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THE FREE TRADE AREA OF THE AMERICAS: IS THERE STILL A PLACE FOR THE WORLD TRADE ORGANIZATION?

Sara Catherine Smith[†]

I. INTRODUCTION

“The FTAA . . . is a fundamental part of a much wider strategy.”¹
- Paulo G. F. Vizentini

In 1995, the World Trade Organization (WTO) was a great plan for liberalizing trade. Governments could gather to negotiate trade agreements, settle trade disputes, and create a system of trading rules.² Currently, the main vein of the WTO consists of negotiated documents that provide the legal ground-rules for international trade.³ The Most-Favored-Nation and National Treatment principles set the undertone, promoting free trade that is non-discriminatory.⁴ Nations violate such

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1. Paulo G. F. Vizentini, *The FTAA and US Strategy: A Southern Point of View*, in *FREE TRADE FOR THE AMERICAS? THE UNITED STATES’ PUSH FOR THE FTAA AGREEMENT* 11 (Paulo Vizentini & Marianne Wiesebron eds., 2004).

2. UNDERSTANDING THE WTO 9 (The World Trade Organization 3d ed. 2003) (1995).

3. *Id.*

4. *Id.* at 10.

principles by forming free-trade areas and other regional trade agreements (RTAs) that provide group members with preferential treatment.⁵

The General Agreement on Tariffs and Trade (GATT), a code of rules regulating trade relations among the parties, allows for certain discriminatory treatment under Articles XXIV and XVIII, given that any preferential trading practice complies with the regulations provided.⁶ As the number of regional trade agreements increases, the size of preferential trading groups tends to grow. One of the newest and hotly disputed negotiations is the Free Trade Area of the Americas (FTAA), encompassing all the countries of North and South America with the exception of Cuba.⁷ The many fears and concerns expressed by the negotiating countries maintain that free-trade is not always fair.⁸ However, if the negotiating parties of the FTAA reach an agreement, the WTO and its ground-rules may no longer hold any authority in a world with such powerful trading nations.⁹ As the WTO's health becomes more fragile, "the unprotected threat from the RTAs could strike the fatal blow."¹⁰

Part II of this comment focuses on the history behind the GATT, the WTO, and the transformation from multilateralism to regionalism. It continues to analyze the founding principles of the GATT, and the flexibility of such principles that allow a contracting member to opt-out of certain obligations. Part III takes a narrow regional agreement, the Free Trade Area of the Americas, and applies the regional manipulation of the GATT principles. Part IV proposes the idea that the WTO will lose influence and support if the FTAA negotiations prove successful. Part IV continues to suggest that as the world shifts, operating mostly on a regional level, multilateral trade agreements may no longer be necessary. Finally,

5. Frank J. Garcia, *Trade and Inequality: Economic Justice and the Developing World*, 21 MICH. J. INT'L. L. 975, 988-89 (2000) (introducing preferential treatment and inequality).

6. Article XXIV, in THE TEXT OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE 41, 41-44 (GATT ed., Geneva, Switz., 1986) [hereinafter GATT, Article XXIV].

7. Mario E. Carranza, *Latin American Perspective: MERCOSUR, the Free Trade Area of the Americas, and the Future of U.S. Hegemony in Latin America*, 27 FORDHAM INT'L L.J. 1029, 1030 (2004).

8. See generally MITSUO MATSUSHITA ET AL., THE WORLD TRADE ORGANIZATION: LAW, PRACTICE, AND POLICY 589-594 (Oxford Univ. Press ed., 2003) (pointing out the future challenges that face the WTO and explaining that a degree of unfairness will always plague a certain market or certain countries).

9. Colin B. Picker, *Regional Trade Agreements v. The WTO: A Proposal for Reform of Article XXIV to Counter this Institutional Threat*, 26 U. PA. J. INT'L ECON. L. 267, 286 (2005).

10. *Id.*

Part V concludes by proposing that the success of the FTAA will deliver the hardest blow to any success the WTO hopes to obtain in the future.

II. IT ALL BEGAN WITH GATT

Although many nations favored the idea of the International Trade Organization (ITO), it needed support from the United States.¹¹ The ITO never gained U.S. approval, but the General Agreement on Tariffs and Trade, which took form as an international organization.¹² With respect to trade and economics, each party committed “to raising standards of living, ensuring full employment . . . developing the full use of the resources of the world and expanding the production and exchange of goods.”¹³ All contracting parties to the GATT receive the benefits of lower tariffs by limiting tariffs to those agreed upon in the Schedule of Concessions.¹⁴ Of all the components of the GATT, most disputes and confusion originate with the Most-Favored-Nation Treatment and National Treatment principles.¹⁵ Most-Favored-Nation (MFN) is a non-discrimination principle, legally binding all contracting parties to accord equal treatment to all other members.¹⁶ National Treatment requires that contracting parties treat imports no less favorably than their own domestic goods.¹⁷ In 1994, the GATT was amended, and the Uruguay Round, determined to reduce non-tariff barriers, transformed it into the current World Trade Organization (WTO).¹⁸

The Uruguay Round of the WTO based its principles on multilateralism, providing that each country concede something of value to create a system that offers benefits to citizens of all the states involved.¹⁹

11. See MATSUSHITA ET AL., *supra* note 8, at 2 (following the adoption of the United Nations, the UN Economic and Social Council favored an international organization designed to develop and coordinate trade among the nations. It was to be called the International Trade Organization, which eventually evolved into the WTO many years later).

12. *Id.*

13. GATT, Article XXIV, *supra* note 6, at 1.

14. MATSUSHITA ET AL., *supra* note 8, at 3.

15. See *id.* at 143-80.

16. *Id.* at 143.

17. *Id.* at 156.

18. *Id.* at 6.

19. See Laura Altieri, *Between Empire and Community: The United States and Multilateralism 2001-2003: A Mid-Term Assessment: Trade and Economic Affairs: NAFTA and the FTAA: Regional Alternatives to Multilateralism*, 21 BERKELEY J. INT'L L. 847, 850 (2003).

The benefits include greater market access to goods and services by reduction of tariffs, relaxation of domestic requirements, and lowering of quotas.²⁰ Tariff reduction provides equal benefits for all producers, while it also serves the consumers' best interests, forcing producers to compete through low-cost or high-quality techniques.²¹ Multilateralism, agreements shared with all WTO members, creates trade and furthers trade liberalization, which remains a central goal in the WTO.²² The WTO gives rich and poor nations the equal right to challenge each other and equal opportunities in the bargaining process.²³

On the contrary, "regionalism is a widespread phenomenon" that works to divert and restrict trade, rather than create it.²⁴ Regional trade agreements create preferential trading areas, also known as free-trade areas, or customs unions.²⁵ The free-trade area eliminates internal tariffs and barriers, but allows members to remain autonomous with their external trade policies.²⁶ A customs union eliminates internal barriers, but creates common external trade policies.²⁷ RTAs continue to contribute to the obstacles and difficulties currently facing the WTO by eroding the development of the original multilateral trading system.²⁸ Regionalism shares similarities with imperial preferences, granting preferential treatment to insiders while discriminating against outsiders.²⁹ "[Customs unions and free-trade areas] are inconsistent with the principle of MFN treatment."³⁰ History shows U.S. trade policy embracing multilateralism and non-discrimination; however, NAFTA (the North American Free Trade Agreement) and the recent Free Trade Area of the Americas suggest that the United States gladly supports preferential trade.³¹

20. *Id.* at 850.

21. *Id.*

22. See MATSUSHITA ET AL., *supra* note 8, at 595.

23. 10 BENEFITS OF THE WTO TRADING SYSTEM 4 (WTO OMC ed., World Trade Organization 2003), available at <http://www.wto.org> (last visited Jan. 27, 2006).

24. MATSUSHITA ET AL., *supra* note 8, at 342-43.

25. *Id.* at 343-44.

26. *Id.* at 344.

27. *Id.*

28. Picker, *supra* note 9, at 270.

29. DAVID PALMETER, *THE WTO AS A LEGAL SYSTEM: ESSAYS ON INTERNATIONAL TRADE LAW AND POLICY* 139 (2003).

30. *Id.*

31. *Id.* at 140.

A. *The Most-Favored-Nation Principle*

Most-Favored-Nation requires that any contracting party giving an advantage or immunity from trade barriers to one product, must immediately grant the same treatment to like products of all other contracting parties.³² MFN applies to cases of discrimination between like products on the basis of country of origin, and it protects from any discrimination created through procedural requirements or practices.³³ WTO members can only claim MFN rights through bilateral or multilateral treaty provisions.³⁴ In the absence of a treaty, states may freely employ discriminatory economic policies, making attempts to establish the MFN principle as a respected international law unsuccessful.³⁵ The negotiation of trade agreements with other members, in the hope of creating a free-trade area, demonstrates the lack of effort by the negotiators to pursue the multilateral negotiations supported by the WTO.³⁶ Free-trade agreements entered into by the United States, and nearly all WTO member nations, represent a departure from the original goal of the MFN principle.³⁷ Regional Trade Agreements, creating preferential trading areas, violate the MFN principle, however, the language of Article XXIV of the GATT provides an exception.³⁸

1. Article XXIV Exception to the MFN Principle

When the drafters of the exception for customs unions in GATT Article XXIV expanded it to include free-trade areas, the WTO Secretariat considered it “‘the major exception’ to the ‘fundamental GATT principle’ of MFN treatment.”³⁹ Article XXIV permits the formation of a customs union or free-trade area, provided that the contracting parties recognize its purpose as facilitating trade between members.⁴⁰ To form a regional trade agreement, Article XXIV requires the elimination of “trade barriers on ‘substantially all’ the trade among its

32. Sydney M. Cone, *The Promotion of Free-Trade Areas Viewed in Terms of Most-Favored-Nation Treatment and “Imperial Preference,”* 26 MICH. J. INT’L L. 563, 566 (2005).

33. MATSUSHITA ET AL., *supra* note 8, at 149.

34. *Id.* at 146.

35. *Id.*

36. *See* Cone, *supra* note 32, at 564.

