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Hegelian Reflections on Unilateral Action in the World Trading System

Raj Bhala

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Raj Bhala**
Professor of Law
The George Washington University
School of Law,
2000 H Street, N.W.
Washington, D.C. 20052
Tel. 202-994-2266
Fax 202-994-5157
E-mail: rkbhal@facstaff.wm.edu

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** Professor of Law, The George Washington University School of Law, Washington D.C., A.B. (Economics, Sociology), 1984, Duke; M.Sc.(Economics), 1985, London School of Economics; M.Sc. (Industrial Relations), 1986, Oxford; J.D., 1989, Harvard Law School. Professor Bhala is the author of *International Trade Law: Cases and Materials* (Michie 1996) and the co-author, along with Professor Kevin Kennedy, of *World Trade Law* (Lexis Law Publishing 1998).

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I.
INTRODUCTION.

In two years of travel for the Clinton administration in Asia, Europe, and Latin America, I have found foreign leaders' most recurrent concern to be that America is moving away from its historically strong support for the multilateral trading system. Rather than embrace the new World Trade Organization (WTO) and bring all its trade disputes before that body, the United States, they charge, is trying to resolve its problems through bilateral agreements at best or unilateral fiat at worst. This substitution of the law of the jungle for established international rules, the critics say, encourages unbridled mercantilism, protectionism, and heightened political tension between countries, weakening global trade.
Jeffrey E. Garten, former U.S. Under Secretary of Commerce for International Trade, *Is America Abandoning Multilateral Trade?*, 74 FOREIGN AFFAIRS 50 (1995).

What explains the persistence of unilateral action in American trade policy? Asked differently, why does the U.S. retain its statutory arsenal of unilateral trade weapons, such as Section 301, and use or threaten to use these weapons on

so many occasions, including disputes with our key Asian trading partners in important sectors such as financial services? The problem is perplexing in light of two facts: the introduction of an improved multilateral dispute resolution mechanism under the auspices of the Uruguay Round agreements, and the mixed empirical record of success of actual or threatened use of unilateral trade action.

Existing theories of unilateral action do not offer a resolution. Fresh reflections on the problem of persistent unilateralism are needed. Toward this end, this article borrows four concepts from the great German idealist philosopher, Georg Wilhelm Friedrich Hegel (1770-1831), and applies them to the problem: the *Geist*, the dialectic, the Hegelian (as distinct from what Hegel would call the "negative" or "classical liberal") view of freedom, and the Hegelian approach to international law.

The *Geist* refers to collective mind. It is a dynamic concept that evolves through a dialectical process of sublation, that is, through an opposition of a pair of ideas — a thesis and antithesis — that is replaced by a new synthesis. This article "diagnoses" persistent unilateralism as the *Geist* of current American trade policy. What pair of opposites is the "cause" of this *Geist*? It is a free trade thesis set against a fair trade antithesis. As yet, no resolution to this opposition has emerged.

What proof exists that this opposition underlies the present *Geist*? This article finds evidence of the free trade - fair trade dialectic in the rhetoric of the debate surrounding Congressional efforts to enact fair trade in financial services legislation in the early and mid 1990s. There are two categories of rhetoric: first, "free trade, but. . ." statements in which a speaker simultaneously affirms a commitment to free trade and a concern about unfair trading practices by other countries; and second, "scorecard" statements in which a speaker implicitly acknowledges the existence of a global financial services market, but simultaneously highlights imbalances in America's financial services trade with certain other countries. Both categories of rhetoric evince a free trade - fair trade dialectic animating within the speaker and, therefore, according to Hegelian principles, in the present *Geist*.

The Hegelian view of freedom explains why the *Geist* of persistent unilateralism, generated by the free trade - fair trade dialectic, lingers and has not yet graduated to a higher evolutionary stage. A higher stage would be characterized by a more accurate conception of freedom than existed in the previous stage. For Hegel, the ultimate evolutionary stage of the *Geist* is characterized by true freedom. Yet, in its trade policy, the U.S. wrongly conceives of freedom in what Hegel would call the "negative" (or "classical liberal") sense as the ability to withdraw from commitments. The mistake is evidenced by America's crude "go it alone" position in the 1993-95 General Agreement on Trade in Services (GATS) negotiations, particularly the self-declared U.S. exemption from the most-favored nation (MFN) principle. This misconception of freedom inhibits the progression of the *Geist* of U.S. trade policy.

To "cure" this problem, persistent unilateralism caused by the free trade - fair trade dialectic, the U.S. must shed the negative (or classical liberal), and

adopt the Hegelian view of freedom in the context of the world trading system. The Hegelian view holds that freedom involves the creation of conditions necessary for its true expression, and these conditions include not only the assertions of rights (which the U.S. does through unilateral action), but also the temperance of such assertions by an ethical will (which is not a feature of unilateral trade action). As a result, true freedom is expressed in a context of laws and norms immanent in the ethical will, such as those created by the post-Uruguay Round world trading system.

Ironically, to embrace the Hegelian view of freedom, U.S. trade policy makers, jurists, scholars, and commentators must abandon the Hegelian approach to the enforceability of international law. It is outdated. They must develop a reservoir of positive experience within the Uruguay Round dispute settlement mechanism. That reservoir could lead to the emergence of a new synthesis to replace the current free trade - fair trade dialectic. This synthesis, dubbed "multilateral freedom" here, would safeguard the autonomous action of the U.S. within an orderly world trading community.

A. The Problem: Persistent Unilateralism.

In the wake of the 1993 Uruguay Round agreements,[1] why has the United States not transferred all of its outstanding international trade disputes to the new World Trade Organization (WTO)? Why does the U.S. refuse to forswear implicit and overt threats of unilateral trade action? Put in statutory terms, why has the U.S. not repealed Section 301 of the Trade Act of 1974, as amended, which authorizes unilateral trade action against foreign government acts, policies, or practices that the U.S. deems unfair?[2] Indeed, why has the U.S. enacted new unilateral trade action statutes such as the 1996 Helms-Burton Act[3] and the

1. The agreements were finalized on December 15, 1993 and took effect on January 1, 1995. The term "Uruguay Round agreements" is commonly used to include the Agreement Establishing the World Trade Organization, the four Annexes to this Agreement (Annex 1A contains the Multilateral Agreements on Trade in Goods; Annex 1B contains the General Agreement on Trade in Services; Annex 1C contains the Agreement on Trade-Related Aspects of Intellectual Property Rights; Annex 2 contains the Understanding on the Rules and Procedures Governing the Settlement of Disputes; Annex 3 contains the Trade Policy Review Mechanism; and Annex 4 contains the Plurilateral Trade Agreements), the Ministerial Decisions and Declarations that accompany the Agreement (for example, Decisions Relating to the General Agreement on Trade in Services), and the Understanding on Commitments in Financial Services that accompanies the Agreement. The Uruguay Round agreements are reprinted in MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING THE URUGUAY ROUND TRADE AGREEMENTS, TEXTS OF AGREEMENTS IMPLEMENTING BILL, STATEMENT OF ADMINISTRATIVE ACTION AND REQUIRED SUPPORTING STATEMENTS, 103D CONG., 2D SESS. 1318-2061, H.R. DOC. NO. 316, vol. 1 (1994).

2. *See* 19 U.S.C. §§ 2411-2420. It is assumed the reader is familiar with Section 301. For a discussion of how the statute operates and a critique of it, *see* RAJ BHALA, INTERNATIONAL TRADE LAW: CASES AND MATERIALS, ch. 11 (1996).

3. Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 (also known as the Helms-Burton Act), Pub. L. No. 104-114 (codified as 22 U.S.C. § 6021 (Mar. 12, 1996)). Coverage of the Helms-Burton controversy has been intense. For brief, recent discussions, *see* Deroy Murdock, *Cuba: This Island of Lost Potential*, WORLD TRADE, Aug. 1997, at 28 (quoting an EU ambassador as saying the Helms-Burton Act "is stirring anti-Americanism in Europe and a sense that this is ugly-American arrogance," and quoting the Canadian Trade Minister as saying the Act is "an American bullying tactic"), Malcom Wilkey & Craig R. Giesze, *Helms-Burton: Two Viewpoints*, 26

1996 Iran-Libya Sanctions Act?[4] These four questions boil down to a simple but nagging problem: What explains the persistence of threatened or actual unilateral trade action by the United States in the post-Uruguay Round world trading system?[5]

Why explore the problem of persistent unilateralism? The answer is not simply that it is a "hot" topic in international trade law, because such a topic is not necessarily an intellectually challenging one. Rather, the answer is that it is a perplexing topic. Two facts make it especially perplexing: the existence of a new and improved multilateral dispute resolution mechanism under the auspices of the WTO; and the mixed, if not outright poor, empirical record of results from the actual use of unilateral action. These two facts imply that unilateral action ought to be unnecessary — and, yet, it persists.

1. The New and Improved WTO Dispute Resolution Mechanism.

America's unilateral behavior in trade matters,[6] its resolve to "go it alone" when it perceives high stakes are involved, cuts against the multilateral spirit of the Uruguay Round agreements, most notably the Understanding on the Rules

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ABA INT'L L. NEWS, at 1 (spring 1997) (setting forth arguments in support of and opposition to the Act) and Gary G. Yerkey, *EU Will Continue to Oppose U.S. Sanctions, Despite Helms-Burton Agreement, Aide Says*, 14 Int'l Trade Rep. (BNA), at 809 (May 7, 1997) (reporting the EU's continued opposition to the Act despite reaching an understanding with the U.S. to suspend any action against the U.S. in the WTO).

4. Pub. L. No. 104-172 (Aug. 5, 1996), 110 Stat. 1541 (codified at 50 U.S.C. § 1701). *See generally* Laurie Lande, *Pariahs Forever?*, WORLD TRADE, Aug. 1997, at 18 (discussing the Act).

5. This article uses the terms "unilateral action" and "unilateral trade action" interchangeably to encompass actual and threatened retaliatory measures authorized under Section 301, and actual and threatened sanctions imposed under a variety of statutes to serve one or more policy objectives. Accordingly, "unilateral action" or "unilateral trade action" are *broad* terms, and could conceivably cover the denial of most favored nation or other preferential trading status.

This broad approach is akin to the definition of "economic sanction" offered by Hufbauer and Schott, which is "the deliberate government-inspired withdrawal, or threat of withdrawal, of 'customary' trade or financial relations." GARY C. HUFBAUER & JEFFREY J. SCHOTT, ECONOMIC SANCTIONS RECONSIDERED 2 (1985).

In contrast, the terms "unilateral action" and "unilateral trade action" are broader than the term "economic sanction" as defined by Professor Carter. That definition is a "coercive economic measure[ ] taken against one or more countries to force a change in policies, or at least to demonstrate a country's opinion about the other's policies." BARRY E. CARTER, INTERNATIONAL ECONOMIC SANCTIONS 4 (1988) (citations omitted). Professor Carter's definition is narrow because it excludes threatened measures, and because a measure must be aimed at changing the behavior of the target country. A "unilateral action" or "unilateral trade action" may be imposed or threatened for other or additional reasons, such as defensive purposes (*i.e.*, national security, such as to keep an enemy state from obtaining military weapons or technology), or communicative purposes (*i.e.*, symbolism reasons, to show displeasure at the behavior of a target state, such as with respect to human rights). The terms "unilateral action" and "unilateral trade action" as used herein are broader than the definition of "economic sanction" offered by Professor Malloy. He defines "economic sanction" to mean "any country-specific economic or financial prohibition imposed upon a target country or its nationals with the intended effect of creating *dysfunction* in commercial and financial transactions with respect to the specified target, in the service of specified foreign policy objectives." MICHAEL P. MALLOY, ECONOMIC SANCTIONS AND U.S. TRADE § 1.2.1, at 13 (1990) (emphasis added). This definition excludes threatened measures, Section 301 retaliatory measures, and actual or threatened withdrawal of preferential trading status. *See id.* §§ 1.2.2, 1.2.3, 1.3, at 16-22.

6. For a comprehensive empirical study of all Section 301 cases concluded between 1975-93, *see* THOMAS O. BAYARD & KIMBERLY ANN ELLIOTT, RECIPROCITY AND RETALIATION IN U.S. TRADE

and Procedures Governing the Settlement of Disputes (commonly referred to as the "DSU").[7] The DSU rectifies the four most egregious problems that plagued the pre-Uruguay Round multilateral dispute resolution system, namely, delays, blockage, compliance, and remedial action.[8]

First, the DSU establishes fixed time periods for virtually every stage of the dispute resolution process. Accordingly, disputes among WTO Members are resolved swiftly, generally within a year.[9] Second, adoption by the WTO Dispute Settlement Body (DSB) of reports of WTO dispute resolution panels or the WTO Appellate Body may not be blocked by a single Member such as the losing party. Rather, there must be a consensus of WTO Members not to adopt such a report, where "consensus" means that no Member offers a formal objection.[10] (Likewise, it is no longer possible for a single Member to block the

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POLICY (1994). The Bayard-Elliott study is discussed below. *See infra* notes 18-22, 35 and accompanying text.

