produce three undesirable consequences. First, they may give rise to rules of trade law that rest not on accepted principles but on the happenstance of forum selection. Second, the weight given to procedural agility may confer a significant advantage on nations having superior resources to initiate and pursue trade disputes, particularly in the context of a bilateral free-trade agreement between two nations with greatly disparate economic strength. Finally, the availability of non-WTO dispute-

78. For an example of the latter situation, see the WTO Panel Report, Definitive Anti-Dumping Duties on Poultry from Brazil, paras. 7.17–7.42 WTO Doc. WT/DS241/R, Apr. 22, 2003, (permitting Brazil to proceed before a WTO Panel and denying claims by Argentina that the WTO Panel should refrain from ruling because of, or was bound by, prior proceedings before a tribunal constituted under Mercosur [*supra* text accompanying note 62]).

79. *See* Consultative Board Report, *supra* note 8, at 80–81, paras. 15–24; Ehlermann, *supra* note 77, at 706–08.

80. Cited in the DSU, *supra* note 71 .

settlement systems will almost certainly add to the tendency to abandon multilateralism in favor of spheres of influence.

B. *Global Politics and Free-Trade Areas*

The question of dispute settlement just discussed is but one example of the political issues raised by free-trade areas. A larger political issue is raised by the preferential nature of these areas—by the exemption of their trade preferences from the "golden rule" of universal MFN treatment discussed in Part II above.[81] The creation of trade preferences through the establishment of free-trade areas has been called "a political development of over-riding importance," and this development has been seen "as effectively dismantling the ceiling placed on preferences in force at the time the GATT was established, thereby creating a new and wider preferential system."[82]

According to a legal scholar who has analyzed the role of the United States in influencing the politics of international trade law, U.S. "hegemonic preferences"—or, as he also artfully phrases it, U.S. "asymmetrical power"—can lead at times to results that the United States favors, and may also at other times induce reactions in the global community that are unfavorable to the United States.[83] Be the reactions to the United States favorable or unfavorable, it seems indisputable that the creation of free-trade areas, the major departures that they often represent from the principle of universal MFN treatment, and the hegemonic position of the United States in many free-trade areas, are all fraught with political implications.

The author referred to above as an advocate of the "ideal" of Empire Free Trade acknowledged that the realization of this "ideal . . . must make for international ill-will," and that this certainty must be taken into account when weighing the merits of Empire Free Trade.[84] By analogy, it seems appropriate to take the possibility of "international ill-will" into account when evaluating free-trade areas in which the United States enjoys "asymmetrical power." In doing so, it is possible today to have the benefit of hindsight with respect to Empire Free Trade when attempting to assess the future global consequences of free-trade areas.

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81. *See supra* text accompanying note 9.

82. WTO-REGIONALISM, *supra* note 13, at 15.

83. Daniel K. Tarullo, *The Hidden Costs of International Dispute Settlement: WTO Review of Domestic Anti-Dumping Decisions*, 34 LAW & POL'Y INT'L BUS. 109, 166–71 (2002).

84. Campbell, *supra* note 32, at 376.

C. *Possible Future Consequences of Free-Trade Areas*

As mentioned above, among the consequences of Imperial Free Trade were the following: (a) over time, members of the imperial free-trade area other than Great Britain reduced their purchases of British exports; (b) increasingly, these members used the British currency earned from their exports to Great Britain for purposes that were relatively non-beneficial to Great Britain, for example, to repurchase British-held investments; and (c) while these developments were occurring, it seems likely that Great Britain would have gained greater benefits had Imperial Free Trade not diminished its markets located outside the area of imperial preference.[85] Translated into today's world of free-trade areas in which the United States is the hegemonic member, these consequences of Imperial Free Trade can be said to raise the question of whether, in the future, the non-hegemonic members of U.S.-sponsored free-trade areas will hold and invest U.S. currency in ways beneficial to the United States.

How members of U.S.-sponsored free-trade areas dispose of U.S. currency gained from exports to the United States could be of considerable importance to the United States as a global debtor nation.[86] The world's largest borrower, the United States has a vital need for foreign countries to hold its currency and to invest its currency in ways that facilitate U.S. fiscal policy. If, however, free-trade areas created on the basis of U.S. hegemony follow a pattern suggested by the history of Imperial Free Trade, it is conceivable that a disjuncture could develop, if indeed it has not already developed, between the needs of the United States as regards the credibility of its currency and the functioning of its free-trade areas. It might well turn out that the United States would have been better advised to create as broad a global trading base as possible, and not to follow the pattern of Imperial Free Trade by disfavoring countries outside its hegemonic free-trade areas.

The possible future problems suggested in the preceding paragraph would cut across U.S. relations with countries both inside and outside the U.S. hegemonic free-trade areas. As regards the latter countries, there

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85. *See supra* text accompanying note 36.

86. On the United States as a global debtor nation, see FERGUSON, *supra* note 42, at 279–85; Peter G. Peterson, *Riding for a Fall*, FOREIGN AFF., Sept./Oct. 2004, at 111; Louis Uchitelle, *U.S. and Trade Partners Maintain Unhealthy Long-Term Relationship*, N.Y. TIMES, Sept. 18, 2004, at C1. *See also* Richard Cooper, *America's Current Account Deficit is Not Only Sustainable, but it is Perfectly Logical Given the World's Hunger for Investment Returns and Dollar Reserves*, FIN. TIMES, Nov. 1, 2004, at 19; Maurice Obtsfeld and Kenneth Rogoff, *The U.S. Deficit Problem Is not only a Domestic Issue, But a Global Concern and Neither Candidate Has the Answer*, FIN. TIMES, Nov. 1, 2004, at 15; Jennifer Hughes and Krishna Guha, *World Foreign Exchange Trading Soars to Peak of 1,900bn a Day*, FIN. TIMES, Sept. 29, 2004, at 1.

could be a further factor of "international ill-will" which, as mentioned above, was seen as a certainty in the context of Imperial Free Trade.[87] Thus, those countries disadvantaged by free-trade areas may especially resent the policies that led to their creation.

In the end, then, in the interest of establishing a healthy system of global trade and in the interest of the United States itself as a participant in that system and as a debtor nation, it may prove necessary to re-invent universal MFN treatment. The goal of reducing trade barriers pursuant to non-preferential principles, originally espoused by the United States as a creditor nation, may come to seem even more desirable to it as a debtor nation. Whether out of principle or out of necessity, the United States might choose to place decreasing reliance on its unwieldy agglomeration of free-trade areas and, instead, to reinvigorate a universal approach to the ordering of world trade. This approach would not involve discarding the notion of legitimate bases for customs unions and free-trade areas,[88] but it would require undertaking the task of more carefully defining that legitimacy and, in particular, reconsidering hegemonic free-trade areas reminiscent of imperial preference.

87. *See supra* text accompanying note 82.
88. *See supra* text accompanying note 17.