37. *Id.*

38. *Id.* at 566.

39. *Id.* (citing WTO Secretariate, *Regionalism and the World Trading System* 11-12 (1995)).

40. GATT, Article XXIV, *supra* note 6, at 41.

members.”⁴¹ While it prohibits members of preferential trade areas from raising external trade barriers, it allows members of the trade agreements to discriminate in favor of other members.⁴²

a. Regional Trade Agreements

In contrast to multilateralism, which encourages the free flow of goods to areas of demand, regional trade agreements (RTAs) divert free-trade by restricting the free flow of goods to a certain region.⁴³ For example, a low-cost producer may be denied access to consumers demanding goods within a preferential trade area.⁴⁴ This may seem to benefit the high-cost producer within the region, yet it plagues the consumer, causing high prices and a trade diversion loss.⁴⁵ On the other hand, RTAs offer plenty of benefits as incentives for nations to join a preferential group.⁴⁶ States often “join RTAs to ensure continued access to a market already covered by an RTA,” or to combine the comparative advantages of each member state, providing more benefits to more people.⁴⁷

Although the original GATT recognized certain pre-existing preferential trade agreements, those agreements failed to play a major role in the global economy; they were merely tolerated for political reasons.⁴⁸ For example, Great Britain was among the first of the European Nations to promote the idea of “Imperial Free Trade,” under which the British Empire established a free-trade area completely inconsistent with the Most-Favored-Nation principle.⁴⁹ Pre-WTO, regional agreements functioned as an initial step towards multilateral free-trade.⁵⁰ Today, the United States and other large economies assume the hegemonic role once occupied by Great Britain.⁵¹ The Free Trade Area of the Americas allows the United States to gain access to the South American regional trade

41. Zakir Hafez, *Weak Discipline: GATT Article XXIV and the Emerging WTO Jurisprudence on RTAs*, 79 N.D. L. REV. 879, 891 (2003) (citing GATT Art. XXIV: 8).

42. GATT, Article XXIV, *supra* note 6, at 41.

43. Altieri, *supra* note 19, at 850-51.

44. *Id.* at 851.

45. *Id.*

46. See Picker, *supra* note 9, at 274-79 (listing the benefits of RTAs as added economic security, welfare gains, additional market access, and an increase in bargaining power).

47. See *id.* at 275.

48. Cone, *supra* note 32, at 570-71.

49. *Id.* at 572-73.

50. Altieri, *supra* note 19, at 851.

51. Cone, *supra* note 32, at 573-74.

areas, such as MERCOSUR, and help complete an imperialistic type of trading system.⁵²

(1) RTAs Take Advantage of GATT Article XXIV

Regional Trade Agreements have grown to be the norm, and no longer the exception.⁵³ With nearly 162 RTAs in force, each WTO member is affiliated with at least one trade agreement.⁵⁴ Every WTO member recognizes the Most-Favored-Nation Principle of the GATT as a prohibition against discriminatory trade policy, yet each RTA offers special and differential treatment.⁵⁵ Article XXIV of the GATT, the most abused article, permits customs unions and free-trade areas that agree with the MFN principle.⁵⁶ Contracting parties to the GATT utilize this provision in a self-serving manner.⁵⁷ According to the GATT language, “the duties and other regulations . . . shall not be higher or more restrictive than [those] . . . existing in the same constituent territories prior to the formation of the free-trade area.”⁵⁸ Members potentially “benefit from preferential rules of origin and regional content requirements,” which stood as trade obstacles pre-membership.⁵⁹ Although the goal of the Article XXIV restrictions is to create trade among RTA members and prohibit the increase of entry barriers to third parties, an RTA clearly discriminates in favor of its member nations.⁶⁰

Article XXIV requires that “substantially all” trade barriers must be eliminated within the free-trade area or customs union.⁶¹ Because the drafters of the GATT never determined the meaning of “substantially all,” the wide spectrum of interpretations of this requirement hinders the GATT’s overall position on individual agreements.⁶² Different trade areas

52. MERCOSUR is the Common Market of the Southern Cone consisting of Brazil, Argentina, Uruguay, and Paraguay. Carranza, *supra* note 7, at 1034; *see also* Cone, *supra* note 32, at 578 (utilizing an imperialistic type of trading system, it is meant to have complete free trade internally, but tariffs on imports outside the imperialistic trade area).

53. *See* Hafez, *supra* note 41, at 879.

54. *Id.*

55. Cone, *supra* note 32, at 564-65.

56. Hafez, *supra* note 41, at 880.

57. Sungjoon Cho, *Breaking the Barrier Between Regionalism and Multilateralism: A New Perspective on Trade Regionalism*, 42 HARVARD INT’L L.J. 419, 421 (2001).

58. GATT, Article XXIV, *supra* note 6, at 42.

59. Chun Hung Lin, *Regionalism or Globalism? The Process of Telecommunication Cooperation within the OAS and NAFTA*, 11 CURRENTS: INT’L TRADE L.J. 30, 34 (2002).

60. Hafez, *supra* note 41, at 891.

61. *Id.* at 889.

62. *Id.* at 891.

vary on their interpretation, considering whether "substantial" should translate to the inclusion of all major market sectors of trade, or whether it deserves a quantitative number of the percentage of trade included.⁶³ In addition to this requirement, RTAs must avoid raising trade barriers to non-members, and they must also liberalize trade within the area by a set deadline.⁶⁴ Considering the discretion RTAs use to determine their own standards, along with a lack of legal discipline, the GATT/WTO has failed to effectively supervise the implementation of the Article XXIV criteria.⁶⁵

b. RTAs Cannot be Eliminated at this Point

Multilateralism creates trade, but it also creates some disadvantages for a wide range of developed and developing nations.⁶⁶ Economic superpowers, like the United States, find that multilateral opening creates unwanted "competition from competitive advanced countries that produce many of the same goods and services."⁶⁷ While multilateralism is responsible for some trade creation, it fails to direct trade towards any specific industry, suggesting that a more compact trade agreement may generate faster results.⁶⁸

Political scientists attempt to pinpoint the motivation behind RTAs, finding that functionalists view RTAs as influential responses to different governmental needs, while providing economic benefits to all participating parties.⁶⁹ Constructionists feel RTAs create a sense of collectivism and provide communal security guarantees.⁷⁰ The realist believes that RTAs serve political aspirations, where the leading nation assumes a hegemonic role during the creation process, similar to the United States in the negotiation process of the FTAA.⁷¹ From an economic perspective, some economists claim geographical proximity influences regional trade, while others argue that regionalism is just an excuse for discriminatory trade policies.⁷² For smaller economies, regionalism provides an increase in their bargaining power at a multilateral level, allowing them to start small and learn from the power players.⁷³ Regardless of theory, nations enter into

63. *Id.* at 892.

64. Lin, *supra* note 59, at 33.

65. *Id.*

66. Altieri, *supra* note 19, at 852.

67. *Id.* at 853.

68. *Id.* at 850.

69. Cho, *supra* note 57, at 423.

70. *Id.* at 424.

71. *Id.*

72. *Id.* at 425.

73. Picker, *supra* note 9, at 276.

RTAs to further foreign policy, improve their economies, gain access to other members' markets, and maintain security.⁷⁴ Since the 1920s, when the British Empire transformed into a free-trade area, RTAs have granted benefits to a variety of nations.⁷⁵

Regionalism has become increasingly popular, expanding to all ends of the globe.⁷⁶ The European Union continues to grant membership to its east, and NAFTA continues to spread further south.⁷⁷ Preferential trade areas have extended their goals to serve more than just trade in goods, including environmental improvements, investments, services, and labor markets.⁷⁸ RTAs serve the interests of developed countries, allowing these nations to secure domestic reforms faster on a regional level.⁷⁹

c. RTA Support Erodes WTO Enthusiasm

Be it an economic powerhouse from Europe, Asia, or the Americas, every nation desires its own preferential trade relations by establishing a regionally exclusive setting.⁸⁰ Those opposed to RTAs worry that countries actively participating in regionalism will lose enthusiasm for multilateralism.⁸¹ Those states that are enthusiastic or dedicated in their support for RTAs find it impossible to support the fundamental ideals of the WTO.⁸² It is understandable that states lost enthusiasm for the WTO over the years, given that the WTO has more diverse members with very diverse opinions about the future of the organization.⁸³ Also, trade issues have grown increasingly complex, no longer only dealing with tariff reduction.⁸⁴

In contrast to multilateralism, regionalism allows "governments a better opportunity to affect policy."⁸⁵ The WTO's agreement on Trade-Related Investment Measures (TRIMs) failed to adopt a Multilateral

74. *Id.* at 274-75.

75. Cone, *supra* note 32, at 571.

76. Lin, *supra* note 59, at 33.

77. *Id.*

78. *Id.*

79. *Id.* at 35.

80. Pitou van Dijck, *FTAA: Implications for the World Trade System, in FREE TRADE AREA FOR THE AMERICAS? THE UNITED STATES' PUSH FOR THE FTAA AGREEMENT* 151, 157 (Paulo Vizentini & Marianne Wiesebron, eds., 2004).

81. Lin, *supra* note 59, at 35.

82. Picker, *supra* note 9, at 301.

83. *Id.*

84. *Id.* at 302.