7. There are a number of excellent overviews of the DSU. *See, e.g.*, Richard O. Cunningham & Clint N. Smith, *Section 301 and Dispute Settlement in the World Trade Organization*, *in* THE WORLD TRADE ORGANIZATION 581, 584-89 (Terence P. Stewart ed., 1996); Richard O. Cunningham, *Dispute Settlement in the WTO: Did We Get What The United States Needs, Or Did We Give Up The Only Remedy That Really Worked?*, *in* THE GATT, THE WTO AND THE URUGUAY ROUND AGREEMENTS ACT 547, 557-63 (Practising Law Institute ed. 1995); EDMOND MCGOVERN, INTERNATIONAL TRADE REGULATION ch. 2 (1986); 1 FRANK WARREN SWACKER ET AL., WORLD TRADE WITHOUT BARRIERS ch. 6 (1995); Tina M. Stikas & Katheryn E. Heine, *The World Trade Organization and Dispute Settlement Under The Uruguay Round Agreements*, *in* THE COMMERCE DEPARTMENT SPEAKS ON INTERNATIONAL TRADE AND INVESTMENT — 1994 155-69 (Practising Law Institute ed. 1994); Judith H. Bello & Alan F. Holmer, *U.S. Trade Law and Policy Series No. 24: Dispute Resolution in the New World Trade Organization: Concerns and Net Benefits*, 28 INT'L LAW. 1095 (1994). For a concise discussion of the ways in which the DSU resolves deficiencies in the pre-Uruguay Round dispute settlement mechanism, *see* Judith H. Bello & Alan F. Holmer, *U.S. Trade Law and Policy Series No. 21: GATT Dispute Settlement Agreement: Internationalization or Elimination of Section 301?*, 26 INT'L LAW. 795, 797-98 (1992).

8. For discussions of the weaknesses inherent in the pre-Uruguay Round dispute resolution procedures, *see* JOHN WHALLEY & COLLEEN HAMILTON, THE TRADING SYSTEM AFTER THE URUGUARY ROUND 55-57, 136-41 (1996), Cunningham, *supra* note 7, at 547, 552-57 (Practising Law Institute, ed. 1995), and Ronald A. Brand, *Competing Philosophies of GATT Dispute Resolution in the Oilseeds Case and the Draft Understanding on Dispute Settlement*, 27 J. WORLD TRADE 117, 119-22, 126-35 (1993). In addition, the Clinton Administration's *Statement of Administrative Action* on the DSU provides contrasts between the provisions of the DSU and the pre-Uruguay Round system. *See Statement of Administrative Action on the Understanding on Rules and Procedures Governing the Settlement of Disputes*, *in* MESSAGE, *supra* note 1, at 1008-1019.

9. *See, e.g.*, DSU arts. 1 (time period for disputes concerning rules and procedures governing a dispute settlement proceeding), 4 (time period for consultations), 5 (time period for use of good offices, conciliation, and mediation), 6 (time period for establishment of a panel), 8.7 (time period for selection of panelists), 12 (panel procedures, including deadlines), 15.2 (time period for interim review of draft panel report), 16 (time period for adoption of WTO panel reports), 17 (time period for review of panel report by Appellate Body), 20 (time frame for decisions of Dispute Settlement Body), 21 (time period for surveillance of implementation of recommendations and rulings contained in a panel or Appellate Body report), and 22 (time period for compensation and suspension of concessions), *in* MESSAGE, *supra* note 1, at 1654, 1657-60, 1662, 1664-65, and 1667-68.

10. *See* DSU arts. 2.4 n.1, 16.4, *in* MESSAGE, *supra* note 1, at 1655, 1664; *Statement of Administrative Action on the Understanding on Rules and Procedures Governing the Settlement of Disputes*, *in* MESSAGE, *supra* note 1, at 1008, 1014. Regarding the operation of the Appellate Body, *see* DSU arts. 17-19 *in* MESSAGE, *supra* note 1, at 1665-67 (discussing creation of a standing seven person Appellate Body to hear appeals from panel cases, appeals of a panel report to the Body, hearings by three persons from the Body to review legal issues raised in a panel's report, adoption of

creation of a panel to hear a dispute.[11]) Third, in order to ensure compliance with recommendations and rulings in a panel or Appellate Body report that is adopted by the DSB, the DSU requires a losing party to notify the DSB of its intentions with respect to implementation of the adopted report, and the DSB monitors such implementation.[12] Finally, if an adopted report is not implemented by a losing party, then remedial action (such as suspending concessions, or possibly cross-sectoral retaliation, *i.e.*, retaliation against a good or service that is different from the good or service that is the subject of the dispute) by the prevailing party may not be blocked by the losing party.[13] The DSB must authorize such retaliation, and any disagreement about the level of retaliation is automatically referred to expeditious arbitration. This last point is particularly important because, in some respects, DSB-condoned retaliation is a "multilateral Section 301" action. Indeed, it has been suggested that "the [Dispute Settlement] Understanding internationalizes section 301 by providing dramatically more effective international enforcement against unfair traders."[14]

Given these four improvements, it is perhaps not surprising that a large number of cases have been brought to the WTO since it was established on January 1, 1995. For example, as of July 1, 1997, the WTO's internet web site indicated there were 88 consultation requests, 12 active cases, 5 completed cases, and 17 settled or inactive cases.[15] It should also not come as a surprise that the conventional wisdom holds that the frequency of use of the DSU is a "tribute to the new [dispute settlement] process," the tendency toward settlement is "very encouraging," and the trends in the use of the new procedures are an overall source of "great satisfaction."[16] Indeed, even the U.S. is actively using the WTO as a forum for dispute resolution.[17] Frequent use by the U.S. is not

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a Body report unless there is a consensus not to adopt the report, communications with the Body, and recommendations of the Body).

11. Article 6.1 of the DSU requires the DSB to establish a panel if a complaining party so requests (unless the DSB decides by consensus not to establish a panel). *See* DSU art. 6.1, *in* MESSAGE, *supra* note 1, at 1659.

12. *See* DSU art. 21, *in* MESSAGE, *supra* note 1, at 1667-68; *Statement of Administrative Action on the Understanding on Rules and Procedures Governing the Settlement of Disputes*, *in* MESSAGE, *supra* note 1, at 1008, 1015-16.

13. *See* DSU art 22.2-.6, *in* MESSAGE, *supra* note 1, at 1668-71.

14. Bello & Holmer (1992), *supra* note 7, at 799.

15. *See* WTO, *Overview of the State-of-Play of WTO Disputes* (visited July 1, 1997) <http://www.wto.org/dispute/bulletin.htm>.

16. John H. Jackson, *The WTO Dispute Settlement Procedures: A Preliminary Appraisal*, *in* THE WORLD TRADING SYSTEM: CHALLENGES AHEAD 153, 156, 164 (Jeffrey J. Schott ed., 1996). *See also Sharp Increase Seen in WTO Disputes, Including Many from Developing Countries*, 13 Int'l Trade Rep. (BNA) Oct. 23, 1996, at 1634 (noting that the "'tremendous proliferation' of trade disputes brought before the World Trade Organization, many of them brought by developing countries, demonstrates the confidence countries have in the body's dispute settlement system"); Frances Williams, *Antagonists Queue for WTO Judgment*, FIN. TIMES, Aug. 8, 1996, at 6 (arguing that the number of cases handled by the WTO "represents an important vote of confidence in the WTO's strengthened dispute settlement procedures"); *International Trade Disputes: Coquilles and Muscles*, THE ECONOMIST, Sept. 30, 1995, at 91 (stating that "[e]very complaint brought to Geneva is a sign of faith in the system, which seems to be working").

17. *See, e.g.*, Nancy Dunne, *If You Make A Deal, Says the U.S., Keep It*, FIN. TIMES, Oct. 4, 1996, at 4 (discussing U.S. efforts to ensure enforcement of trade agreements).

entirely unexpected. As the largest trading nation, the U.S. is sure to be involved in a large number of disputes. But, if this conventional wisdom is correct, then why not forswear unilateral action and repeal Section 301?

2. *The Mixed, If Not Poor, Empirical Record of Unilateral Trade Actions.*

The problem of persistent unilateralism is also perplexing given the very mixed, if not outright poor, empirical record achieved by the actual use of unilateral trade actions. Consider first the use of Section 301. The most careful and comprehensive empirical study of the efficacy of this statute is by two economists at the Institute for International Economics, Thomas O. Bayard and Kimberly Ann Elliot. They analyze 72 cases brought under Section 301 (as well as those under Special 301, and Super 301) between 1975 and June 1994 in which the outcomes were reasonably clear.[18] Bayard and Elliott define a "successful" outcome as "one in which US negotiating objectives — that is, improved market access for U.S. exporters of goods and services, reduced export subsidies by the European Union and others, and improved protection for intellectual property rights . . . — were at least partially achieved."[19] They conclude that Section 301 has been a "reasonably effective tool of American trade policy."[20]

Their conclusion is the most positive "spin" possible on their results. They find that in 35 of the 72 cases — about half of the time — the U.S. achieved its negotiating objectives.[21] In other words, the probability of "winning" is about

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18. BAYARD & ELLIOTT, *supra* note 6, at 3.
19. *Id.* at 59.
20. *Id.* at 64.
21. *Id.* at 64, 86.

What factors contribute to a successful outcome of a unilateral trade action? On the basis of multivariable regression analysis, Bayard and Elliott find that three variables are critical in predicting whether a Section 301 action will be successful. First, Section 301 is an effective tool if the target foreign government is vulnerable because the U.S. is a key destination for its country's exports. In the 35 successful Section 301 cases, the ratio of the target country's exports to the U.S. as a percentage of the target's GNP, which is a measure of its export dependence on the U.S., was 7.5 percent. *Id.* at 86. In the 37 failed cases, the average target country's export dependence was 4.3 percent of its GNP. *Id.* Obviously, as the share of a target country's GNP accounted for by exports to the U.S. rises, the stakes rise, and U.S. retaliation can inflict serious damage. The practical message for all of America's trading partners is to diversify their export markets, because overreliance on the U.S. market is dangerous.

Second, the absolute size of the bilateral trade balance between the U.S. and the target foreign country is significant. In successful cases, the average U.S. trade deficit was $15 billion, while in failed cases it was $2 billion. *Id.* at 89. The reason this variable is important is not entirely clear. One argument could be that the U.S. is more likely to "bargain hard" and take retaliatory action if it faces a greater imbalance, thus a target foreign government perceives threats of retaliation as credible and is more likely to modify its act, policy, or practice in question.

Third, the more transparent the act, policy, or practice in question, the more likely that a Section 301 action will be successful. This result seems based on the common sense notion that if the USTR can "see it," then it is easier for the USTR to urge its elimination or modification.

A fourth variable that can influence the outcome of some Section 301 cases is whether there are interest groups in the target foreign country that support the U.S. position. *Id.* at 82, 84-85, 94. For example, do Japanese consumer groups lobby their government to liberalize its import regime with respect to U.S. agricultural goods? Does the government of India seek to replace India's traditional

50-50. Further, this probability has diminished over time. Generally, the rate of successful outcomes was higher in the mid-1980s, prior to the passage of the Omnibus Trade and Competitiveness Act of 1988 Act and Super 301.[22] Thus, the problem is apparent: if the DSU is a new and improved multilateral dispute

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socialist-style planning and import substitution policies with market-oriented, trade liberalization policies?

22. The Bayard-Elliott study is not the only noteworthy empirical examination of the efficacy of Section 301. *See generally* BHALA, INTERNATIONAL TRADE LAW, *supra* note 2, at 1170-75 (discussing the other empirical studies). For example, in an earlier study, Bayard argues that might does make right. US retaliatory threats are quite often effective in encouraging our trading partners to open their markets to US exports. [I]n the twenty seven Section 301 actions in which retaliation was threatened or imposed, trade liberalization occurred in about two-thirds of the cases.

Thomas O. Bayard, *Comment On Alan Sykes' "Mandatory Retaliation for Breach of Trade Agreements: Some Thoughts on the Strategic Design of Section 301,"* 8 B.U. INT'L L.J. 301, 322 (1987). In this earlier study, Bayard finds that Section 301 is not necessarily more effective against large, powerful trading partners than LDCs and NICs.