85. Matthew W. Barrier, *Regionalization: The Choice of a New Millennium*, 9 CURRENTS: INT'L TRADE L.J. 25, 30 (2000).

Agreement on Investment (MAI), which was “designed to impose tight restrictions on what national governments can and can not do in regulating the economies.”⁸⁶ Because the MAI would give foreign multinational corporations legal status with political rights, governments fear loss of sovereignty and national security.⁸⁷ Upon the WTO’s failure to adopt the MAI, many nations realized its weak power, and reinforced their interest in regionalism.⁸⁸

The WTO’s multilateral agreement on trade in goods, GATT, actually permits preferential trade that distorts trade patterns.⁸⁹ Proponents of the GATT argue that it prevents national governments from utilizing protectionism, limiting the freedom to discriminate against foreign products in order to protect domestic industries.⁹⁰ Enthusiasm for the equal protection ideas within the WTO becomes difficult to support as the GATT legitimizes protectionist measures, providing “a laundry list of general exceptions for all WTO members.”⁹¹ It allows a state to restrict trade where it is necessary to protect national security interests, public morals, natural resources, human, plant, or animal life, and intellectual property rights.⁹² Although these exceptions are economically justified, the GATT’s non-discrimination policy underhandedly allows states to pursue protectionist practices that undermine the WTO.⁹³

2. Exception for Developing Nations: GATT Article XVIII

The GATT accords developing countries discriminatory treatment in the form of preferential access to developed nations’ markets and market protection from domination by exports of developed countries.⁹⁴ GATT Article XVIII provides economies in early stages of development, unable to support more than a low standard of living, with the privilege to enjoy government assistance necessary to establish particular industries, promote these industries, and raise the general standard of living.⁹⁵ These

86. *Id.* at 28.

87. *Id.* at 26.

88. *Id.* at 30.

89. Joel R. Paul, *The New York University-University of Virginia Conference on Exploring the Limits of International Law: Do International Trade Institutions Contribute to Economic Growth and Development?* 44 VA. J. INT’L L. 285, 327 (2003).

90. *Id.* at 324.

91. *Id.* at 326.

92. *Id.* at 326-27.

93. *Id.* at 327.

94. Garcia, *supra* note 5, at 989.

95. Article XVIII, in THE TEXT OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE 28, 29 (GATT ed., Geneva, Switz., 1986) [hereinafter GATT, Article XVIII].

economies may also temporarily deviate from the provisions of other articles of the GATT in order to safeguard their external financial positions and preserve adequate reserves for economic development.⁹⁶ Article XVIII permits the developing economies to apply new restrictions or raise the existing restrictions as a means of protecting their infant industries.⁹⁷

B. National Treatment

Article III of the GATT calls for the application of national treatment, which bans any domestic rule or regulation that discriminates against imported products.⁹⁸ The language indicates that any internal taxes, internal regulations, internal quantitative restrictions, and anything affecting the importation of goods internally should be prevented from protecting domestic products.⁹⁹ Imports of any contracting party are to “be accorded treatment no less favourable than that accorded to like products of national origin.”¹⁰⁰ To determine “like product,” the Appellate Body of the WTO compares two or more products’ physical properties, their use, and their ability to be substituted for one another.¹⁰¹ The products must also be directly competitive and produced by similar processes or production methods.¹⁰² If one country can show that the manner in which another contracting party operates its competition policy is discriminatory against imports, or implicitly violates GATT or WTO policy, it is viewed as a potential violation of the National Treatment principle.¹⁰³

Sometimes regulatory measures appear neutral or non-discriminatory, but they have a discriminatory effect.¹⁰⁴ Known as de-facto discrimination, it presents itself when “the application of formally identical legal provisions results . . . in less favourable treatment of imports.”¹⁰⁵ Although many GATT panels have designed multiple tests to judge de-

96. *Id.* at 29, 31.

97. *Id.* at 31-32.

98. Peter Holmes, *Trade and Competition in the New WTO Round*, in *TRADE LIBERALIZATION, COMPETITION AND THE WTO* 147, 161 (Chris Milner & Robert Read eds., 2002).

99. Article III, *THE TEXT OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE* 6 (GATT ed., Geneva, Switz., 1986) [hereinafter GATT, Article III].

100. *Id.*

101. MATSUSHITA ET AL., *supra* note 8, at 158-59.

102. *Id.* at 159, 162-63.

103. Holmes, *supra* note 98.

104. MATSUSHITA ET AL., *supra* note 8, at 173.

105. *Id.* at 174.

facto discrimination, history forecasts that contracting parties will continue to manipulate the law in hope of protecting their domestic market.¹⁰⁶

1. GATT Article XX Exception

The GATT fundamentally denounces arbitrary or unjustifiable discrimination, however, Article XX provides some exceptions to the National Treatment principle, allowing discrimination under certain circumstances.¹⁰⁷ The exceptions allow parties to take measures necessary to protect public morals; to protect human, animal, and plant life; and to protect patents, trademarks, and copyrights.¹⁰⁸ These measures must be necessary in securing compliance, and they may not discriminate between countries arbitrarily or unjustifiably.¹⁰⁹ Countries may also protect their national treasures, resources, and intergovernmental commodities through government procurement, provided that they are consistent with other provisions of the GATT.¹¹⁰

C. Trade Policy and Competition Policy

Generally, a nation's "trade policy is [designed] to regulate international trade for the purpose of furthering the economic interests of its own citizens," while a nation's competition policy strives to protect consumers by lowering prices through promotion of competition.¹¹¹ Competition policy focuses more on private, anti-competitive conduct and governmental barriers that "impose restrictions on the freedom of enterprises to compete."¹¹² The focus on private, anti-competitive conduct takes form as abusive behavior by a monopolist, striving to restrict competition.¹¹³ The trade barriers created by the private conduct are set by private sectors, rather than by the government.¹¹⁴ Governmental barriers to competition may be reduced or removed; however, private, anti-

106. See generally *id.* at 173-176 (providing a number of examples of de facto discrimination throughout the history of the GATT/WTO).

107. Article XX, in THE TEXT OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE 37 (GATT ed., Geneva, Switz., 1986) [hereinafter GATT, Article XX].

108. *Id.* at 37-38.

109. MATSUSHITA ET AL., *supra* note 8, at 177.

110. GATT, Article XX, *supra* note 107, at 38.

111. Seung Wha Chang, *Interaction Between Trade and Competition: Why a Multilateral Approach for the United States?* 14 DUKE J. COMP. & INT'L L. 1, 6 (2004).

112. MATSUSHITA ET AL., *supra* note 8, at 541.

113. *Id.*

114. Chang, *supra* note 111, at 2.

competitive conduct remains harder to regulate.¹¹⁵ Currently, national competition laws are utilized for prohibiting and controlling anti-competitive practices that affect international trade.¹¹⁶

1. Opinions on Current Policy

Open and liberal trade remains the main economic premise that underlies the entire GATT/WTO.¹¹⁷ The multilateral trade rules progressively removed or lowered various governmental barriers to trade, yet private barriers have erupted, undermining the progress of the WTO.¹¹⁸ A competition policy's goal of protecting consumers from predatory pricing by private firms complements a liberal trade policy's goal of reducing government trade barriers.¹¹⁹ Only if private firms are inspected by effective competition laws will trade policy achieve desired liberalization.¹²⁰ Without enforcement of competition law, private trade barriers will prevent consumer access to foreign imports, and damage any gains from liberalized trade.¹²¹

The WTO established a Working Group on the Interaction between Trade and Competition (Working Group).¹²² The Working Group works to clarify principles of non-discrimination, procedural fairness, and transparency, while it works to gain support for the "reinforcement of competition institutions in developing countries through" voluntary cooperation.¹²³ Although the Working Group has made progress, participants of the Cancun Ministerial Conference failed to agree on the modalities of such negotiations, suspending any further negotiation for a multilateral agreement on the interaction between trade policy and competition.¹²⁴ The European Community and other advocates of a multilateral agreement on competition policy failed to convince

115. MATSUSHITA ET AL., *supra* note 8, at 541.

116. *Id.* at 551.

117. Kevin C. Kennedy, *Global Trade Issues in the New Millennium: Foreign Direct Investment and Competition Policy at the World Trade Organization*, 33 GEO. WASH. INT'L L. REV. 585, 586 (2001).

118. *Id.* at 587.

119. *Id.*

120. *Id.* at 588.

121. *Id.*

122. Chang, *supra* note 111, at 3.

123. *Id.* (quoting World Trade Organization, Ministerial Declaration of 14 November 2001, WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2002), available at http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm).

124. *Id.* at 4.

developing nations that the multilateral framework would benefit their national interest.¹²⁵

However, the United States took a passive and pessimistic approach towards the negotiations.¹²⁶ Although multilateral trade benefits a large number of consumers, "pointing out noticeable benefits to any single voting block may not be easy."¹²⁷ Consequently, most trade policies reflect the economic goals of nations and the interests of particular groups on a regional level.¹²⁸ The developing nations sided with the United States, hesitating to negotiate on a multilateral level, but for differing reasons.¹²⁹ Most developing countries have not yet enacted a domestic competition law, giving them reason to "believe that it is too early for them to participate in multilateral negotiations."¹³⁰

III. OVERVIEW OF THE FREE TRADE AREA OF THE AMERICAS

As trade negotiations escalate in the Americas, they "are viewed as a prerequisite for securing effective competition, improving positions in foreign markets, and attracting new investments."¹³¹ Negotiations for the Free Trade Area of the Americas began in 1994 at a meeting known as the First Summit of the Americas.¹³² The Free Trade Area of the Americas includes every nation of North and South America with the exception of Cuba.¹³³ The FTAA is one free-trade bloc, sharing many similarities with NAFTA, and opening the door for greater trading possibilities and greater challenges.¹³⁴ It focuses on advancing economic prosperity, strengthening the relationships between Parties, and further liberalizing trade in goods and services, while protecting the environment, preserving cultural

125. *Id.*

126. *Id.*

127. Altieri, *supra* note 19, at 849.

128. *Id.* at 849-50.

129. Chang, *supra* note 111, at 17.

130. *Id.* at 17.

131. Barrier, *supra* note 85, at 31.

132. Eric Dannenmaier, *Trade, Democracy, and the FTAA: Public Access to the Process of Constructing a Free Trade Area of the Americas*, 27 *FORDHAM INT'L L.J.* 1066, 1069 (2004).

133. See generally Official Website of the FTAA, at http://www.ftaa-alca.org/alca_e.asp (last visited Feb. 3, 2006).

134. See generally Suzanne Elmilady, *A Step in the Right Direction: How to Make the Free Trade Agreement of the Americas a Cohesive Agreement that Will Better Serve Integration of Free Trade in the Western Hemisphere*, 12 *CURRENTS: INT'L TRADE L.J.* 93, 97 (2003) (suggesting that the FTAA will face many of NAFTA's similar challenges, and that the FTAA will follow a model similar to its sister agreement, NAFTA).

diversity, and creating opportunities for all parties of different size and levels of development.¹³⁵

The original plan for the FTAA sought to extend NAFTA to the entire Western Hemisphere, but a more balanced negotiation plan proves closer to victory.¹³⁶ The original agenda stated that “nothing is agreed until everything is agreed upon,” and the FTAA will work with bilateral and regional agreements that nations previously formed within the area.¹³⁷ The FTAA is attempting to harmonize the NAFTA and MERCOSUR (Argentina, Brazil, Paraguay, and Uruguay) agreements; however, both agreements follow different regional integration strategies.¹³⁸ While MERCOSUR concentrates on forming a customs union and providing equality to its members, NAFTA allows the United States to pursue its own trade goals and maintain more influence and power over Canada and Mexico.¹³⁹ The FTAA proposal also integrates parts of “the Andean Community (‘CAN’), the Caribbean Community (‘CARICOM’), [and] the Central American Common Market (‘MCCA’).”¹⁴⁰ Although its reach extends continentally, the FTAA has a planetary scope, striving to create a “new order [of] American power.”¹⁴¹

Because of high U.S. demands, negotiations have not gone as smoothly as planned.¹⁴² Larger economies, like Brazil, insist that the United States concede more during negotiations, while smaller economies are less resistant to their requests.¹⁴³ While Chapter V of the FTAA agreement promises to make deferential treatment for countries of different development levels a fundamental principle,¹⁴⁴ the power struggle and extensive range of resources in the Western Hemisphere possibly form

135. Free Trade Area of the Americas Draft Agreement, ch. 1, Nov. 21, 2003, *available at* http://www.ftaa-alca.org/ftaadraft03/ChapterI_e.asp (last visited Feb. 4, 2006) [hereinafter FTAA].

136. Carranza, *supra* note 7, at 1030.

137. *Id.*

138. *See id.*

139. *Id.* at 1031.

140. Marie-Claire Cordonier Segger, *Sustainable Development in the Negotiation of the FTAA*, 27 FORDHAM INT'L L.J. 1118, 1133 (2004).

141. Vinentini, *supra* note 1, at 11.

142. Jacqueline Granados, *Investor Protection and Foreign Investment Under NAFTA Chapter 11: Prospects for the Western Hemisphere Under Chapter 17 of the FTAA*, 13 CARDOZO J. INT'L & COMP. L. 189, 212 (2005).

143. *Id.* at 212-13.

144. FTAA, *supra* note 135, ch. 5.

the greatest obstacle to achieving a balanced agreement among thirty-four nations.¹⁴⁵

A. *The Flexible FTAA*

Due to the many obstacles and concerns raised by the initial negotiations of the FTAA, the trade ministers from the participating countries approved the Miami Declaration on November 20, 2003.¹⁴⁶ In the Miami Declaration, the trade ministers agreed to continue negotiations, but the declaration proposed “a more flexible, but also diluted, FTAA.”¹⁴⁷ The Declaration allows countries to choose different commitment levels, while also permitting plurilateral negotiations within the FTAA for those who desire additional benefits and obligations.¹⁴⁸ Although it supports a broad-based FTAA, seeking a common, balanced set of rules and regulations for each country, the declaration allows countries to opt-out of some of the obligations in any of the negotiation areas.¹⁴⁹

The Trade Negotiations Committee (TNC) sits at the top of the FTAA's structure, ensuring that “negotiations move in the same direction” and providing an environment that allows all countries to fully participate in the process.¹⁵⁰ Beneath the TCN, general negotiation committees responsible for negotiations in the FTAA include market access, investment, services, government procurement, dispute settlement, agriculture, intellectual property, subsidies, antidumping, countervailing duties, and competition policy.¹⁵¹ Smaller, specialized committees, unlike the negotiation groups, focus on important issues of a delicate nature.¹⁵² They receive input from different representatives of civil society, and they focus on the future of smaller economies (The Consultative Group on Smaller Economies).¹⁵³ In an attempt to combine NAFTA, MERCOSUR,

145. Carranza, *supra* note 7, at 1031-32.

146. *Id.* at 1054.

147. *Id.*

148. Free Trade Area of the Americas, Ministerial Declaration of 20 November 2003, available at http://www.ftaa-alca.org/Ministerials/Miami/Miami_e.asp (last visited Feb. 5, 2006).

149. Carranza, *supra* note 7, at 1054.

150. Michel Duquette & Maxime Rondeau, *The Puzzle of Institutionalizing a Free Market Continental Zone: The Nuts and Bolts of the FTAA*, in *FREE TRADE FOR THE AMERICAS? THE UNITED STATES' PUSH FOR THE FTAA AGREEMENT* 59, 62 (Paulo Vizentini & Marianne Wiesebron eds., 2004).

151. Segger, *supra* note 140, at 1186-87.

152. Duquette & Rondeau, *supra* note 150, at 68.

153. *Id.*

and the remainder of the Western Hemisphere, the declaration, in essence, permits countries to reject either agreement's trade disciplines.¹⁵⁴

B. Problems with the Flexible FTAA

1. Smaller Economies vs. the U.S. Economy

One of the FTAA's greatest challenges centers on the small and vulnerable economies.¹⁵⁵ Tariff reduction and production center consolidation will likely cause revenue and job loss, respectively.¹⁵⁶ "[A] single catastrophic event, e.g., an economic, social, or natural disaster," will negatively impact a developing nation or one with a small economy more significantly than a large, diversified nation.¹⁵⁷ The FTAA agreement has yet to specifically state what special and deferential treatment the smaller economies will receive.¹⁵⁸

Although the FTAA recognizes the difference in economic size of all the member nations, the asymmetrical distribution of power continues to cause tension.¹⁵⁹ For the United States, which has an economy almost 100 times greater than all of the Central American and Caribbean countries combined, the FTAA offers many opportunities for big businesses and the federal government.¹⁶⁰ Because the United States has the ability to mold continental integration in its favor, no other FTAA member can individually challenge any action taken by the United States.¹⁶¹ With a combined gross domestic product (GDP) of nine trillion dollars, thirty-four percent of the world's GDP per capita, and twenty-nine percent of the world's market, the relatively low-populated United States remains unchallenged for such reasons.¹⁶² The United States has the ability to participate in simultaneous negotiations involving regional and bilateral agreements, as well as WTO multilateral negotiations.¹⁶³ The nations with little economic power lack the same resources necessary to engage in

154. Carranza, *supra* note 7, at 1054-55.

155. P.J. Patterson, *Caribbean Perspective: The Free Trade Area of the Americas and Smaller Economies*, 27 *FORDHAM INT'L L.J.* 899, 900 (2004).

156. *Id.*

157. *Id.* at 903.

158. FTAA, ch. 5.1.3, *supra* note 135.

159. Carranza, *supra* note 7, at 1032.

160. *Id.*

161. *Id.* at 1033.

162. Segger, *supra* note 140, at 1128.

163. Altieri, *supra* note 18, at 851.

multiple negotiations, often finding themselves at the mercy of the power players.¹⁶⁴

While many less developed countries face low economic growth in the global community, some have been entirely excluded from regional trade blocs.¹⁶⁵ In the FTAA, however, lesser developed, Latin American economies would annex to the U.S. economy in a similar fashion as NAFTA.¹⁶⁶ One possible theory for annexation is that the smaller economies will receive more benefits than the hegemon of the group (the United States) because the hegemon will act as the leader "for the emergence of a stable international regime of free trade."¹⁶⁷ Other theories predict that the United States and Canada will gain more benefits than Latin American countries due to discriminatory liberalization, which more powerful nations tend to practice and the lesser developed rarely challenge.¹⁶⁸ This suggests that the FTAA will allow the United States to keep poor nations' domestic goods out of its market.¹⁶⁹

2. The FTAA's Size Causes Controversy

A free-trade area consisting of all the countries in the Western Hemisphere, with the exception of Cuba, makes the FTAA the largest and most diverse free trade area in the world.¹⁷⁰ In fact, no other trade negotiation "has ever been launched on the basis of such a heterogeneous set of countries."¹⁷¹ Negotiations have consisted of NAFTA members and members of the Southern Common Market, MERCOSUR, led by the United States and Brazil respectively.¹⁷² Latin America widely opposes the FTAA, perceiving it to only serve big businesses and narrow-minded, free-market economies.¹⁷³

The current FTAA Draft Agreement stresses the importance of using existing international standards, uniform technical regulations, and conformity assessment in all areas that could affect trade among the

164. *Id.* at 852.

165. Lin, *supra* note 59, at 33.

166. Carranza, *supra* note 7, at 1032.

167. *Id.* at 1038.

168. *Id.*

169. Altieri, *supra* note 19, at 868.

170. Jessica S. Wiltse, Comment, *An Investor-State Dispute Mechanism in the Free Trade Area of the Americas: Lessons from NAFTA Chapter Eleven*, 51 BUFF. L. REV. 1145, 1149 (2003).

171. Rubens Antonio Barbosa, *Latin American Perspective: The Free Trade Area of the Americas and Brazil*, 27 FORDHAM INT'L L.J. 1017, 1019-1020 (2004).