The empirical study that argues most strongly in favor of the efficacy of Section 301 appears to have been made by Professor Sykes. He examines 83 cases arising between 1975-91 in which the USTR's objective was to open the market of a target foreign country to U.S. exports, remove barriers to U.S. direct investment, gain access to raw materials, or improve intellectual property protection. *See* Alan O. Sykes, *Constructive Unilateral Threats in International Commercial Relations: The Limited Case for Section 301*, 23 LAW & POL'Y INT'L BUS. 263, 307-16 (1992). Of the 83 cases, 48 involved Section 301(a), *i.e.*, alleged violations of U.S. rights under an international trade agreement, typically GATT 1947. *Id.* at 309-10. In these 48 alleged breach-of-agreement cases, the target foreign country eliminated or modified the challenged act, policy, or practice, or provided compensation, in 31 instances. *Id.* at 310. Only one case was a clear failure. The balance of cases remained open (*i.e.*, subject to ongoing negotiations at the time of the study), or were deemed settled in one manner or another. Retaliation was necessary in just 7 of the 48 cases. *Id.* at 310. The target country agreed to the USTR's demands in 8 of the 9 cases where the U.S. obtained a favorable GATT panel ruling. Accordingly, Sykes maintains that the overall impression suggested . . . is that Section 301 is fairly successful at inducing foreign governments to modify their practices when they are accused of violating U.S. legal rights. Countries often accede to U.S. demands prior to the conclusion of formal dispute resolution, and where dispute panels complete their work, a finding favorable to the United States usually results in a settlement acceptable to the USTR. Retaliation has been fairly uncommon. *Id.* at 313. In addition, using countries that are beneficiaries of the Generalized System of Preferences (GSP) as a proxy for smaller, less powerful countries than the U.S., it does not seem that Section 301 is more effective against them than against Japan or the EU. *Id.*

What about the remaining 35 of the 83 cases arising under Section 301(b), *i.e.*, those that did not involve an alleged breach of an international agreement? In 27 of these 35 cases, the target foreign governments eliminated or modified the challenged act, policy, or practice. *Id.* at 314. Of the remaining eight cases, two remained open, and of the other six, a settlement was agreed to, the petition was dismissed or withdrawn, or the U.S. modified its practices. *Id.* at 314-15. From the perspective of the USTR, only one of the 35 cases was a failure. In only two of the 35 cases was retaliation necessary. Thus, "[a]gain, . . . the overall impression is that the statute works fairly well." *Id.* at 316. In addition, Section 301(b) seemed to be used to a great extent against GSP beneficiaries.

However, one problem with the Sykes study is its definition of a successful outcome. The agreements reached in some of the cases may not have been "successful" because, on closer examination, some of the agreements were not stable. *See* BAYARD & ELLIOTT, *supra* note 6, at 61 n.5. In other words, mere conclusion of an agreement is not sufficient to call an outcome a negotiating success. If a case recurs because the agreement was not implemented to US satisfaction, or if it was circumvented in some other way, it is classified as a failure. *Id.* at 61. Thus, the Sykes study may be too optimistic in its conclusions. For a study of compliance with bilateral trade agreements negotiated in the shadow of a Section 301 investigation in nine Far East cases, *see* Michael P. Ryan, *Strategy and Compliance with Bilateral Trade Dispute Settlement Agreements: USTR's Section 301 Experience in the Pacific Basin*, 12 MICH. J. INT'L L. 799 (1991). For a discussion of two examples — market access in China and Korean beef — where an agreement reached to resolve a Section 301 investigation has proved unstable — *see* BHALA, INTERNATIONAL TRADE LAW, *supra* note 2, at 1171-74.

resolution mechanism, and if unilateral action pursuant to Section 301 is at best 50 percent effective, then why pursue unilateral action at all? Why even bother to threaten, implicitly or overtly, such action?

As intimated at the outset, recent dramatic international political events suggest the problem of persistent unilateralism is manifest in contexts well beyond the actual or even threatened use of Section 301. The problem exists anytime the U.S. threatens or deploys unilateral economic sanctions to further its national security goals or to promote human rights. Most recently, this problem is manifest with respect to (1) the 1996 Helms-Burton Act, which is aimed at trafficking in U.S. property expropriated by Fidel Castro's Cuban government, (2) the Iran and Libya Sanctions Act of 1996, which takes economic action against Iran and Libya because of the role of their leaders in sponsoring terrorist acts, and (3) President Clinton's 1997 Executive Order, which imposes economic sanctions on Burma due to the suppression by the ruling State Law and Order Restoration Council (SLORC) of Ms. Aung San Suu Kyi's National League for Democracy.[23] In each case, the U.S. acted alone in the absence of a

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A different empirical study, conducted by Low, yields a lower "success" rate than the Sykes analysis. *See* Patrick Low, TRADING FREE 89 (1993). Low examines 77 cases from 1975 to 1990 and concludes that 27 — or about one-third of these cases — "had the kinds of results that Section 301 is supposed to produce." *Id.* at 89. In other words, they led to trade liberalization. In 8 instances, or about 10 percent of the cases, retaliation was the result — "an unequivocally negative outcome, since it simply reduces trading opportunities for all concerned." *Id.* One inference from the infrequency of retaliation could be that the threat of retaliation is not credible.

Academic observers of U.S. trade policy tend to regard policies based on the threat of retaliation to be of limited use in a country like the United States. They argue that it is difficult to bluff in a democracy, particularly one with institutional characteristics like those of the United States. Therefore, unless there is a willingness to carry out retaliatory threats, a problem of credibility emerges. If there is a willingness to retaliate, the policy turns out to be costly, in terms of both the trade costs of the retaliation and the risk of counterretaliation. *Id.* at 89. The Low study suggests a trade liberalization result is more likely if the target is Japan or Korea rather than the EU, but that "there are limits to the responsiveness of the Japanese [and Koreans] to demands and threats based on unilateral determinations of actionable behavior." *Id.* at 91.

23. Exec. Order No. 28,301, 62 Fed. Reg. 28301 (1997). The President's decision is authorized by an amendment to the fiscal 1997 foreign operations appropriations bill. *See* Foreign Operations, Export Financing, and Related Appropriations Act of 1997, Pub. L. No. 104-208, § 570 (1996). *See also* Steve Barth, *U.S. Stands Alone on Burma Sanctions*, WORLD TRADE, July 1997, at 13 (observing that "[i]n fact, it is the United States that is isolated in this cause, rather than the Burmese regime" because "[n]either American companies nor foreign governments seem to be endorsing the U.S. ban" on making new investments in Burma); Mark Felsenthal, *Clinton Orders Burma Sanctions; New Foreign Investment Banned*, 14 Int'l Trade Rep. (BNA), May 28, 1997, at 942 (reporting President Clinton's May 20, 1997 Executive Order imposing economic sanctions against Burma that prohibit U.S. firms from entering into a contract for the development of economic resources in Burma); Ted Bardacke, *U.S. Companies Rush to Beat Sanctions Against Burma*, FIN. TIMES, Apr. 25, 1997, at 16 (noting that in advance of unilateral U.S. economic sanctions, American companies rushed to sign "more investment deals with Burma in February [1997] than in the whole of the past eight years" — about $300 million worth of deals, making the U.S. the fourth largest investor in Burma after the U.K., Singapore, and Thailand); Ted Bardacke & Nancy Dunne, *Clinton Bans All New Investment in Burma*, FIN. TIMES, Apr. 23, 1997, at 14 (reporting unilateral U.S. economic sanctions against Burma after the Clinton Administration failed to win multilateral support for such sanctions); Mark Felsenthal & Daniel Pruzin, *Citing Deepening Political Repression, U.S. Bans All New Investment in Myanmar*, 14 Int'l Trade Rep. (BNA), Apr. 23, 1997, at 718 (noting that the EU is unlikely to follow with sanctions of its own, and that American "[b]usiness groups criticized the [Clinton Administration's] decision for unilaterally ceding U.S. interests in the Asian nation to international competitors").

multilateral consensus. Indeed, typically, the U.S. encountered strong resistance from its closest allies and trading partners. As with the use of Section 301, the results of unilateral action under these types of statutes are mixed.

One recent study, conducted by the Institute for International Economics, examines the impact of unilateral U.S. sanctions imposed against 26 countries, including Cuba, Iran, Libya, and Burma.[24] It concludes that in 1995, the sanctions cost the U.S. between $15 and $20 billion as a result of lost exports and higher-priced substitute import sources, and between 200,000 and 250,000 lost export-related jobs.[25] These self-inflicted wounds are sure to worsen with the tightened unilateral ban on new U.S. investment in Burma:

> The day after a prohibition on new U.S. investments in Burma was announced, the heads of several [non-U.S.] oil companies operating in the country sat down to dinner at one of Rangoon's new luxury hotels. They were salivating — but not because of the succulent lobster on offer that evening.
>
> Instead, they were discussing how to carve up exploration rights held by U.S. companies, rights the U.S. companies will most likely have to give up under the new rules. . . .
>
> In the absence of the U.S. companies, "it's all there for the taking. No project will not be taken up," says an executive with a Malaysian conglomerate.[26]

Interestingly, the Institute for International Economics study triggered the creation of a coalition of 440 U.S. companies and trade associations called "USAENGAGE."[27] The mission of USAENGAGE is to "fight the imposition of unilateral sanctions by the United States."[28] As its chairperson, Donald V. Fites (the chief executive officer of Caterpillar, Inc.) states, "the evidence is clear . . . [that] [t]he proliferation of U.S. unilateral sanctions undermines American leadership and competitiveness, costs U.S. jobs, and results in significant losses to the economy."[29]

A second recent study, conducted by the National Association of Manufacturers, reviews 61 laws or executive actions ordering unilateral U.S. sanctions against 35 foreign countries — including Cuba, Iran, Libya, and Burma — that represent 42 percent of the world's population, or 2.3 billion potential consumers of U.S. goods and services in export markets worth $790 billion annually.[30] The upshot is that while these sanctions may make some Americans feel good, they do not work. "[I]n only a handful of cases can it be argued that the sanc-

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24. *See* Gary Clyde Hufbauer et al., *U.S. Economic Sanctions: Their Impact on Trade, Jobs, and Wages*, Apr. 16, 1997.

25. *See* Institute for International Economics News Release, *Economic Sanctions Reduce U.S. Exports by $15 Billion to $20 Billion Annually*, Apr. 16, 1997, at 1 (available from the Institute for International Economics, Washington, D.C.); Gary G. Yerkey, *U.S. Sanctions Against Other Countries Cost Exporters Up to $19 Billion, Study Says*, 14 Int'l Trade Rep. (BNA), Apr. 23, 1997, at 736 (discussing a study by the Institute of International Economics); Robert Corzine, *U.S. Business Hits At Use Of Unilateral Sanctions*, FIN. TIMES, Apr. 16, 1997 (also discussing the Institute of International Economics study).

26. Ted Bardacke, *Burma — The Sick Man Gets Sicker*, FIN. TIMES, Apr. 29, 1997, at 6.

27. *See* Yerkey, *supra* note 25, at 736.

28. Yerkey, *supra* note 25, at 736.

29. *Quoted in* Yerkey, *supra* note 25, at 736.

30. NATIONAL ASSOCIATION OF MANUFACTURERS, A CATALOG OF NEW U.S. UNILATERAL SANCTIONS FOR FOREIGN POLICY PURPOSES 1993-96 (1997).

tions changed the behavior of the targeted governments."[31] Thus, "[u]nilateral sanctions are little more than postage stamps we send to other countries at the cost of thousands of American jobs,"[32] and they "give U.S. companies the 'stigma' of being unreliable trading partners."[33]

Both studies might well have added two other key concluding points. First, unilateral trade actions rarely have positive diplomatic results to offset the costs they impose on the U.S. economy. As of this writing, for instance, there have been no significant changes in the ruling regimes or policies thereof in Cuba, Iran, Libya, or Burma. Typically, unilateral action turns an already recalcitrant regime into an outright defiant one that attracts both admiration and sympathy from many in the Third World.

Second, unilateral trade actions have no effect on trade imbalances. To be sure, national security or human rights concerns motivate some unilateral actions. But a nagging concern about imbalances also plays a role in such actions. The truth that must be acknowledged is that macroeconomic factors are the key determinant of the direction and size of the U.S. trade balance. Our chronic trade deficits are caused by variables such as "relative rates of economic growth, fiscal and monetary choices at home and abroad, tax, savings, investment and exchange rate policies made individually or collectively around the world, and the internal cultures of important U.S. industries."[34]

> [T]rade policy cannot correct trade imbalances. For instance, if resources in an economy are fully employed, export promotion may affect the composition of a country's exports but is not likely to increase the level of exports. If Country A's economy is not at full employment, or if trade barriers in Country B raise that country's level of saving or reduce its domestic investment, trade policy may raise the level of Country A's exports. But with floating exchange rates, again there will be little impact on the trade balance because Country A's currency will appreciate, causing exports to decrease and imports to increase. Fundamentally, the trade balance is a macroeconomic phenomenon, determined by the balance between saving and investment by government, industry, and citizens, and it is usually not significantly affected by trade policy. . . .[35]

It is an understatement to say that unfair trade barriers are not the principal obstacle to U.S. exports. In fact, "unfair trade practices account only for five to fifteen percent of the trade deficit."[36] Suppose Japan removed all of its unfair

31. Gary G. Yerkey, *Unilateral Sanctions Target $790 Billion Potential Export Market a Year, Study Finds*, 14 Int. Trade Rep. (BNA), Mar. 5, 1997, at 421.

32. Yerkey, *supra* note 31, at 422 (quoting Jerry Jasinowski, President, National Association of Manufacturers).

33. Yerkey, *supra* note 31, at 422 (quoting Tracy O'Rourke, Chairman and Chief Executive Officer, Varian Associates, Inc.). Yet another study, conducted by the American Chamber of Commerce in Japan, concludes that "[o]nly 13 out of 45 U.S.-Japan trade agreements signed since 1980 have succeeded in helping U.S. businesses penetrate the Japanese markets, while 10 accords were failures." Toshio Aritake & Mark Felsenthal, *Only 13 Of 45 Accords With Japan Succeeded In Market Access, Business Group Reports*, 14 Int'l Trade Rep. (BNA), Jan. 15, 1997, at 76. Many of these accords were negotiated "under the gun" of an actual or threatened Section 301 action.