172. Wiltse, *supra* note 170, at 1173.

173. Barbosa, *supra* note 171, at 1039.

parties.¹⁷⁴ After considering the time this would consume and the possibility of never reaching common ground, Brazil proposed that new rules and topics that are highly sensitive to certain parties be negotiated multilaterally, or among those with conflicting opinions, but not at a hemispheric level.¹⁷⁵

a. Conflict Among the Many Members

While success of the FTAA will solidify the United States' dominant position in global trade, multiple parties refuse to cooperate with the agenda.¹⁷⁶ Smaller economies show less resistance to the U.S. terms and willingness to pursue the FTAA, while stronger economies are not as compliant.¹⁷⁷ The United States also hopes to gain access to Brazil, the largest asset of MERCOSUR,¹⁷⁸ and the tenth largest economy in the world.¹⁷⁹ However, Brazil wishes to pursue its own agenda, often frustrating the group objectives.¹⁸⁰ Reviewing its past behavior, Brazil abandoned negotiations between MERCOSUR and the Andean Community.¹⁸¹ Because Brazil showed a lack of cooperation on a sub regional level and opposed hemispheric unification, it may pose a threat to a larger conglomerate like the FTAA.¹⁸²

In addition to conflicts among the members, Brazil, the United States, and Canada have demonstrated signs of internal conflict through lack of dedication and enthusiasm to the entire FTAA group.¹⁸³ The United States and Canada recently considered exclusive negotiations between the four MERCOSUR members and themselves.¹⁸⁴ When Mexico realized its possible exclusion from these negotiations, it lost respect for the group.¹⁸⁵ Support for the trade agreement continues to hover somewhere in the middle, as "public concern and mistrust relating to new trade agreements" has steadily increased over the years.¹⁸⁶ This public

174. FTAA, *supra* note 135, at ch. 13, arts. 2, 7.

175. Barbosa, *supra* note 171, at 1021.

176. Joe Zopolsky, *Implementing the FTAA: A Survey of Hemispheric Unification Efforts Within the Americas Over the Past Ten Years*, 9 CURRENTS: INT'L TRADE L.J. 91 (2000).

177. Granados, *supra* note 142, at 212.

178. Carranza, *supra* note 7, at 1034.

179. Granados, *supra* note 142, at 212.

180. Zopolsky, *supra* note 176, at 95.

181. *Id.*

182. *Id.* at 96.

183. *Id.*

184. *Id.*

185. *Id.*

186. Segger, *supra* note 140, at 1205.

concern and mistrust surfaces in the citizens of the United States, despite the fact that their government has positively promoted the FTAA.¹⁸⁷ The lack of attention given to the social and environmental aspects of trade and the lack of information given to the public take most of the responsibility for the mistrust of new trade agreements.¹⁸⁸

b. Outsiders' Response

Those outside the FTAA negotiations may first respond by establishing other preferential trading regions to build a "level playing field" with the major players in the Americas."¹⁸⁹ Another strategy they may employ to counter the effects of the FTAA would involve a new WTO round, attempting to reduce the "potential discriminating effects and trade [diversion] consequences."¹⁹⁰ Through this WTO round, the outsiders would attempt to render the concessions and agreements of the FTAA multilateral.¹⁹¹ Not surprisingly, the EU poses the greatest opposition to American desires, striving to "counterbalance and prevent the United States from exacting the preferential terms it wants."¹⁹²

3. Workers Get No Guarantees

Although trade boosts economic growth and national income, it does not necessarily create new employment for the workers who will compete with imports, and ultimately lose.¹⁹³ "[T]he distribution of benefits and burdens within the trading system will be skewed in favor of the dominant party."¹⁹⁴ The American Federation of Labor-Congress of Industrial Unions (AFL-CIO) compares the negative impacts of NAFTA on domestic markets with the possibilities of similar results from the FTAA.¹⁹⁵ While the FTAA proposes exclusive new rights to multinational corporations, it does not guarantee any rights of workers, small businesses,

187. Zopolsky, *supra* note 176, at 98.

188. Segger, *supra* note 140, at 1205.

189. Dijck, *supra* note 80, at 157.

190. *Id.*

191. *Id.*

192. Altieri, *supra* note 19, at 849.

193. WORLD TRADE ORGANIZATION, *supra* note 23, at 9.

194. Garcia, *supra* note 5, at 988.

195. AMERICAN FEDERATION OF LABOR-CONGRESS OF INDUSTRIAL ORGANIZATION, TIME TO CHOOSE: GOOD JOBS AND STRONG COMMUNITIES OR NAFTA TIMES TEN? 1, available at <http://www.aflcio.org/issues/jobseconomy/globaleconomy/upload/Time-to-Choose-Good-Jobs-and-Strong-Communities-or-NAFTA-Times-Ten.pdf> (last visited Jan. 27, 2006).

and the unemployed.¹⁹⁶ Domestic market supporters fear that the FTAA will only benefit multinational corporations that wish to outsource work to cheaper markets and destroy good jobs in their home country.¹⁹⁷ In the same way that NAFTA failed to create a healthy economy in Mexico, these same supporters share a similar worry that the FTAA will keep economic development out of reach for poorer countries in Latin America.¹⁹⁸

Brazil furthers this fear by complaining that the United States heavily subsidizes its agriculture and creates barriers on Brazilian imports.¹⁹⁹ Latin America and the Caribbean concur that the free-trade area will give U.S. multinationals free reign over their home markets and destroy domestic businesses.²⁰⁰ They are concerned that high environmental and labor standards will harm the competitive level of Latin American and Caribbean businesses.²⁰¹ The possibility of Canada or the United States using environmental, or social provisions as a form of protectionism, fails to earn much confidence from the FTAA.²⁰² Despite the fears expressed by the poorer countries, Latin America may follow the U.S. lead and support the FTAA, panicking that they may be excluded from a group which “grants preferential access to the U.S. market, one of the largest markets in the world.”²⁰³ Social and political opposition and other hurdles stand in the path of the FTAA, yet, it continues to gain momentum from pressures within the United States.²⁰⁴

C. The FTAA Gets Big Business Vote

Recognized mostly for their labor intensive goods and small economies, Latin America openly opposed the FTAA, branding it “a narrow, free-market oriented agreement, ‘a brainchild of big business, whose interests it would serve from start to finish.’”²⁰⁵ The lesser

196. *Id.*

197. *Id.* at 2.

198. *Id.*

199. Joseph Mann, *South Florida Businesses Support Free Trade Area*, SOUTH FLORIDA SUN-SENTINEL, Nov. 14, 2003, at 1, available at 2003 WL 12446914.

200. *Id.*

201. Segger, *supra* note 140, at 1131.

202. *Id.*

203. Carranza, *supra* note 7, at 1041.

204. Dorval Brunelle, *The US, the FTAA, and the Parameters of Global Governance*, in FREE TRADE FOR THE AMERICAS? THE UNITED STATES' PUSH FOR THE FTAA AGREEMENT 23, 37 (Paulo Vizentini & Marianne Wiesebron eds., 2004).

205. Carranza, *supra* note 7, at 1039 (citing William Finnegan, *The Economics of Empire: Notes on the Washington Consensus*, 306 HARPER'S MAGAZINE, May 2003, at 41, 49).

developed countries of South and Central America fear that the FTAA's trade liberalization goal will only encourage structural inequalities and strengthen income disparities.²⁰⁶ As a result of NAFTA, the Mexican economy increased overall, but domestic growth declined, which leaves these countries wary about the FTAA.²⁰⁷ Mexico's NAFTA experience indicates that the FTAA will not likely produce the same benefits for Latin America that it will for the United States, unless the United States opens its market to other's agricultural and industrial exports.²⁰⁸

On the contrary, when analyzing the different sectors of the Mexican economy, NAFTA brought improvements in the areas of inflation, deficit, and fiscal and monetary policies.²⁰⁹ The Mexican multinational companies' economies are growing, which serves as one of the main reasons why big businesses support the FTAA.²¹⁰ The Latin American Banking Federation strongly supports the FTAA because it would increase Latin banks' volume of services and trade.²¹¹ The Latin American Banking Federation and Thomas P. Noonan, president of Florida International Bankers Association, predict that the FTAA will yield similar results as NAFTA, which doubled the size of the Mexican Economy.²¹² To much surprise, even the Brazilian business community shows support for the FTAA.²¹³ Brazilian businesses reason that if they remain outside the FTAA, they would lose a substantial share of the U.S. market; a concern shared by many potential members of the FTAA.²¹⁴

1. Multinational Corporations (MNCs)

Multinational Corporations make up roughly 70 percent of all world trade.²¹⁵ Regional trade agreements have proved a powerful investment tool for MNCs as trade and investment continue to grow inseparable.²¹⁶ On a regional level, MNCs have "the ability to exploit all the existing

206. Elmilady, *supra* note 134, at 97.

207. *Id.*

208. Carranza, *supra* note 7, at 1038.

209. Elmilady, *supra* note 134, at 98.

210. *Id.*

211. Susan Stabley, *Latin Bank Group Gives Support to FTAA*, MIAMI TODAY, Nov. 13, 2003, available at <http://www.miamitodaynews.com/news/031113/story2.shtml>.

212. *Id.*

213. See Raymond Buve, *Conclusions, in FREE TRADE FOR THE AMERICAS? THE UNITED STATES' PUSH FOR THE FTAA AGREEMENT 197, 204-205* (Paulo Vizentini & Marianne Wiesebron eds., 2004).

214. *Id.* at 204

215. Barrier, *supra* note 85, at 25.

216. *Id.*

advantages of scale in their regional facilities,” providing protection from outside competition.²¹⁷ Countries prefer regional trade agreements over multilateral agreements because they fear foreign-owned MNCs in their territory, which may possibly threaten national security.²¹⁸ A Multilateral Agreement on Investment, which would allow MNCs to take advantage of global investment in nearly every country, will not likely gain support due to possible “loss of culture as tastes, practices, and ideas move across borders.”²¹⁹ To combat the concerns of MNCs, governments must provide the means to protect investment, which explains the trend to switch to regionalism.²²⁰ The FTAA attempts to fashion its investment protection plan after NAFTA chapter 11,²²¹ by “establish[ing] a dispute resolution mechanism . . . between a party and an investor of another party.”²²² While the exact level of protection remains uncertain, “the FTAA attempts to achieve a homogeneous legal framework that promotes intra-hemispheric investment.”²²³

“[A] large [percentage] of world trade occurs within a multinational [corporation].”²²⁴ In the United States, a significant number of exports and imports are traded intrafirm.²²⁵ Multinationals establish subsidiaries in other countries where parts can be cheaply produced, and they import from, or export to these establishments, depending on the corporation’s pattern of trade.²²⁶ Many U.S. MNCs, concerned with their competitive position on a global level, support this larger free-trade area.²²⁷ U.S. businesses hope the FTAA will help combat competition from EU firms by securing the Western Hemisphere in a single trade area and erecting “a common external tariff wall.”²²⁸ MNCs also anticipate the establishment of trade courts within Latin America where they would be allowed to sue the governments for health, labor, or environmental violations.²²⁹ If a NAFTA-style FTAA succeeds, U.S. government and big businesses will

217. *Id.* at 26.

218. *Id.*

219. *Id.*

220. *Id.* at 27.

221. Granados, *supra* note 142, at 222.

222. Brunelle, *supra* note 204, at 30.

223. Granados, *supra* note 142, at 224.

224. Paul, *supra* note 89, at 295 (discussing the importance of the role of multinational corporations in international trade).

225. *Id.*

226. *Id.*

227. Altieri, *supra* note 19, at 868.

228. *Id.*

229. Carranza, *supra* note 7, at 1032.

obtain access to the MERCOSUR market.²³⁰ Because MNCs have extreme confidence in the MERCOSUR economies, they gladly entertain this possibility.²³¹

D. Benefits if the FTAA were to Succeed

The FTAA negotiations failed to conclude in January 2005, but hemispheric political leaders maintain that the FTAA will create opportunities for all of the nations of the Americas, taking into account the different levels of development and economic potential.²³² The FTAA groups the most powerful economies with some of the smallest and poorest, and includes middle-income Latin American economies with the power to pursue individual strategies in the global economy.²³³ If agreed upon, the FTAA will surpass the structure of any other free-trade zone, including the multilateral trade regime of the WTO.²³⁴

1. Small Economies Gain from a Hegemon

Following the Cold War, the United States needed a means to reaffirm its worldwide dominance.²³⁵ The United States sought exclusive economic space and made efforts to increase exports in order to face the challenges presented by the EU and East Asia.²³⁶ From this dilemma eventually rose NAFTA, reaffirming U.S. hegemony as it exercised control and authority over less developed nations.²³⁷ In order to continue a strong level of global involvement, “[t]he American strategy evolved from containment to enlargement and engagement, as” it began actively pursuing the FTAA.²³⁸ The United States is considered an international hegemon, enforcing its rules and openly pursuing its goals internationally.²³⁹ “[H]egemonic stability theory [predicts] that smaller States gain even more than the international hegemon when the latter provides . . . leadership [necessary] for . . . a stable international regime of

230. *Id.*

231. *Id.* at 1034.

232. Myrtle D. Bishop & Samuel J. Chandler, *Caribbean Perspective: Opportunities and Challenges: The Caribbean Involvement in the Free Trade Area of the Americas*, 27 FORDHAM INT'L L.J. 909, 913 (2004).

233. *Id.* at 913-14.

234. *Id.* at 914.

235. Vizontini, *supra* note 1, at 14.

236. *Id.*

237. *See id.*

238. *Id.* at 14-16.

239. *See Carranza, supra* note 7, at 1037.

free trade.”²⁴⁰ Leaders in the FTAA negotiations established the Consultative Group on Smaller Economies to review and convey the concerns and interests of smaller economies to the Trade Negotiation Committee.²⁴¹

The Caribbean countries of the CARICOM Single Market Economy became involved with the FTAA due to the fact that other participants were to accord special and deferential treatment to the developing economies.²⁴² The Caribbean community has insisted that special and deferential treatment be accepted and offered by all negotiating partners, and that developed nations view it “as an important set of policy instruments,” not just as a concession.²⁴³ In Article XIII, Chapter XIII of the third draft of the FTAA Declaration, the parties are required to implement technical assistance programs and provide financial cooperation for developing economies.²⁴⁴ The assistance should strengthen institutions and improve infrastructure in order to level the playing field and destroy technical barriers to trade.²⁴⁵

2. Everyone Gains from a Hegemon

The combination of a growing WTO and a broadening agenda further complicates multilateral negotiations.²⁴⁶ In a regional trading area, like the FTAA, a limited membership combined with the significant power of a hegemon will likely produce fast results.²⁴⁷ Analysis of other regional agreements, such as NAFTA, illustrates a RTA’s powerful force.²⁴⁸ NAFTA led to an increase in international competitiveness in all three economies, and attracted an inward flow of investment.²⁴⁹ As a result, Mexico has a positive trade balance due to its increase in exports to the United States, which is twice than Brazil’s total exports to the United

240. *Id.* at 1038.

241. Bishop & Chandler, *supra* note 232, at 912.

242. *Id.* at 923.

243. *Id.*

244. FTAA, *supra* note 135, at art. 13.

245. *Id.*

246. Dijck, *supra* note 80, at 153.

247. *Id.*

248. Peter F. Allgeier, Deputy U.S. Trade Representative, Remarks at the Brazil Summit 2004, U.S.-Brazil Relations in the Context of the FTAA Negotiations in New York (Apr. 27, 2004), [available at](http://www.ustr.gov/assets/Document_Library/USTR_Deputy_Speeches/2004/asset_upload_file109_4408.pdf) http://www.ustr.gov/assets/Document_Library/USTR_Deputy_Speeches/2004/asset_upload_file109_4408.pdf (last visited Jan. 24, 2006).

249. *Id.*

States.²⁵⁰ NAFTA also created millions of jobs in Mexico and increased wages for export-oriented workers.²⁵¹ The cooperation among members with the economic reforms and other disciplines required by NAFTA explains much of its success, and convinced the United States that the thirty-four contracting parties to the FTAA could benefit from a similar agreement.²⁵²

Although Brazil has demonstrated little support for the FTAA, Brazil is aware that non-participation in a successful FTAA would cause severe consequences in foreign trade.²⁵³ The United States would gain market-share by exporting to Latin America, while Brazil would lose this market-share to the United States.²⁵⁴ In the past few years, Brazil increased its exports to the United States, resulting in a trade surplus, which Brazil continues to maintain.²⁵⁵ Brazilian businesses and the Brazilian government realized the importance of the United States presence and investment in Brazil; therefore, "it is unrealistic to ignore the necessity of working out free-trade agreements with the US."²⁵⁶ Brazil-U.S. trade relations have evolved from diametrically opposing one another, to serving as co-chairs of the FTAA negotiation process.²⁵⁷

IV. THE WTO LOSES INFLUENCE

As regionalism continues to spread quickly at the expense of multilateralism, the world trading system transforms into one consisting solely of preferential trading areas.²⁵⁸ Although regional trade agreements, like the FTAA, oppose the underlying principles of the WTO and GATT, the WTO and GATT continue to encourage their formation.²⁵⁹ The FTAA may trigger new discriminatory trade-policy initiatives regionally, where member "countries participat[e] in several overlapping but discriminatory trade agreements to maximize market access."²⁶⁰ In order

250. *Id.*

251. *Id.*

252. *Id.*

253. Jan Van Rompay, *Brazil's Strategy towards the FTAA*, in *FREE TRADE FOR THE AMERICAS? THE UNITED STATES' PUSH FOR THE FTAA AGREEMENT* 120, 126 (Paulo Vizentini & Marianne Wiesebron eds. 2004).

254. *Id.*

255. *Id.*

256. *Id.*

257. Allgeier, *supra* note 248.

258. Dijck, *supra* note 80, at 159.

259. Paul, *supra* note 89, at 328.

260. Dijck, *supra* note 80, at 159.

to enjoy the benefits offered by WTO membership, every member must assume the responsibility to uphold the promises made during the negotiation process.²⁶¹ However, opening its doors to countries with different economic systems and “radically different institutional arrangements in their economic structures” exonerates members of ever truly upholding every promise in the same manner as the next.²⁶²

Reconfirming its pessimistic view, the United States doubts the WTO’s ability to handle certain matters effectively in the future, particularly negotiations for a multilateral competition policy.²⁶³ The United States always doubted the influence and success of the WTO as it insisted on using its own court systems and resolutions in response to breaches of trade agreements.²⁶⁴ Although the European Community continues to back the WTO by submitting various proposals to the Competition Working Group and by taking a leading role in various areas, the developing nations tend to follow the U.S. lead.²⁶⁵

The United States plays a significant role in the erosion of enthusiasm for the WTO.²⁶⁶ Those who support multilateral trade development criticized the United States for re-directing its energies towards a bilateral, or regional trading system.²⁶⁷ The United States exhausts its energy on regional trade agreements, like its current involvement in the FTAA negotiations, preventing its ability to participate in and support multilateral negotiations, which is detrimental to the WTO’s current rounds of negotiations.²⁶⁸ Other member nations of various RTAs also take responsibility for the “[i]nstitutional harm [that] occurs when countries resort to bilateral or regional agreements rather

261. Michael K. Young, Symposium, *Global Trade Issues in the New Millennium: Lessons from the Battle Front: U.S.-Japan Trade Wars and their Impact on the Multilateral Trading System*, 33 GEO. WASH. INT’L L. REV. 753, 756 (2001).

262. *Id.* (questioning the flexibility and openness of the WTO and its ability to maintain a uniform structure in such an environment).

263. Chang, *supra* note 111, at 18 (suggesting that the United States’ position on the WTO will play a major role in the WTO’s possible demise).

264. Ewell E. Murphy, Jr., *Charting the Transnational Dimension of Law: U.S. Free Trade Agreements as Benchmarks of Globalization*, 27 HOUS. J. INT’L L. 47, 64 (2004).

265. *See generally* Chang, *supra* note 111, at 18 (the developing nations would rather have something secure to fall back on, such as the U.S., rather than representing their own interests on a multilateral level).

266. *See generally* Colin Picker, *Reputational Fallacies in International Law: A Comparative Review of United States and Canadian Trade Actions*, 67 BROOK. J. INT’L L. 85 (2004) (suggesting that the U.S. has a reputation in the world trading system for pursuing its own interest despite the WTO).