34. Paula Stern, *Reaping the Wind and Sowing the Whirlwind: Section 301 as a Metaphor for Congressional Assertiveness in U.S. Trade Policy*, 8 B.U. INT'L L.J. 1, 2 (1990).

35. BAYARD AND ELLIOTT, *supra* note 6, at 53-54.

36. Steven R. Phillips, *The New Section 301 of the Omnibus Trade and Competitiveness Act of 1988: Trade Wars or Open Markets?*, 22 VAND. J. TRANSNAT'L L. 491, 551 (1989).

trade barriers. At best, the bilateral U.S. trade deficit might decline by approximately 8 to 14 percent.[37]

In this regard, it is also important to appreciate that a trade deficit also results from non-economic factors, such as social and cultural attitudes, and perceptions of product quality. For instance, traditionally many Japanese consumers have been reluctant to buy rice from California, in part because they feel it is inappropriate for use in Japanese cuisine like sushi. During the heated 1995 auto parts dispute, some Japanese officials remarked that U.S. car manufacturers did not make right-hand drive vehicles for the Japanese market, and were generally of inferior quality relative to Japanese cars.[38] A unilateral trade action cannot alter foreign observations of, or attitudes about, U.S. goods.

Examples of this problem abound and include America's highly significant trading relationships with Asian countries, the most dynamic and robust economies in the world.[39] Many of the examples involve key sectors such as services, in which 76 percent of all American workers are employed, and which accounts for 72 percent of the U.S. gross domestic product.[40] There is no reason to believe a resolution to the problem is imminent. After all, President Clinton used the rhetoric of war to explain why he nominated Charlene Barshefsky to be the U.S. Trade Representative: "[s]he's a *tough* and *determined* representative for our country, *fighting* to open markets to the goods and services produced by American workers and businesses."[41] (The title of a 1995 book by Steve Dryden about the Office of the United States Trade Representative also conjures up the image of conflict: *Trade Warriors*.) The President has backed his rhetoric with high-profile action. As the above questions suggest, since the Uruguay Round agreements entered into force on January 1, 1995, the U.S. has continued to initiate Section 301 investigations, commencing 14 such investigations between January 9, 1995 and December 9, 1996.[42] Pursuant to other statutes, it has taken high-profile action on its own against Cuba, Iran, Libya, and Burma.[43] The *1997 National Trade Estimate Report on Foreign Trade Barriers* published

37. *Id.* at 500-01.

38. For discussions of this dispute, *see* BHALA, INTERNATIONAL TRADE LAW, *supra* note 2, at 1144-52; William E. Scanlan, Comment, *A Test Case for the New World Trade Organization's Dispute Settlement Understanding: The Japan-United States Auto Parts Dispute*, 45 KAN. L. REV. 591 (1997); Tracy M. Abels, Comment, *The World Trade Organization's First Test: The United States-Japan Auto Dispute*, 44 UCLA L REV. 467 (1996).

39. For an overview of the importance of U.S. trade relations with Asia, *see* Bhala, *supra* note 2, at vii-xii.

40. *See The Final Frontier*, THE ECONOMIST, Feb. 20, 1993, at 63.

41. *President Nominates Barshefsky For Full Confirmation As USTR*, 13 Int'l Trade Rep. (BNA), Dec. 18, 1996, at 1943 (emphasis added).

42. *See* Office of the United States Trade Representative, *Section 301 Table of Cases* 34-39. This Table is available from the USTR and on the USTR's web site at <http://www.ustr.gov> and is updated periodically. The USTR also publishes a Table of Section 301 petitions rejected or withdrawn, available from the same sources. A complete listing of all Section 301 cases is maintained and updated periodically at the internet web site of the United States Trade Representative.

The fact that a Section 301 investigation may be initiated in connection with the use of the WTO's dispute resolution procedures is discussed below. *See infra* notes 132-140 and accompanying text.

43. *See infra* notes 23-33 and accompanying text.

by the United States Trade Representative (USTR) is a 387 page catalog of alleged foreign barriers affecting U.S. exports of goods and services, foreign direct investment by U.S. companies, and protection of intellectual property rights.[44] Any of these barriers, if proven and not lifted, could trigger still more unilateral actions. The official rhetoric and action is not the only engine powering U.S. unilateral behavior. A majority of U.S. executives in companies doing business in the Pacific Rim favor the use of unilateral action over bringing complaints to the WTO to pressure other countries, particularly Japan, to reduce their trade barriers.[45] Thirty-nine percent of these executives believe the U.S. government is not doing enough to pry open the Japanese markets.[46]

In sum, it is clear that unilateralism persists despite the existence of a new and improved multilateral dispute resolution mechanism, and in the face of considerable evidence that it is not efficacious, and is often counterproductive. This perplexing problem cries out for a resolution. The two very practical facts discussed above have not prodded U.S. trade policy officials or jurists to rethink their fidelity to unilateral trade actions. Perhaps a more theoretical approach, drawing upon Hegel's work, might provide the necessary stimulus.

B. The Argument in Brief: Using the Hegelian Concepts of The Geist, Dialectic, Freedom, and International Law in Three Steps.

The present article explores the problem of persistent unilateralism using an engaging and provocative philosophical guide for inspiration: the great German idealist philosopher Georg Wilhelm Friedrich Hegel (1770-1831).[47] There are four remaining parts to the article, and Part II explains the reason for turning to Hegel's works for insights into the problem of persistent unilateralism. Parts III and IV explore unilateral trade action using Hegel's concept of the *Geist* (collective mind) and its dialectical evolution, his theory of freedom of action, and his views on the enforceability of international law. The reflections provided in Parts III and IV are not limited to the actual or threatened use of Section 301. They are relevant to any form of unilateral trade action under any statute,[48] such as the Helms-Burton Act and Iran-Libya Sanctions Act, 1986 Narcotics Control Trade Act,[49] International Security and Development Cooperation Act of

44. The *Report* is available from the Office of the USTR in Washington, D.C. and on the USTR's web site at <http://www.ustr.gov>.

45. *See* Heather Bourbeau, *U.S. Favors Direct Approach*, FIN. TIMES, June 18, 1997, at 4.

46. *Id.*

47. Hegel's life span and a brief biographical sketch are set forth in S.E. FROST, JR., BASIC TEACHINGS OF THE GREAT PHILOSOPHERS 282 (1942), H.B. Acton, *Georg Wilhelm Friedrich Hegel, in* III THE ENCYCLOPEDIA OF PHILOSOPHY 435-36 (Paul Edwards ed., 1967), and PETER SINGER, HEGEL 1-2, 5-8 (1983). An excellent chronology of Hegel's life and times is contained in STEPHEN HOULGATE, FREEDOM, TRUTH AND HISTORY: AN INTRODUCTION TO HEGEL'S PHILOSOPHY xv-xviii (1991). For a more detailed biographical treatment, *see* FRANZ WIEDMANN, HEGEL: AN ILLUSTRATED BIOGRAPHY (Joachim Neugroschel trans., Pegasus 1968).

48. For an overview of many of the statutes dealing with unilateral trade actions, *see* HOUSE COMM. ON WAYS AND MEANS, 104TH CONG., OVERVIEW AND COMPILATION OF U.S. TRADE STATUTES 161-73 (Comm. Print 1995).

49. *See* Pub. L. No. 99-570, tit. IX, § 9001 (1986), 100 Stat. 3207-164, codified at 19 U.S.C. §§ 2491-95.

1985,[50] International Emergency Economic Powers Act of 1977,[51] Foreign Assistance Act of 1961,[52] or 1917 Trading with the Enemy Act[53]. The final section of the article, Part V, offers conclusions.

The heart of the article is organized around three related issues. First, *diagnosis,* or "the *what?* issue": in Hegelian terms, *what* is the present problem? Second, *cause*, or "the *why?* issue": from an Hegelian perspective, *why* does the problem exist? Third, *cure*, or "the *how?* issue": in an Hegelian sense, *how* might the problem be resolved? Part III considers the first two issues, and Part IV treats the third issue. Thus, Parts III and IV develop a three-step argument based on these three issues.

First, the problem of persistent unilateralism is diagnosed in Part III as the present *Geist* of American trade policy. The "*Geist*" is a central concept in Hegel's philosophy that, loosely translated, refers to collective mind (or spirit). Unilateralism — as manifest in unilateral trade action, whether it is implicitly or overtly threatened, or actually undertaken — simply *is* a critical and sometimes dominant element (but by no means the only element) in the collective American mind about the world trading system. Essentially, persistent unilateralism is a spirit of the times.

Second, this Geist is said in Part III to be caused by an underlying free trade - fair trade dialectic, namely, a free trade "thesis" set against a fair trade "antithesis." Hegel's *Geist* raises itself up to progressively higher states of consciousness through a process of sublation, or the synthesis of two opposing ideas — a thesis and antithesis. Each state reflects a more accurate view of freedom than the previous state, and the ending point in the evolution of the *Geist* is a realization of true freedom. In the present context, the *Geist* of persistent unilateralism is caused by a dialectic in which the ideas of free trade and fair trade are pitted against one another and have not yet been replaced by a new synthesis. This *Geist* reflects the present stage of an evolutionary dialectical process in America's consciousness about freedom of action in the post-Uruguay Round world trading system.

Third, Part IV contends this Geist cannot evolve, hence the U.S. cannot achieve a higher collective mind about trade policy, until the U.S. develops a more accurate conception of freedom of action in the world trading system. The U.S. must shed its "negative" (or "classical liberal") conception of freedom as the ability to withdraw from commitments — to "walk away" and "go it alone," which the U.S. does every time it takes or threatens unilateral action. It must accept the seemingly paradoxical Hegelian proposition that there is no true freedom without constraint, that is, without willing submission to submit to a set of agreed-upon laws and customs. The U.S. must see the world trading community as an Hegelian civil society whose laws safeguard the true freedom of choice of each member. In this civil society, the agreed-upon rules are contained in the

50. *See* Pub. L. No. 99-83 (1985), codified at 22 U.S.C. §§ 2349aa-8, aa-9.
51. *See* Pub. L. No. 95-223 (1977), codified at 50 U.S.C. §§ 1701-06.
52. *See* Pub. L. No. 67-195 (1961), codified at 22 U.S.C. §§ 2151 *et seq.*
53. *See* 50 U.S.C. §§ 1-44.

new Uruguay Round agreements, to which the U.S. and over 125 other nations are supposed to be bound. Unfortunately, and ironically, the U.S. clings to one Hegelian concept that is outdated: Hegel's view that international law is unenforceable because there is no supreme sovereign to impose sanctions on rule violators. For the *Geist* to evolve, the U.S. must abandon this conception, because it reinforces the American view that unilateral action is the ultimate guarantor of freedom and thereby inhibits the development of a reservoir of positive experience with the new rules, particularly the Uruguay Round dispute resolution mechanism. Developing this reservoir would help the U.S. realize its freedom of action is best safeguarded, and international trade rules are best enforced, through the Uruguay Round mechanism. This realization may, in turn, provide the foundation for a synthesis, "multilateral freedom," that could supplant the free trade - fair trade dialectic and thereby resolve the problem of persistent unilateralism. This synthesis would favor multilateral dispute resolution in all trade disputes, and the U.S. could afford to forswear the threat or use of unilateral trade actions.

In Parts III and IV, two pieces of evidence are offered in support of the applicability of Hegelian concepts. The evidence highlights a key sector, financial services, and a key group of American trading partners, Far Eastern countries. Neither piece of evidence involves the outright use of Section 301 — because neither example needs to in order to make the point. In both examples, the threat of a Section 301 investigation loomed in the background and could not have been lost on America's Far Eastern trading partners. Therefore, the fact that unilateral trade action pursuant to Section 301 is a brooding omnipresence, but not actually used, suggests the general applicability of the Hegelian approach taken here. It may be adopted not only for overt Section 301 cases, but also for implicit or overt threats of unilateral action undertaken on any other legal basis.

The first piece of evidence, introduced in Part III, addresses cause — the *why?* issue — and suggests the utility of Hegel's dialectical process. It is the rhetoric associated with Congressional efforts in the early and mid 1990s to enact fair trade in financial services legislation. While this legislation ultimately was not enacted, there are two noteworthy categories of rhetoric in the legislative debate. The first category encompasses "fair trade, but. . ." statements in which a speaker simultaneously affirms a steadfast commitment to free trade, and a grave concern about unfair trading practices by other countries. The second rhetorical category covers "scorecard" statements in which a speaker implicitly acknowledges the existence of a global financial services market, but simultaneously highlights imbalances in America's service trade with certain other countries. Both categories of rhetoric evince a free trade - fair trade dialectic animating within the speaker — and, therefore, according to Hegelian principles, in the present *Geist*.

Concerning cure — the *how?* issue discussed in Part IV — and the utility of Hegel's concept of freedom, a second piece of evidence is presented: the U.S. position during the 1995 General Agreement on Trade in Services (GATS)

negotiations.[54] The U.S. refused to extend most-favored nation (MFN) treatment in the entire financial services sector to other WTO Members, and refused to join the 1995-97 interim agreement. While the U.S. ultimately may decide to offer MFN treatment in the 1997 negotiations, its initial refusal illustrates its "go-it-alone" approach, or in Hegelian terms, its misconception of what true freedom means.

II.
WHY HEGEL?

No philosopher of the nineteenth or twentieth centuries has had as great an impact on the world as Hegel. The only possible exception to this sweeping statement would be Karl Marx , and Marx himself was heavily influenced by Hegel. Without Hegel, neither the intellectual nor the political developments of the last 150 years would have taken the path they did.

Peter Singer, Hegel vii (1983).

There are, of course, existing theories of unilateral trade action. Two such theories focus exclusively on Section 301. The first theory (which I treat elsewhere[55]) concerns civil disobedience. In brief, unilateral action is seen as a legitimate means of resolving disputes in the absence of an effective multilateral dispute resolution mechanism. However, this theory is somewhat outdated. It was devised when the pre-Uruguay Round dispute resolution mechanism, with all of its flaws, operated. The continuing vitality of this theory is questionable in light of the new, improved Uruguay Round dispute resolution mechanism, which as indicated above removes the flaws.[56]

A second approach to Section 301 (which I also discuss elsewhere[57]) attempts to explain the use of the statute in terms of game theory. Unfortunately, this theory suffers from many severe limitations (which I articulate in detail elsewhere[58]). In brief, game theory requires a number of dubious if not outright unrealistic assumptions (*e.g.*, parties to international trade agreements do not view their obligations as binding, international trade agreements can be conceptualized in terms of a two-party payoff structure where the parties have equal

54. It is assumed that the reader is familiar with the basic terms of the GATS and its negotiating history. For discussions of the terms of the GATS, *see, e.g.*, BHALA, INTERNATIONAL TRADE LAW, *supra* note 2, at 1390-93, 1405-10; Richard H. Snape & Malcolm Bosworth, *Advancing Services Negotiations*, *in* THE WORLD TRADING SYSTEM: CHALLENGES AHEAD 185-203 (Jeffrey J. Schott ed., 1996); Richard B. Self, *General Agreement on Trade in Services*, *in* THE WORLD TRADE ORGANIZATION 523-54 (Terence P. Stewart ed., 1996); WILL MARTIN & L. ALAN WINTERS, THE URUGUAY ROUND AND THE DEVELOPING ECONOMIES 20-23 (1995), JEFFREY J. SCHOTT, THE URUGUAY ROUND: AN ASSESSMENT 99-111 (1994); Andrew Buxton, *The General Agreement on Trade in Services ("GATS") of the World Trade Organization: Opportunities for Bankers*; BUTTERWORTHS J. INT'L BANKING & FIN. L. 59 (Feb. 1997); Mary E. Footer, *The International Regulation of Trade in Services Following Completion of the Uruguay Round*, 29 INT'L LAW. 453 (1995). For discussions of the GATS negotiating history, *see* JOHN CROOME, RESHAPING THE WORLD TRADING SYSTEM 122-30, 242-51 (1995) and II TERRENCE P. STEWART ED., THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY (1986-1992) 2335-61 (1993).

55. *See* BHALA, INTERNATIONAL TRADE LAW, *supra* note 2, at 1163-64.

56. *See supra* note 8 and accompanying text.

57. *See* BHALA, INTERNATIONAL TRADE LAW, *supra* note 2, at 1164-69.

58. *See* BHALA, INTERNATIONAL TRADE LAW, *supra* note 2, at 1167-69.

negotiating power and the same time horizon, the payoff structure is neither manipulable nor dynamic, and reputational concerns are not relevant). More generally, it relies on a microeconomic foundation that seems increasingly untenable.[59]

Thus, one answer to the question "why Hegel?" is that extant theories of Section 301 are unsatisfying as explanations of the problem of persistent unilateralism. The shortcoming of this answer is that it leads us to aspire toward a new theory, but it does not lead us inexorably to reflect upon unilateral action through an *Hegelian* lens. So, why call upon Hegel to lend insights, and perhaps even resolve, the problem? Does it needlessly complicate the analysis?

Hegel is perhaps the last of the great system-building philosophers, and it is impossible in one article to relate directly all aspects of his system to the current topic (assuming the entire system is relevant).[60] To be sure, Hegel wrote a considerable amount about nation-states. But, he can hardly be said to have focused on international relations, much less international trade matters — virtually no philosopher since Hugo Grotius (1583-1645) has maintained such a focus.[61] Accordingly, the skeptic, who may be motivated by an uncompromising or purist approach to Hegel's work, will object that applying Hegel's ideas to a contemporary international trade law problem illustrates the stereotype that legal scholars are scavengers — the legal scholar will borrow ideas carelessly from any discipline to develop a theory in support of an argument, even if the borrowed ideas fit the argument in a Procrustean manner.

There are five replies to the skeptic. First, as a general matter, it is the very nature of interdisciplinary legal scholarship to borrow, because that scholarship is, in part, *applied* in nature. Admittedly, applied interdisciplinary scholarship sometimes progresses in a non-uniform, mistake-filled manner. But, it cannot hope to resolve real-world problems without drawing on what is a common intellectual heritage. That is, a problem ought not to be neatly but misleadingly packaged as a purely "legal" one when in fact it may be susceptible to analysis using concepts from other disciplines. Accordingly, the present use of Hegel is grounded in part on a belief that there is a distinction between applied and theoretical philosophy, just as there is a distinction between applied and theoretical physics and applied and theoretical mathematics, and that it is entirely legitimate for the applied interdisciplinary legal scholar to bring theoretical tools to bear on the problem at hand.

Second, as a general matter, it is not uncommon for the work of a prior scholar to be used in ways not anticipated by that scholar. The potency of the prior scholar's ideas may very well be illustrated by their generalizability, or their application to new and different contexts. Certainly, Alfred Marshall did not anticipate that his marginalist economic concepts would several decades

59. *See generally* John Cassidy, *The Decline of Economics*, THE NEW YORKER 50, 56-58 (Dec. 2, 1996)(discussing shortcomings in modern economic theories, including game theory).

60. For example, this article does not draw upon Hegel's writings on the theory of art.

61. For an overview of Grotius' life and his theory of international law, *see* Wolfgang Friedmann, *Hugo Grotius*, *in* 3 THE ENCYCLOPEDIA OF PHILOSOPHY 393-95 (Paul Edwards ed. 1967).

later be used to assess issues in demography, much less contract and antitrust law. While there is a risk in misapplying old concepts to contemporary problems, the effort to resolve these problems by reference to old concepts pays homage to the continuing vitality of these concepts. In brief, they become time-honored concepts.

Third, applying time-honored concepts need not be forceful and direct, and Hegelian concepts are susceptible to use as *heuristic* devices for understanding contemporary problems such as the problem of persistent unilateralism. That is, they are inspirational, can be used by way of analogy, and the analogy can be subtle and indirect. In this regard, it is worth remembering that in the two principal works of Hegel relied upon in this article, *Philosophy of History* (1837), and *Philosophy of Right* (1821), Hegel wrote extensively about collectives — a *Geist* (collective mind), a collective conscious, a collective of humans in a civil society and state, and a collective of states in the international arena — because he focused on the problem of the development of history.[62] Accordingly, a risk that does not exist in utilizing Hegelian concepts in this loose manner is generalizing from concepts designed for a micro (*i.e.*, individual) level to concepts appropriate for a macro (*i.e.*, country or world) level.

Fourth, most international trade law policy makers, jurists, scholars, and commentators think in terms of a "tension" between two policy alternatives. But, the application of Hegelian concepts offers a deeper level of thought. Most commonly, trade policy makers, jurists, scholars, and commentators conceive of the current problem as a tension between unilateralism and multilateralism.[63] The very term used here for the problem, "persistent unilateralism," may conjure up an image of this tension.

However, conceiving of the problem as nothing more than a "tension," while not inaccurate, is unfortunate for several reasons. First, it yields a rather static characterization that provides only a snapshot of American trade behavior. It fails to explain how trade policy might evolve in the future, and whether it

62. GEORG WILHELM FRIEDRICH HEGEL, THE PHILOSOPHY OF HISTORY (J. Sibree trans., Dover Publications, Inc.) (1956); GEORG WILHELM FRIEDRICH HEGEL, THE PHILOSOPHY OF RIGHT (T.M. Knox trans., Oxford University Press) (1967).

63. *See, e.g.*, Cunningham, *supra* note 7, at 547, 549-52 (discussing the "[t]ension [b]etween [m]ultilateral [a]nd [u]nilateral [a]pproaches [t]o [t]he [e]limination [o]f [u]nfair [t]rade [p]ractices"); Eduardo Lachica, *U.S. May Be Losing Its Trade-Bully Status*, WALL ST. J., Oct. 13, 1995, at A11 (explaining how the multilateral dispute settlement system levels the playing field for settling disputes, and asking whether "U.S. politician Pat Buchanan and other WTO-bashers [are] right when they gripe about America's diminishing place in the 'new world order'?"); SCHOTT, THE URUGUAY ROUND: AN ASSESSMENT, *supra* note 54, at 129 (noting that "as the United States has increasingly become a defendant as well as a plaintiff in GATT disputes, congressional support for stronger multilateral procedures has become more ambivalent," and asking whether "the new [Uruguay Round multilateral dispute resolution] rules significantly increase the constraints on the United States' ability to impose trade measures to defend its trading interests?"); JOHN G. RUGGIE, ED., MULTILATERALISM MATTERS (discussing the meaning of multilateralism in the international institutional order); Rudiger W. Dornbusch, *Policy Options for Freer Trade: The Case for Bilateralism, in* AN AMERICAN TRADE STRATEGY — OPTIONS FOR THE 1990s 106-41 (Rudiger W. Dornbusch *et al.* eds., 1990) (arguing that the U.S. should aggressively seek freer trade through bilateral initiatives, and that the pace of gains from the multilateral approach is slowing and the liberal trading system is eroding).

might become more consistent with the post-Uruguay Round world trading system. Second, it leaves many trade policy makers, jurists, scholars, and commentators frustrated because it suggests they must be in one camp or the other. Put concretely, talk of unilateralism versus multilateralism is designed to seduce us as voters by conjuring up fears of a loss of American sovereignty to international bureaucrats at the WTO. Indeed, playing on such fears was an important theme in the 1996 presidential campaign conducted by Republican Patrick J. Buchanan, and it may well be a theme in a presidential bid in the year 2000 by Democratic Congressman Richard A. Gephardt. Third, and perhaps worst of all, thinking in terms of a "tension" between unilateralism and multilateralism proves that (ironically) Congressman Gephardt is correct when he says

> [n]owhere is there *less analysis and more intellectual paralysis* than on the critical issues of foreign trade. The dominant voices are both *dogmatic and outdated*; they insistently echo a past that probably never was, a past that in any event no longer exists and will not come again.[64]

In contrast to the conventional mode of thinking about the problem as a tension between two policy alternatives, Hegel's philosophy contains an inherent dynamism that aims to suggest how the future might evolve. It builds on, and ultimately transcends, traditional conceptual opposites (such as unilateralism-multilateralism) by showing how these opposites are succeeded by new evolutionary stages of awareness. To be more precise, and to apply Hegelian terms, the conventional conceptualization reflects a pre-dialectical mode of thinking, known simply as "understanding."

> Hegel, following Kant, contrasted the reason, the source of dialectical thinking, with the understanding, the predialectical mode of thought. The understanding, as Hegel saw it, is the type of thinking that prevails in common sense, in the natural sciences, and in mathematics and those types of philosophy that are argued in quasi-scientific or quasi-mathematical ways. *Fixed categories are uncritically adhered to, demonstrations are produced (only to be demolished), analyses are made, and distinctions are drawn.* Analyzing and distinguishing are necessary foundations of philosophical activity but only to prepare the way for the more sinuous and subtle method of the dialectic. Once an analysis has been made, the elements of it are seen to conflict and collide as well as to cohere. *First, the understanding isolates, then comes the Reason's negative moment of criticism or conflict, and after that its speculative moment of synthesis.*[65]

A current illustration of "uncritical adherence" to the "fixed categories" of unilateralism and multilateralism involves the already infamous Helms-Burton law that penalizes foreign companies and their officials for trafficking in U.S. assets expropriated by the Cuban government after the 1959 Communist Revolution. In their *American Society of International Law* bulletin, Professors Jackson and Lowenfeld characterized the Helms-Burton controversy as one of a choice between either following or not following the DSU with respect to controversies

64. Richard A. Gephardt, *Fooling Ourselves about Free Trade*, WALL ST. J., Apr. 12, 1988, at A34 (emphasis added). Unfortunately, Congressman Gephardt falls into the same trap of conventional thinking he identifies. Typically, he argues for protectionist measures in order to correct U.S. bilateral trade imbalances.

65. ACTON, *supra* note 47, at 445 (emphasis added).

about the national security exception in Article XXI of GATT 1947.[66] It reflects the two expected categories, unilateralism (dubbed "auto-determination") and multilateralism (discussed in terms of following the WTO's dispute settlement procedures). It thus takes us to the level of understanding, but not beyond. Applying the teaching from the above quoted passage, the understanding we gain from viewing the Helms-Burton and other trade controversies "uncritically" in terms of "fixed" categories is the "isolation" of the American concern with both open markets and a just trading system. But, to get beyond this simple understanding, Hegel pushes us to think in terms of an underlying or fundamental dialectic that animates through the matter under study. As argued in Part III below, the "negative moment of criticism or conflict" that emerges from applying "Reason" to this understanding is the opposition of free and fair trade,[67] and ultimately the "speculative moment of synthesis," namely, a new synthesis called "multilateral freedom" may suggest a resolution to this opposition.