267. *Id.*

268. *Id.*

than multilateral agreements, resulting in the expenditure of significantly more of a country's limited negotiating resources on [RTAs] than on the ongoing WTO negotiations."²⁶⁹ The WTO's development will slow to a crawl as countries reach their trade goals through RTAs.²⁷⁰

A. Protectionism Still Prevalent

The GATT consists of multiple international rules, but it contains almost an equal number of exceptions.²⁷¹ It permits a member nation to protect its national security interests through any action considered necessary.²⁷² The most significant exception to the GATT principles allows members of customs unions and free-trade areas to grant preferential tariffs on imports from other member states.²⁷³ These regional agreements are inconsistent with non-discrimination and the idea of comparative advantage, benefiting those included and harming those excluded.²⁷⁴

U.S. protectionism traces back to the pre-WTO era, when its strength prevented the approval for the International Trade Organization.²⁷⁵ The United States also obtained a GATT waiver for agricultural subsidies.²⁷⁶ As the establishment of the GATT removed tariffs and other non-tariff barriers, the number of private trade barriers became more evident.²⁷⁷ Non-tariff and non-quota barriers include safety and health standards, licensing requirements, and other domestic measures that discourage the importation of goods and services.²⁷⁸ As the WTO considers its possible role in a future agreement on competition policy, the United States remains hesitant.²⁷⁹ The United States maintains the concern that "codification of competition rules at the WTO level would result in . . . a compromise in substantive standards for antitrust regulations

269. *Id.* at 86.

270. *Id.* at 85.

271. See generally THE TEXT OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE (GATT ed., Geneva, Switz., 1986) [hereinafter GATT], available at www.wto.org/english/docs_e/legal_e/06-gatt.pdf (last visited Feb. 13, 2006)

(nearly every article that contains rules and regulations is accompanied by an article containing an exception).

272. Paul, *supra* note 89, at 327.

273. *Id.* at 326.

274. *Id.* at 327.

275. PALMETER, *supra* note 29, at 119.

276. *Id.*

277. Young, *supra* note 261, at 769.

278. *Id.*

279. Chang, *supra* note 111, at 16.

so as to make them available for other developing countries.”²⁸⁰ Further, the United States believes that legal tools, such as unilateral or bilateral agreements, will more effectively resolve trade related competition conflicts, compared with multilateral agreements.²⁸¹

The GATT’s “dumping” provisions invite protectionist behavior through the granting of broad discretion to importing nations allowing them to determine when goods are sold for less than cost, to determine whether the importation caused a material injury, and to determine the appropriate countervailing duty necessary to repair such injury.²⁸² GATT Article VI allows a country to determine whether the effect of dumping or subsidizing caused a material injury to a domestic industry, or whether it materially retarded the establishment of a domestic industry.²⁸³ A similar form of disguised protectionism, countervailing duties, gives importing nations the authority to determine “whether a foreign government’s actions are a subsidy.”²⁸⁴

Some theories suggest that the level of protection for intellectual property rights may be overly protective.²⁸⁵ Industrialized nations protect most of their exports by trademark, patent, or copyright, using these intangible devices to convince consumers that their quality surpasses substitutable goods.²⁸⁶ The WTO’s anti-competitive trade regime “requires members to prohibit competition, benefiting exporters of protected products in industrialized countries,” which is embodied in the Trade Related Aspects of Intellectual Property Rights (TRIPS) Agreement.²⁸⁷ The agreement obligates all members to adopt laws conforming to international treaties, sets a high minimum standard for intellectual property rights, creates a standard for protection and enforcement, and requires the use of the WTO dispute settlement mechanism to settle disputes among WTO members.²⁸⁸ Unfortunately for the lesser developed

280. *Id.* at 16-17.

281. *Id.* at 17.

282. Paul, *supra* note 89, at 331; *see also* MATSUSHITA ET AL., *supra* note 8, at 303 (The term “dumping” refers to “sales below cost,” usually caused by intense competition in the market, a decline in demand in the market due to recession, forward pricing, or predatory pricing, all of which cause a material injury to a domestic industry).

283. *See* Article IV, in THE TEXT OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE 41, 41-44 (GATT ed., Geneva, Switz., 1986) [hereinafter GATT, Article IV], *available at* www.wto.org/english/docs_e/legal_e/06-gatt.pdf (last visited Feb. 13, 2006).

284. Paul, *supra* note 89, at 332.

285. *Id.* at 329.

286. *Id.* at 330.

287. *Id.*

288. MATSUSHITA ET AL., *supra* note 8, at 397-98.

countries, TRIPS provides another form of protectionism heavily used by strong economies, and subtly allows discrimination which violates the National Treatment principle.²⁸⁹

1. Private Barriers to Entry

The GATT system only dealt with public barriers to trade, ignoring the private trade barriers employed by private businesses.²⁹⁰ If private barriers to trade remain unchecked through the absence of an effective competition policy, the WTO's trade policy goal (to liberalize and open markets) will fail.²⁹¹ "[T]he current WTO . . . does not have legally binding rules that effectively address trade-restrictive anticompetitive practices."²⁹² Although trade policy promotes trade, it also protects trade by providing trade remedy laws, serving protectionist purposes by allowing domestic industries to correct injuries they received from unfair pricing practices.²⁹³ The extent to which the domestic producers can apply trade remedy laws, and the extent to which these remedy laws unfairly affect competition remains largely unregulated.²⁹⁴

Private barriers often surface in the form of patents, know-how agreements, or some other type of intangible licensing agreement.²⁹⁵ For example, a licensor may require a licensee to purchase components needed to produce products under a patent from the licensor or a third party that the licensor designates.²⁹⁶ Also, a licensor may deprive the licensee of any incentive to develop new technology by requiring the latter to concede any improved technologies.²⁹⁷ Although different countries have different opinions on restrictive business practices, the TRIPS agreement, designed specifically to regulate intellectual property, recognizes that some practices will continue to adversely affect "trade and may impede the transfer and dissemination of technology."²⁹⁸

289. See generally Paul, *supra* note 89, at 329-30 (discussing the fact that protection of intellectual property rights and ideas costs developing countries enough to where larger economies are able to protect the intellectual property market from the less developed).

290. Chang, *supra* note 111, at 13.

291. Kennedy, *supra* note 115, at 588.

292. Chang, *supra* note 111, at 34.

293. Kennedy, *supra* note 117, at 589.

294. *Id.* at 589-590.

295. MATSUSHITA ET AL., *supra* note 8, at 435.

296. *Id.*

297. *Id.*

298. *Id.* at 436.

2. Breaching of Trade Agreements

An enduring problem with international trade relations resides in how one should punish a losing respondent in a claim for breach of trade agreement.²⁹⁹ In a slightly subtle way, the WTO allows for protectionism once again.³⁰⁰ NAFTA follows a system created by the GATT and WTO, which permits the winner of a claim for breach to “withhold[] a compensatory amount of trade benefits that NAFTA otherwise requires the winner to concede.”³⁰¹ Also, the loser may “pay an annual monetary assessment” similar to a prepaid fee that equals half of the otherwise suspendible benefits, which the U.S. may use in all of its future trade agreements.³⁰²

The current draft agreement of the FTAA furthers the idea of “suspension of benefits,” allowing the injured party to suspend benefits up to a certain level decided upon by an established neutral panel or the Appellate Body of the FTAA dispute settlement system.³⁰³ The draft agreement provides the potential parties with much discretion as to what the injured party may consider when applying procedures and suspending benefits.³⁰⁴ Another ambiguity in the agreement, allowing “modification of measures for the suspension of benefits . . . if justified,” lets the party complained against justify why they deserve more protection.³⁰⁵

3. Nations Ignore Prohibition of Protectionism

In the world trade system, nations acquire a wide spectrum of reputations, depending on their tendency to obey or disobey the rules.³⁰⁶ Although protectionism is prohibited, states such as the U.S. and Canada show little shame when employing domestic trade remedies and providing subsidies in a manner which results in protectionism.³⁰⁷ “[G]ood players [in the world trade system] are states that employ protectionist measures sparingly and transparently.”³⁰⁸

299. Murphy, *supra* note 264, at 64-65.

300. *See generally id.* at 65 (providing another example where the WTO allows the winner of a trade dispute to punish the losing respondent with much of its own discretion).

301. *Id.*

302. *Id.*

303. FTAA, *supra* note 135, at ch. 23, arts. 33.1, 33.2.

304. *See id.* at arts. 33.3, 33.4, 33.5, 33.6.

305. *See id.* at art. 33.7.

306. *See generally* Picker, *supra* note 266, at 72-76 (for a discussion of the reputations nations acquire, including trade related reputations, and their effect on international law).

307. *Id.* at 97-99.

308. *Id.* at 96.

B. RTAs Have Their Own Agenda

1. Free Trade Area of the Americas

Like the WTO, the Western Hemisphere will have its own code of conduct, regulating segments from subsidies to intellectual property rights, and from dispute settlement to competition policies.³⁰⁹ In most chapters of the FTAA Draft Agreement, the text recognizes that “the Marrakesh Agreement Establishing the World Trade Organization . . . govern[s] the rights and obligations of the Parties” unless otherwise provided in said chapter.³¹⁰ It appears that the WTO takes a back seat to the FTAA when the Draft Agreement allows for express provisions to provide alternative rules and obligations than those provided by the WTO.³¹¹

The FTAA negotiations on subsidies disapprove of “perverse subsidies” that harm social development, the environment, or the economy.³¹² On the other hand, some substantial economic sectors in the Americas remain heavily subsidized, particularly the agriculture, energy, and transportation sectors.³¹³ The negotiations seek to further the application of “the WTO Agreement on Subsidies and Countervailing Measures and [possibly] . . . to improve . . . ‘the operation and application of trade remedy laws’ within the [Western] [H]emisphere.”³¹⁴ Although the FTAA Draft Agreement supports the WTO in the area of subsidies, the text was written to guide and protect the members of the region.³¹⁵

In regard to intellectual property rights, the FTAA provides proscriptive measures explaining what the countries should do, as opposed to other rules describing what countries should not do.³¹⁶ The Draft Agreement promotes technological innovation in the Americas and

309. See generally Segger, *supra* note 140, at 1183-1204 (illustrating the sustainable development in the FTAA negotiations in the areas of subsidies, intellectual property rights, and competition policy).