There is a final reply to the skeptic to justify turning to Hegel's work as a framework for understanding the present problem. It concerns the use to which legal scholars have already put Hegelian concepts. If we consider the imperfect indicator of how many "hits" a Lexis search among all law reviews for "G.W.F.

66. *See* John H. Jackson & Andreas F. Lowenfeld, *Helms-Burton, the U.S., and the WTO*, American Society of International Law Flash Insight (Mar. 1997). This document is available from the ASIL in Washington, D.C.

67. To be sure, the idea of a "tension" between free trade and fair trade is not new to the international trade law literature. *See, e.g.*, James Srodes, *Neither Free Nor Fair Trade*, WORLD TRADE 20, 23 (April 1997) (noting various hypocritical features about U.S. advocacy of free trade, including the direct association between U.S. demands for fair trade and the use of Section 301); DANI RODRIK, HAS GLOBALIZATION GONE TOO FAR? 5, 31-38, 77, 80-81 (discussing demands for fair trade); STEPHEN D. COHEN ET AL., FUNDAMENTALS OF U.S. FOREIGN TRADE POLICY 137 (1996) (stating that "Congress is an unabashed advocate of 'fair' trade"); Barry D. Solarz, *The Future of Free Trade*, GLOBAL TRADE TALK 13 (July/Oct. 1996) (observing that "[r]ecent opinoin polls show a growing unease about the relative costs and benefits of free trade to American business, the American worker and America's standard of living); I.M. DESTLER, AMERICAN TRADE POLITICS 185-91 (1995) (treating the challenges to conventional free trade theory); CHARLES K. ROWLEY ET AL., TRADE PROTECTION IN THE UNITED STATES 63-65, 239-68 (1995) (considering the fair trade argument and rebuttals to it); Martin Khor, *Free Trade and the Third World, in* THE CASE AGAINST FREE TRADE 97, 99-101 (Earth Island Press ed., 1993) (discussing the adverse effects on developing countries from the colonial-like imposition of free trade policies by developed countries); PATRICK LOW, TRADING FREE (1993) (discussing the meaning of fair versus free trade); J. Michael Finger, *The Meaning of "Unfair" in United States Import Policy*, 1 MINN. J. GLOBAL TRADE 35 (1992) (arguing that "unfair trade laws do not embody any moral, economic, or philosophical definition of 'unfair'); JAMES BOVARD, THE FAIR TRADE FRAUD (1991) (attacking the concept of fair trade and U.S. efforts to make trade more fair by making it less free). Indeed, protectionists are wont to speak of this tension to play on fears of job loss to cheap foreign laborers in countries that care little about human rights or environmental, health, and safety standards. *See, e.g.*, *Polls Find Republicans Raising Free-Trade Doubts*, WALL ST. J., Feb. 26, 1997, at A4 (noting that "pluralities among all groups of Republicans — from antiabortion 'moralists' to antitax 'supply-siders' — agreed that . . . [open trade] pacts 'send jobs overseas' rather than 'grow our economy and create jobs'); Christina Duff, *Is Buchanan's Take on Layoffs Too Pat?*, WALL ST. J., Mar. 4, 1996, at A2 (indicating that free trade has played only a minor role in job loss); David E. Sanger, *Buchanan's Tough Tariff Talk Rattles G.O.P.*, N.Y. TIMES, Oct. 8, 1995, at 1 (discussing the anti-free trade platform of former presidential candidate Patrick J. Buchanan). However, as suggested above, the conventional conceptualization of the problem in terms of a tension between unilateralism and multilateralism is static, frustrating, and unimaginative, and takes us only to the level of understanding.

Hegel" yields, then the answer is 85.[68] This impressive number of hits suggests the possibility of a minor renaissance in the application of Hegelian concepts to contemporary legal problems.[69] To be sure, a close examination of the articles in which Hegel's works are cited reveals that Hegelian concepts are not the primary analytic tools used in, or central focus of, the majority of the articles. After all, to put it bluntly, many of the articles cite Hegel's works only once or a small number of times, suggesting a gimmick. Still, there are a number of very thoughtful, detailed examinations of Hegel's ideas in contexts such as property,[70] torts,[71] constitutional law,[72] criminal law,[73] evidence,[74] contracts,[75] secured transactions,[76] remedies,[77] ethics,[78] and, of course, jurisprudence.[79] However, there are relatively few articles that discuss Hegel's ideas in the context of international law, and the rare examples fall in the category of public

68. This Lexis search was performed on April 21, 1997 in the ALLREV file of the LAWREV library. Obviously, the less constrained search of "Hegel" yields a vastly larger number of hits — 789. The narrower search for "Georg Hegel" provides only 15 hits.

69. *See* Michael H. Hoffheimer, *Hegel's First Philosophy of Law*, 62 TENN. L. REV. 823, 825-28 and app. 3 (1995) (noting that "the past decade has witnessed an outpouring of legal scholarship on Hegel," mentioning various fields of law in which Hegelian methods have been applied, and discussing the results of Lexis searches for "Hegel").

70. *See, e.g.*, Jeanne L. Schroeder, *Never Jam To-Day: On the Impossibility of Takings Jurisprudence*, 84 GEO. L.J. 1531, 1532 (1996) (adopting a property analysis based on Hegel's political philosophy).

71. Steven J. Heyman, *Foundations of the Duty to Rescue*, 47 VAND. L. REV. 673 (1994) (citing various passages in Hegel's works).

72. *See, e.g.*, Andrew Lugar, *Liberal Theory as Constitutional Doctrine: A Critical Approach to Equal Protection*, 73 GEO. L.J. 153, 157, 161, 163 (1984) (applying concepts from Hegel's *Phenomenology of Spirit* to problems of equal protection).

73. *See, e.g.*, Markus Dirk Dubber, *Crime and Punishment: Rediscovering Hegel's Theory of Crime and Punishment*, 92 MICH. L. REV. 1577 (1994) (reviewing MARK TUNICK, HEGEL'S POLITICAL PHILOSOPHY: INTERPRETING THE PRACTICE OF LEGAL PUNISHMENT (1993)).

74. *See, e.g.*, Edward J. Imwinkelried, *An Hegelian Approach to Privileges Under Federal Rules of Evidence 501: The Restrictive Thesis, the Expansive Antithesis, and the Contextual Synthesis*, 73 NEB. L. REV. 511 (1994) (applying Hegel's dialectical method to Rule 501, which grants courts a power to determine federal privilege law); Gregory M. Klass & Gustavo Faigenbaum, *The Enlightenment of Dialectics: Strategies Involved in Burdens of Proof*, 17 HARV. J.L. & PUB. POL'Y 735 (1994) (applying Hegelian dialectics to burdens of proof).

75. *See, e.g.*, Peter Benson, *Abstract Right and the Possibility of a Nondistributive Conception of Contract: Hegel and Contemporary Contract Theory*, 10 CARDOZO L. REV. 1077 (1989) (considering Hegel's philosophy in the light of modern contract theory); Michael Rosenfeld, *Hegel and the Dialectics of Contract*, 10 CARDOZO L. REV. 1199 (applying Hegelian dialectics to contract law) (1989).

76. Jeanne L. Schroeder, *Some Realism About Legal Surrealism*, 37 WM. & MARY L. REV. 455 (1996) (offering an alternative justification for the perfection requirement based on Hegel's *Philosophy of Right*).

77. *See, e.g.*, James Q. Whitman, *Supervision of Violence, Mutiliation of Bodies, or Setting of Prices?*, 71 CHI.-KENT L. REV. 41, 44-45, 58-60 (1995) (arguing that Hegel's influence has had pernicious effects on scholarship about self-help).

78. *See, e.g.*, Franklin G. Miller et al., *Clinical Pragmatism: John Dewey and Clinical Ethics*, 13 J. CONTEMP. H. L. & POL'Y 27 (1996) (discussing Hegel as a historical source of Dewey's philosophy); Drucilla Cornell, *Toward a Modern/Postmodern Reconstruction of Ethics*, 133 U. PA. L. REV. 291, 294-95, 299, 327, 334-35, 346, 350, 353-54, 361-62 (1985) (citing various passages in Hegel's works).

79. *See, e.g.*, Hoffheimer, *supra* note 69, at 823 (discussing Hegel's philosophy of law).

international law.[80] Heretofore, the use of his ideas by legal scholars in the private international law arena has been relatively, if not wholly, unknown. Given the breadth and majesty of Hegel's philosophical system, this omission from private international law fields such as international trade law is unfortunate. At least, an effort ought to be made to see whether certain Hegelian concepts lend useful insights into practical problems faced by international trade policy makers, jurists, scholars, and commentators. Moreover, from the scholar's perspective, the effort may teach us something about the interplay between international trade law and philosophy.

What parts of Hegel's grand system provide inspiration, if not direct application, to understanding why America continues to act unilaterally in order to resolve certain trade disputes? The first two parts, which are set forth in Hegel's *The Philosophy of History,*[81] are the concept of the *Geist* (the collective mind) and its development through human history by means of a dialectical process of sublation (*i.e.*, raising up) involving a contradiction between a thesis and antithesis that, ultimately, is replaced by a synthesis. This process is inherently dynamic and leads to an ultimate stage of historical development characterized by true freedom whereby individuals, and the civil society and state in which they live, are in harmony. It provides a useful way of translating the simplistic description of a tension between unilateralism and multilateralism into a more engaging, evolutionary characterization of American trade policy.

A third part of Hegel's system relevant to the current topic is his theory of freedom, which is discussed in his *Philosophy of Right.* It suggests the U.S. misunderstands the meaning of autonomous action, wrongly viewing it in what Hegel would term the "negative" (or "classical liberal") sense as the ability to withdraw from commitments. Instead, true freedom involves — somewhat paradoxically — willing submission to rules. The persistence of unilateral trade action is in part due to this misunderstanding. The *Geist* and freedom are thus related in that the ultimate stage in the development of the *Geist* is the expression of true freedom.

A fourth relevant Hegelian concept comes from his views on the enforceability of international law, which are also discussed in *Philosophy of Right.* Hegel considers international law to be an expression of what ought to be and, therefore, aspirational. It cannot be enforced, except by war, because there is no sovereign reigning above nations to ensure compliance with international law. Unfortunately, the U.S. seems to adhere to Hegel's outdated view, thereby precluding the U.S. from making broader use of the WTO dispute resolution mechanism and forswearing unilateral action.

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80. *See, e.g.*, Thomas M. Franck, *Clan and Superclan: Loyalty, Identity and Community in Law and Practice*, 90 AM. J. INT'L L. 359 (1996) (discussing nationalism and identity); Guyora Binder, *The for Self-Determination*, 29 STAN. J. INT'L L. 223 (1993) (applying some of Hegel's ideas to contemporary democracy and self-determination issues).

81. Hegel also discusses the *Geist* in the *Phenomenology of Spirit* (1807). The English language edition of this work used for the present article was translated by A.V. Miller and published by Oxford University Press in 1977. Much of that discussion is difficult and metaphysical, and its relevance to the current topic is not immediately apparent.

Applying these four features of Hegel's philosophy suggests a possible resolution of the problem: the emergence of a new evolutionary stage in American trade policy. This new stage, multilateral freedom, would involve a synthesis between the current oppositions of free trade and fair trade, and an understanding that submission to multilateral dispute resolution mechanisms is the ultimate guarantor of true freedom of action.

III.
DIAGNOSIS AND CAUSE.

> Instead of trying to remake Japan in our own image, perhaps it might be more appropriate to accept the fact that Adam Smith's invisible hand does not extend to Tokyo.
>
> *Fair Trade in Financial Services Legislation — Part 1: Joint Hearing Before the Subcomm. on International Development, Finance, Trade and Monetary Policy and the Subcomm. on Financial Institutions Supervision, Regulation, and Insurance of the House Comm. on Banking, Finance and Urban Affairs*, 102nd Cong., 1st Sess. 38 (Nov. 20, 1991) (statement of Eric W. Hayden, bank consultant, in support of fair trade in financial services legislation).

A. Understanding the Geist and Dialectic.

To understand Hegel's concept of the *Geist*, it is necessary to realize that Hegel develops this concept in response to the manner in which three other great 19th century German philosophers, Immanuel Kant (1724-1804), Johann Gottlieb Fichte (1762-1814), and Friedrich Wilhelm Joseph Schelling (1775-1854), grapple with the problem of consciousness.[82] All four philosophers inquire how the human mind relates to the external world. Kant argues that the mind interprets the world through categories, or *a priori* forms of cognition such as being, negation, space, and time.[83] These forms are fixed (or "hard-wired," to use a contemporary computer analogy) into each person's brain. It is impossible to know the true underlying nature or reality of a thing — the thing-in-itself — because the true content of reality is filtered through these forms.[84]

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82. *See generally* FROST, *supra* note 47, at 40-44 (discussing how Kant, Fichte, and Schelling deal with the questions of what is knowledge, how knowledge is possible, and what we can really know). The life spans and brief biographical sketches of these philosophers are set forth in Frost's Biographical Notes at pp. 281 (Fichte), 284 (Kant), and 291 (Schelling).