310. See generally FTAA, *supra* note 135, at ch. 15, § A, art. 2 (This chapter, as well as nearly all others of the draft agreement, provide for recognition of the WTO, which governs the rights and obligations of the parties, unless the FTAA provides otherwise).

311. *Id.*

312. Segger, *supra* note 140, at 1187.

313. *Id.* at 1188.

314. Bishop & Chandler, *supra* note 232, at 911 (citing Free Trade Area of the Americas: Fourth Trade Ministerial Meeting, Declaration of Ministers, ann. II, San Jose, Costa Rica, Mar. 19, 1998, available at http://www.ftaa-alca.org/ministerials/SanJose/SanJose_e.asp); see also MATSUSHITA ET AL., *supra* note 8, at 264. (SCM defines a subsidy and provides three categories of subsidies, allowing some and not others).

315. See FTAA, *supra* note 135, at ch. 15.

316. Segger, *supra* note 140, at 1190.

encourages the transfer and dissemination of technology within the region.³¹⁷ The Draft Agreement also requires that future members continue to give effect to previous WTO intellectual property agreements, and that each country accord National Treatment and Most-Favored Nation status to other members of the FTAA.³¹⁸

Furthermore, the Draft Agreement establishes a dispute settlement process unique to only FTAA members in order to preserve the rights and obligations of the parties under the Agreement.³¹⁹ The Agreement provides for a “neutral panel” upon the request of a party in consultation, consisting of members that “have expertise . . . in: law, international trade, other matters covered by this Agreement, or the resolution of disputes arising under international trade agreements.”³²⁰ The drafters wrote the Agreement in hope of giving effective access to all FTAA members to the dispute settlement process, recognizing the needs of lesser developed countries, providing several choices of forums, and catering to the various needs of all parties.³²¹

Chapter XIX of the Draft Agreement, discussing competition policy, fails to make any reference to the WTO.³²² It asks that each party “adopt or maintain competition laws or regulations, at a national or subregional level, to proscribe anticompetitive . . . conduct . . . [so as to promote] economic efficiency and consumer welfare.”³²³ Consistent with other chapters, this chapter provides exceptions, and a committee on competition, designed to monitor the progress and problems that might occur in the FTAA.³²⁴ The variety of size and economic development in the FTAA suggests that the FTAA needs a strong competition policy prepared to help small producers enter a monopolistic market and to discipline those overstepping their boundaries.³²⁵ Because international competition laws emerged less than a decade ago, the FTAA has the opportunity to group economic objectives and non-economic public policy goals into its competition policy.³²⁶ The youth of international competition

317. FTAA, *supra* note 135, at ch. 20 § A, art. 2.1.

318. *Id.* at § A, arts. 2, 5 and § B, art. 1.

319. FTAA, *supra* note 135, at ch. 23, § A, art. 5.

320. *Id.* at § B, art. 12.3.

321. *Id.* at arts. 6, 7, 8.

322. *See generally*, FTAA, *supra* note 135, at ch. 19 (neglecting to reference the WTO in the chapter).

323. *See id.* at § B, art. 6.

324. *See id.* at § B, art. 7 and § C, art. 12.

325. Segger, *supra* note 140, at 1198-1199.

326. *Id.*

laws gives the FTAA a chance to compete with the WTO in exploring and developing internal laws.³²⁷

The FTAA strives to be WTO compatible, yet it surpasses every structure that has been contemplated by other regional trading blocs.³²⁸ In general, regional trade agreements further economic, security, and foreign policy goals,³²⁹ yet, the Agreement is designed to apply rules in areas that "have never been successfully incorporated into the multilateral trade negotiations," such as competition, investment, and government procurement.³³⁰ Because GATT principles of Most-Favored Nation and National Treatment are greatly abused through the many exceptions that the GATT provides, the FTAA will ultimately lead to the erosion of the WTO as it pursues its own goals and objectives.³³¹ "Article XXIV has proven weak and irrelevant over the decades," and only continues to support exceptions that will benefit the members of the FTAA, providing nearly an entire hemisphere with special and deferential treatment.³³² Despite the lack of enthusiasm that the FTAA conveys for the WTO, the FTAA, "while having to be WTO compatible, can be WTO-plus in terms of both scope of coverage and depth of obligations."³³³

C. International Law: Is It Really Obeyed?

As technology and transnational investment continue to accelerate globalization, the world will face many challenges and changes.³³⁴ Because only forty-nine of the world's hundred largest economies are nations and fifty-one are corporations, traditional nation states slowly become more unnatural.³³⁵ "[G]lobalization [lessens] the authority of less influential nations" because larger economies of nations and corporations manipulate the market to their advantage.³³⁶ On the contrary, economic superpowers, like the United States, find few obstacles to pursuing their goals and

327. See generally *id.* at 1197-1200 (because the WTO has not yet established a multilateral agreement on competition policy, new RTAs, like the FTAA or NAFTA, have the ability to develop and influence this new area of international law).

328. Bishop & Chandler, *supra* note 232, at 914.

329. Picker, *supra* note 9, at 274.

330. Bishop & Chandler, *supra* note 232, at 914.

331. See generally Picker, *supra* note 9, at 284-287 (suggesting that the WTO will become irrelevant as large RTAs abuse the GATT through its provided exceptions and pursue their own goals).

332. *Id.* at 284.

333. Bishop & Chandler, *supra* note 232, at 914.

334. Murphy, *supra* note 264, at 49-50.

335. *Id.* at 50.

336. *Id.* at 53.

interests.³³⁷ “U.S. lawyers and U.S. policymakers tend to be dismissive of *international* law as an operative social force” even though most transactions that they make fall within a transnational scope.³³⁸

The WTO legal system is part of a larger system of public international law which incorporates traditional sources of law into the WTO agreements, consisting of customary law, “general principles of law, and other international instruments.”³³⁹ In regard to compliance, the WTO Dispute Settlement Body attempts to regulate international trade by finding an impairment, adopting a report, and recommending that the offending country remedy the injury within a reasonable amount of time.³⁴⁰ If that process fails, the Dispute Settlement Body can apply sanctions in the form of suspension or withdrawal of tariff concessions.³⁴¹ Although this seems effective, the WTO lacks a strong enforcement measure that is likely to compel compliance.³⁴² The larger economies, such as the United States, the EU, Japan, and China, have the most leverage to enforce rulings and compel compliance from smaller economies; however, the issue remains as to whether the larger economies would obey adverse rulings, and whether anyone could force them to comply.³⁴³

“[T]o date, there are no firmly established principles of international law that would effectively resolve the issues arising from extraterritorial application of competition laws.”³⁴⁴ Jurisdictional principles remain disputed, and a unanimous agreement to a single set of principles will not likely be achieved.³⁴⁵ A number of nations recently chose to cooperate bilaterally with others on the issue of competition policy and enforcement; however, a multilateral agreement dealing with similar issues will likely cause more disputes than it will solve.³⁴⁶ Bilaterally, the two parties concerned can easily address their own unique issues, and bilateral agreements may also act as a transition into plurilateral or multilateral agreements on international cooperation.³⁴⁷

337. *Id.* at 54.

338. *Id.* at 55-56.

339. MATSUSHITA ET AL., *supra* note 8, at 76.

340. Paul, *supra* note 89, at 334.

341. *Id.*

342. *Id.*

343. *See generally id.* at 334-35 (illustrating the WTO Dispute Settlement Body's lack of enforcement, and suggesting that the EU, Japan, China, and the U.S. are the only powers with enough leverage to enforce rulings).

344. MATSUSHITA ET AL., *supra* note 8, at 564.

345. *See id.*

346. *See id.* at 569-70.

347. *See id.* at 570.

V. CONCLUSION

Many challenges lie ahead for the WTO, as it must address the ever-changing needs of the future, "integrate broader social concerns into its agenda," and respond to the needs of lesser developed countries.³⁴⁸ The WTO's youth and unprecedented dispute settlement system will determine whether it will succeed or fail in the future coupled with whether it can maintain its composure while addressing the challenges.³⁴⁹ Besides future challenges, the WTO has numerous challenges it is currently facing. The liberal interpretation of the GATT gives WTO members much discretion as to what trade policies and what forms of domestic protection they wish to pursue.

Regional Trade Agreements support the ideals embodied in the WTO; however, they may be responsible for the WTO's demise. Internally, they support trade liberalization and despise discrimination, yet externally they refuse to extend the same preferential treatment. RTAs respect the Most-Favored Nation and National Treatment principles internally, yet they discriminate externally. The United States once opposed free-trade agreements, but it quickly abandoned such feelings upon the formation of the European Common Market.³⁵⁰ Also, Mexico desired "to attract American investment and increase trade," which eventually led to the formation of NAFTA.³⁵¹ Fearing European competition and lusting for "control over the main assets in Latin American economies, thus consolidating the southern part of the hemisphere as its secure economic backyard," the idea of the FTAA logically followed NAFTA.³⁵²

Comprised of some of the world's largest economies, a wide variety and hefty supply of natural resources, and diverse human capital, the FTAA proves virtually self-sufficient.³⁵³ While the FTAA Draft Agreement relies heavily on the fundamental principles provided by the GATT and WTO, it also includes much of its own influence, offering protection and benefits to its potential members, and it addresses new topics unregulated by the WTO.³⁵⁴ If the FTAA succeeds, there will be

348. *Id.* at 589.

349. MATSUSHITA ET AL., *supra* note 8, at 590.

350. Buve, *supra* note 213, at 197.

351. *Id.*

352. *Id.* at 199.

353. *See id.* at 197-206.

354. *See generally* The Free Trade Area of the Americas Draft Agreement, Nov. 21, 2003, available at http://www.ftaa-alca.org/FTAADraft03/Index_e.asp (last visited Feb. 13, 2006) (summarizing the general ideals of the FTAA).

little need to deal outside the group. Trade deals will evolve from the multilateral, country-to-country negotiations, to regional, RTA-to-RTA negotiations. As the world's hegemonic leaders continue to play by their own rules and regionalism continues to grow, the question remains: Will the WTO succeed, or will it erode into history?