83. *See* FROST, *supra* note 47, at 241-42 (discussing Kant's view that "[t]he mind receives impressions according to its nature or its categories and shapes them into patterns which conform not to the world outside mind, but to the nature of mind," that "we are shut up in our minds, and must interpret everything in terms of our minds," and that space and time are "not realities existing by themselves, but . . . ways our minds have of receiving and shaping sensations"); SINGER, *supra* note 47, at 3 (explaining Kant's view that "[k]nowledge is only possible because our mind plays an active role, organizing and systematizing what we experience," and that "[w]e know the world within a framework of space, time and substance; but space, time and substance are not objective realities that exist 'out there,' independently of us," rather they are "creations of our intuition or reason without which we could not comprehend the world").

84. *See* FROST, *supra* note 47, at 40-41 (discussing Kant's theory that "we cannot know the universe which exists outside of our thinking," that "[o]ur minds receive sensations and shape them into ideas because they are what they are," and that "[w]hat the world is without our minds, it is impossible for us to know") and 242 (noting that Kant held that the mind can never prove the

Fichte and Schelling point out a flaw in Kant's argument: if we cannot know a thing-in-itself, how do we know there is a thing-in-itself? "[W]as not Kant contradicting himself when he said that we could know nothing of it [the thing-in-itself], and yet claimed to know that it exists and is a 'thing'?"[85] Kant's *a priori* forms of cognition are not simply a filter through which we perceive reality, but also a barrier to proving there is an underlying reality. Accordingly, Fichte and Schelling posit there is no such underlying reality, and "[e]verything in the universe is spirit [*i.e.*, mind]."[86]

In *Phenomenology of Spirit*, Hegel deals with this flaw by postulating that there is no thing-in-itself.[87] This move clearly demarcates Hegel as an idealist philosopher in the line of Fichte and Schelling, because he rejects the dichotomy of mind and reality and posits that all reality is a product of mind.[88] However, reality is not simply a product of each individual's "little" mind. Rather, reality is the product of the collective human mind. This collective human mind (or spirit) is called the *Geist*.[89]

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existence of the thing-in-itself); SINGER, *supra* note 47, at 3 (noting Kant's conclusion that "[i]ndependent reality — . . . the world of the 'thing-in-itself' is for ever beyond our knowledge").

85. SINGER, *supra* note 47, at 4.

86. FROST, *supra* note 47, at 42. *See also id.* at 242 (noting Fichte's view that "Kant's 'thing-in-itself' could not possibly exist outside of the mind," "[t]he material world is . . . a creation of the mind . . . [and] is a projection into space of objects which exist only in the mind"); SINGER, *supra* note 47, at 3-4 (discussing Fichte's argument that "[w]hat mind cannot know, does not exist").

87. *See* FROST, *supra* note 47, at 45 (stating that "Kant had called this reality the 'thing-in-itself" and that "Hegel had argued that there is no such 'thing.'").

88. *See* HEGEL, PHENOMENOLOGY, *supra* note 81, ¶ 25, at 14 (stating that "[t]he spritual alone is the *actual*; it is essence, or that which has *being in itself*. . . .") (emphasis original); FROST, *supra* note 47, at 42-44 (discussing German idealism); ACTON, *supra* note 47, at 435, 436 (stating that "Hegel wrote that only mind (*Geist*) is real, and he constantly reiterated this view"); ACTON, *supra* note 47, at 435, 436 (pointing out that Hegel "must be regarded as a philosophical idealist"); SINGER, *supra* note 47, at 69-70 (noting Hegel's belief "that the ultimate reality is mind, not matter"). Like Hegel, Fichte also adhered to the proposition that it is a universal, not individual, mind that creates the material world.

89. *See, e.g.*, HEGEL, PHENOMENOLOGY, *supra* note 81, ¶ 28, at 15 (stating that "[t]he single individual is incomplete Spirit"). There is no single word in the English language into which the German word "*Geist*" neatly translates. Philosophers have used, somewhat interchangeably, the words "mind" and "spirit," both in a collective or universal sense. For a discussion of the problems of translating the German word "*Geist*" into English, *see* SINGER, *supra* note 47, at 45-47 (concerning the translations "mind" versus "spirit") and 68, 73 (concerning the collective or universal mind). Perhaps even the English words "consciousness" or "culture" might capture some of the meaning of "*Geist*." The present article uses the term "collective mind" because it avoids the religious or mystical connotations of "spirit," and seems to capture the focus on America's attitude toward the protection of its interests in the world trading system.

Hegel speaks of three parts, or moments, of the *Geist* through which the *Geist* develops — subjective *Geist*, objective *Geist*, and Absolute *Geist*. Each moment itself contains triadic sub-divisions. *See* FROST, *supra* note 47, at 243 (discussing the three stages of evolution through which mind passes — subjective mind, objective mind, and Absolute mind); SINGER, *supra* note 47, at 45 (noting Hegel's view of the state as objectified *Geist*). Acton provides a straightforward explanation of the moments and their sub-divisions. Subjective *Geist* consists of (1) the soul (which means the soul as a (i) natural entity, (ii) sensitive, feeling being, and (iii) being that expresses itself in the world), (2) sense experience, perception, understanding, and self-consciousness (*i.e.*, the stages in the historical development of *Geist* treated in *Phenomenology of Spirit*), and (3) intellectual functions (such as intention, representation, recollection, imagination, memory, and thought). Objective *Geist* consists of (1) law (*i.e.*, legal rights and duties), (2) subjective morality (*i.e.*, the morality of intention and conscience), and (3) social morality (which, in turn, has three elements, namely, the (i)

The *Geist* is an inherently dynamic concept.[90] It evolves through history based on categories through which human beings interpret the world. In contrast to Kant's fixed *a priori* forms of cognition, Hegel's categories are flexible and evolve over time as a result of extrinsic forces like religion and geography. It is an evolutionary process (namely, the dialectical process explained below) through which the *Geist* progresses to ever-greater stages of self-consciousness towards an ultimate stage of understanding of true freedom.

Consequently, as is evident from Hegel's *The Philosophy of History*, "history has some meaning and significance."[91] This central Hegelian belief stands in stark contrast to the post-modern view that history has no "ultimate purpose beyond the myriad individual purposes of the countless human beings who make history," that history is a "meaningless jumble of events."[92] What, for Hegel, is the purpose of history? To what end is the *Geist* progressing? As he indicates in the introduction to *The Philosophy of History*, "[t]he history of the world is none other than the progress of the consciousness of freedom."[93] (Hegel's concept of freedom is discussed more fully in Part IV below.)

There are five distinct stages in this progress.[94] The first stage involves ancient China and India. These are stationary civilizations and, indeed, may be regarded as outside of the historical development process.[95] In China and India, the only free individual is the ruler, and all others are completely subordinate to the will of the ruler.[96] In fact, the ruler's subjects have no individual wills of their own, and thus do not form their own moral judgments of right and wrong.[97] Rather, morality and law are matters of "external regulation."[98] External regulation in China takes the form of honor of, and obedience to, the

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family, (ii) civil society, and (iii) state). Absolute Mind consists of (1) art, (2) religion, and (3) philosophy. *See* ACTON, *supra* note 47, at 442-43.

For the most part, these moments and sub-divisions are not relevant to the present article, hence this article does not distinguish among them. Technically, however, the discussion in Part IV below on Hegel's concept of freedom deals with the triadic sub-division of objective *Geist*.

90. *See* HEGEL, PHENOMENOLOGY, *supra* note 81, ¶ 11, at 6 (declaring that "Spirit is indeed never at rest but always engaged in moving forward"); SINGER, *supra* note 47, at 9 (stating that the notion of "change from one historical era to another," "of development throughout history, is fundamental to Hegel's view of the world").

91. SINGER, *supra* note 47, at 10.

92. SINGER, *supra* note 47, at 10

93. HEGEL, THE PHILOSOPHY OF HISTORY, *supra* note 62, at 19. Hegel repeats this thesis in his conclusion. *See id.* at 412-57. *See also* ACTON, *supra* note 47, at 443 (noting that for Hegel, "[w]orld history is not wholly an affair of chance or contingency;" rather "the history of the world has a rational structure," and "[t]his rational structure . . . is the development of freedom") and 446 (stating that "Hegel considered that the history of the human race is a development from less to greater freedom and from less adequate forms of freedom to freedom in its perfection").

94. For a brief overview of these stages, *see* ACTON, *supra* note 47, at 446-47. A more in-depth treatment of these stages is found in HOULGATE, *supra* note 47, at ch. 1.

95. *See* HEGEL, THE PHILOSOPHY OF HISTORY, *supra* note 62, at 111-172; SINGER, *supra* note 47, at 11.

96. *See* SINGER, *supra* note 47, at 11.

97. *See* SINGER, *supra* note 47, at 11-12.

98. SINGER, *supra* note 47, at 12.

family and Emperor.[99] In India, the caste system precludes the development of the concept of individual freedom.[100]

The second stage, which is the beginning of "[t]rue history" for Hegel,[101] is the Persian Empire. While an absolute ruler governs this Empire, the Persian monarchy is theocratic. It is based on a general spiritual principle, or law, that regulates the ruler and the ruled.[102] That law is the religion of Zoroaster, and involves the worship of Light, which is pure, universal, and confers benefits on (*i.e.*, shines and warms) all persons.[103] The extension of this law to both ruler and subject , namely, the idea of a constraint on a ruler other than himself , is a necessary prerequisite toward a consciousness of freedom on the part of the subject.

In the third stage, the Greek world, some growth of consciousness of freedom occurs.[104] The idea of free individuality first takes hold during this stage. However, this idea cannot reach its full development in the Greek city states. Slavery supports the freedom of only a subset of the populace, and Greeks conceive of themselves as "indissolubly linked" to their particular city-state and do not distinguish between their own interests and the interests of their community as expressed through customs.[105] Indeed, Greeks adhere to the custom of consulting an oracle for guidance before making important decisions, instead of relying on their own powers of reason to lift them "above the chance events of the natural world" and "reflect[ing] critically upon their situation and the forces that influence them."[106]

Hegel's fourth stage is the Roman State. Consciousness of freedom is somewhat greater in this State than in the Greek world because the Roman State "rests upon a political constitution and a legal system which has individual right as one of the most fundamental notions."[107] However, Hegel realizes that the Roman state upholds only the "abstract freedom of the individual," not "*concrete* individuality," because diversity is not tolerated by the Roman Emperor.[108] "[T]here is a constant tension between the absolute power of the State and the ideal of individuality."[109] (In contrast, in the Persian Empire, there is no such tension because the ideal of individuality is not developed , only the poten-

99. *See* HEGEL, THE PHILOSOPHY OF HISTORY, *supra* note 62, at 116-38; SINGER, *supra* note 47, at 12.

100. *See* HEGEL, THE PHILOSOPHY OF HISTORY, *supra* note 62, at 139-72; SINGER, *supra* note 47, at 12.

101. SINGER, *supra* note 47, at 11.

102. *See* HEGEL, THE PHILOSOPHY OF HISTORY, *supra* note 62, at 173-222; SINGER, *supra* note 47, at 12.

103. *See* SINGER, *supra* note 47, at 12-13.

104. *See* HEGEL, THE PHILOSOPHY OF HISTORY, *supra* note 62, at 223-56; SINGER, *supra* note 47, at 13.

105. SINGER, *supra* note 47, at 14.

106. SINGER, *supra* note 47, at 15.

107. SINGER, *supra* note 47, at 16. *See also* HEGEL, THE PHILOSOPHY OF HISTORY, *supra* note 62, at 278-95

108. HEGEL, THE PHILOSOPHY OF HISTORY, *supra* note 62, at 279 (emphasis original).

109. SINGER, *supra* note 47, at 16.

tial for this idea exists. Nor is there any such tension in the Greek world, because political power in opposition to the ideal is not centralized.[110])

Hegel calls the final stage in the progression of the *Geist* the "German world," though it encompasses the vast span of time from the fall of the Roman Empire to the period in which he lives.[111] The "single key event" during this stage is the Reformation.[112] The Reformation attacks the rituals of the Catholic Church, and introduces the idea that "[t]he individual conscience is the ultimate judge of truth and goodness."[113] Ultimately, it leads to the removal of many of the inhibitions on the expression of freedom that had plagued earlier historical stages: slavery, reliance on oracles, and custom. Therefore, "the Reformation unfurls 'the banner of Free Spirit' and proclaims as its essential principle: 'Man is in his very nature destined to be free.'"[114] "Since the Reformation, the role of history has been nothing but the transforming of the world in accordance with this essential principle."[115]

It is apparent that each of Hegel's historical stages is characterized by a *different Geist*.[116] In ancient China and India, the only freedom is that of a single, omnipotent ruler, hence the concept of freedom is totally lacking. In Persia, rule is based on a general principle, and this fact "signifies the beginning of the growth of the consciousness of freedom."[117] The Greek world is "animated by the idea of free individuality,"[118] though this idea is not fully mature as its development is constrained by superstitions and customs. The Roman state is characterized by consciousness of abstract, though not concrete, freedom. The German world, for Hegel, represents the consummation of freedom. Individuals govern themselves "according to their own conscience and convictions," and the social and political institutions of the real world (*e.g.*, constitutions, law, property, government, morality, etc.) are "rationally organized."[119]

To be sure, the evolutionary process from one stage to the next is not always linear, *i.e.*, there are periods of stagnation and chaos. For example, Hegel rightly describes the Middle Ages as "the long, eventful and terrible night" that

110. *See* HEGEL, THE PHILOSOPHY OF HISTORY, *supra* note 62, at 278-79; SINGER, *supra* note 47, at 16

111. *See* HEGEL, THE PHILOSOPHY OF HISTORY, *supra* note 62, at 341-46; SINGER, *supra* note 47, at 18.

112. SINGER, *supra* note 47, at 19. *See also* HEGEL, THE PHILOSOPHY OF HISTORY, *supra* note 62, at 412-38.

113. SINGER, *supra* note 47, at 20. *See also* HEGEL, THE PHILOSOPHY OF HISTORY, *supra* note 62, at 416-17.

114. SINGER, *supra* note 47, at 20.

115. SINGER, *supra* note 47, at 20. Thus, for example, Hegel interprets the Enlightenment and French Revolution as further developments toward the idea of freedom. *See id.* at 20-22 and HEGEL, THE PHILOSOPHY OF HISTORY, *supra* note 62, at 447.

116. *See* ACTON, *supra* note 47, at 435, 436 (stating that "each historical epoch, according to Hegel, embodied some aspect of or stage in the development of man's free mind").

117. SINGER, *supra* note 47, at 13.

118. SINGER, *supra* note 47, at 13.

119. SINGER, *supra* note 47, at 22. For a discussion of Hegel's conception of the rationally organized state and its relationship to the Germany in which he lived, *see id.* at 22, 39-44 (refuting the argument that Hegel is an apologist for the Prussian monarch and advocates totalitarianism).

was not ended until "that *blush of dawn*," the Renaissance.[120] Nonetheless, in general, each new stage is characterized by a higher level of consciousness of freedom , a more advanced *Geist* , than the previous stage.

> But while the course of world history, as Hegel presents it, is certainly not a smooth and steady progression, it does not go backwards either. The gains made in a previous epoch are never lost entirely.[121]

Moreover, as is suggested by Hegel's criticism of the reliance of ancient Greeks on oracles, reason plays a central role in the evolutionary process. The use of reason "is the key to further progress in the development of freedom."[122]

By what mechanism does the *Geist* evolve? For Hegel, the evolutionary process is dialectical.

> In the *Philosophy of History*, one immense dialectical movement dominates world history from the Greek world to the present. Greece was a society based on customary morality, a harmonious society in which citizens identified themselves with the community and had no thought of acting in opposition to it. This customary community forms the starting-point of the dialectical movement, known in the jargon as the *thesis*.
>
> The next stage is for this thesis to show itself to be inadequate or inconsistent. In the case of the community of ancient Greece, this inadequacy is revealed through the questioning of Socrates. The Greeks could not do without independent thought, but the independent thinker is the deadly foe of customary morality. The community based on custom thus collapses in the face of the principle of independent thought. It is now the turn of this principle to develop, which it does under Christianity. The Reformation brings acceptance of the supreme right of individual conscience. . . . This is the second stage of the dialectical movement. It is the opposite or negation of the first stage, and hence is known as the *antithesis*.
>
> The second stage then also shows itself to be inadequate. Freedom, taken by itself, turns out to be too abstract and barren to serve as the basis for a society. Put into practice, the principle of absolute freedom turns into the Terror of the French Revolution. We can see that both customary harmony and abstract freedom of the individual are one-sided. They must be brought together, unified in a manner that preserves them, and avoids their different forms of one-sidedness. This results in a third and more adequate stage, the *synthesis*. In the *Philosophy of History*, the synthesis in the overall dialectical movement is the German society of Hegel's time, which he saw as harmonious because it is an organic community, yet preserving individual freedom because it is rationally organized.[123]

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120. HEGEL, THE PHILOSOPHY OF HISTORY, *supra* note 62, at 411 (emphasis original).
121. SINGER, *supra* note 47, at 16.
122. SINGER, *supra* note 47, at 15.
123. SINGER, *supra* note 47, at 77-78 (emphasis original).

Hegel explores the dialectical progression of the *Geist* from the abstract perspective of consciousness in *Phenomenology of Spirit*. In brief, he argues consciousness develops through the following stages: (1) sense certainty (which is not genuine knowledge because it cannot be expressed); (2) perception (where objects are classified according to universal and articulated properties); (3) understanding (where consciousness reflects upon itself and becomes self-consciousness); (4) fully explicit self-consciousness (as opposed to the latent self-consciousness of the previous stage); (5) the master-slave relationship (involving the need for acknowledgment or recognition as between two self-consciousnesses); (6) stoicism (which resolves the combat between master and slave by teaching the slave to be detached from his circumstances); (7) skepticism; (8) the unhappy consciousness (in which the soul feels alienated from God, yet it cannot escape the material world); and finally (9) full self-consciousness (*i.e.*, absolute knowledge, or knowledge of the world as it really is, namely, a

Thus, in a generic sense, the dialectical process is one of sublation:[124] two dominant but opposing ideas, a thesis and antithesis, negate one another and are replaced by a new synthesis.

> Everywhere, in the natural world or in the mind of man, we find a process of unfolding. This . . . [Hegel] called the dialectical process or the principle of contradiction. Everything tends to pass over to its opposite. The seed tends to become a flower. However, nature does not stop with these contradictions, but strives to overcome them, to reconcile them in a whole or unity.
>
> The entire universe is a whole. In it this principle is working, a principle which is rational. Mind is everywhere. Within this whole there is development. And this development proceeds by the dialectical process. First we discover a thing, a "thesis." Then we discover its opposite or contradiction, an "antithesis." These two are at last reconciled in a "synthesis" which becomes another "thesis" and the process starts again.
>
> All the universe is a continuation of this process with the whole. Reality then is a process of evolution, a developing from a less clear to a more clear.
>
> . . . .
>
> This [dialectical] process is everywhere. First there is a thesis or affirmation, then we discover the antithesis to this thesis or its contradiction. The highest form of thought is the reconciling of both in a synthesis which lifts thinking one step higher. The human mind does not stop with contradictions, but strives to get rid of them by effecting a synthesis. This is not to be confused with a compromise. In a true synthesis the values of both the thesis and the antithesis are conserved and together they move toward new values.
>
> The highest function of the mind, then, is that activity which enables one to see things whole, to see opposites unified. Here man rises to the true height of his nature. Thought moves from the simple ideas to more complex notions, from the individual to the rich and full.
>
> . . . [T]hinking moves from the simple to the complex not by discreet jumps but by a gradual development into syntheses which become theses for still higher syntheses.
>
> But, since nature and thought follow the same process of evolution, Hegel reasoned that all reality is a logical process of evolution. The universe is a logical process of thought and not dead material upon which thought works.[125]

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creation of mind). *See* HEGEL, PHENOMENOLOGY OF SPIRIT, *supra* note 81, at 58-262. For a straightforward overview of the aforementioned stages, *see* SINGER, *supra* note 47, at 47-57 (discussing *Phenomenology of Spirit* and Hegel's equation of consciousness and the mind, that is, his argument that "history is nothing but the progress of the consciousness of freedom because history is the development of the mind"), and 66-67 (discussing Hegel's view that true freedom and absolute knowledge are inseparable, and hence "the progress of the consciousness of the idea of freedom is also the progress of the mind towards absolute knowledge"). For a discussion of the master-slave relationship and the unhappy consciousness, *see* ACTON, *supra* note 47, at 438-39.

Hegel also discusses dialectics as a logical cognitive method in *Science of Logic* (1812-13, 1816). The English language edition of this work relied upon in the present article was translated by A.V. Miller and published by Humanities Press International, Inc. in 1969. (The publication dates of the first German edition are set forth in ACTON, *supra* note 47, at 435.) For a clear summary of these stages, *see* SINGER, *supra* note 47, at 78-80 (discussing *Science of Logic* and Hegel's application of the dialectical method to "the abstract categories in which we think").

For the most part, *Phenomenology of Spirit* and *Science of Logic* are beyond the scope of this article.

124. For a discussion of the term "sublation," *see* Hoffheimer, *supra* note 69, at 823, 839-46.

125. FROST, *supra* note 47, at 43-44, 258-59. In a different passage, Frost makes clear the importance of the dialectic not only in each individual's thought processes, but also in the universal mind (*i.e.*, the *Geist*).

The dialectical process is a rational one in which Hegel sees individuals, the states they combine to form, and the civilizations they develop, as self-determining.[126] In other words, the history of the *Geist* is a sublation process by which humans in a collective sense search for greater self-determination, and the *Geist* thereby raises itself upward to ever-greater stages of consciousness about freedom. Hegel posits that the ultimate stage in the historical development of the *Geist* is true freedom.[127] As intimated earlier, in *The Philosophy of History*, he

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> In man, Hegel found certain logical processes operating. He recognized that the human mind naturally moves from the statement of a fact to a statement of its opposite. For example, war is evil. But, it is evident that good can and has come of war. Thus, war must also be good. Having recognized both these contradictory facts, the human mind moves on to discover some basis for reconciling them. Hegel believed that this was the way in which all thinking takes place. First, we propose a thesis: war is evil. Then, we propose an antithesis: war is good. The final proposition is the synthesis: despite the evils that come from war, there are certain values which men realize in war.
>
> As with the human mind, so with the universal mind [*i.e.*, the *Geist*], reasoned Hegel. The universe is like man and the processes in the universe are the same processes, on a larger scale of course, which we find in the mind of man. Reality is, for Hegel, a logical process of evolution. It, too, has its thesis, antithesis, and eventual synthesis. Man is the pattern of which the universe is the complete realization. Man is the universe in miniature. Man is a microcosm of the great macrocosm; that is, man is a little universe which is a miniature of the whole universe.

FROST, *supra* note 47, at 71-72.

The dialectic is said by some philosophers to be Hegel's "greatest discovery." SINGER, *supra* note 47, at 75. *See also* ACTON, *supra* note 47, at 435, 436 (noting that "Hegel is, of course, famous for his dialectical method"). No doubt Hegel is best remembered for the dialectic, in part because the Marxist theory of history relies on it to explain the downfall of capitalism and its ultimate replacement by communism. Ironically, however, Hegel does not emphasize the use of the terms "thesis," "antithesis," or "synthesis." Instead, Hegel speaks of contradictions, and identifies triads, and his division of concepts into triads is evident throughout his works. *See* ACTON, *supra* note 47, at 435, 436 (noting that "Hegel set out his systematic writings in dialectical triads") and 440-43 (discussing the triads in Hegel's *Encyclopedia of the Philosophical Sciences in Outline* (1817)). Accordingly, there is some debate among Hegel scholars as to the importance of the dialectic in Hegel's works. *See, e.g.*, ACTON, *supra* note 47, at 443-44 (discussing the debate among philosophers of the role of contradiction in Hegel's philosophy); Hoffheimer, *supra* note 69, at 823, 827-28 (arguing that "it is doubtful whether Hegel propounded a dialectical view of law" because "[h]is writings rarely employ the term 'dialectical' and never employ it in the sense that it is most often used today").

126. *See generally* SINGER, *supra* note 47, at 36 (discussing a lesson Hegel draws from the French Revolution, namely, that "to build a State on a truly rational basis we must not raze everything to the ground and attempt to start again completely from scratch" but rather "[w]e must search for what is rational in the existing world and allow that rational element to have its fullest expression").

127. In *Phenomenology of Spirit*, Hegel describes the ultimate stage in the development of the *Geist* in more abstract terms. Through the dialectical process, the *Geist* progresses "from the simplest and most primitive to the Absolute Mind." FROST, *supra* note 47, at 149. At this final stage, the *Geist* attains absolute knowledge, *i.e.*, absolute self-consciousness, and is aware that all of reality is its own creation. "At its highest, mind is creative of the world which it knows." *Id.* at 243. *See also* ACTON, *supra* note 47, at 440 (noting that "Absolute Mind" is "the consciousness man gains of himself through understanding his own history in a civilization that he has imposed upon the contingencies of nature"); SINGER, *supra* note 47, at 69 (explaining Hegel's definition of "absolute knowledge" not as "knowledge of everything," but rather "knowledge of the world as it really is").

The exact nature of this ultimate stage is a matter of debate among post-Hegel philosophers. One group, the orthodox or Right Hegelians, argues that *Geist* ultimately achieves a re-unification of God and man. *See, e.g.*, FROST, *supra* note 47, at 123, 149 (discussing Hegel's conception of the nature of God); SINGER, *supra* note 47, at 84 (noting the efforts of the Right Hegelians to reconcile

regards the Germany of his time as having attained this stage, though he provides little defense of this position.

Of what possible relevance to the contemporary international trade law problem of persistent unilateralism are Hegel's five stages of history and the dialectical development of the *Geist*? One answer is to relate each of Hegel's stages of history to the stages in the development of international trade law. However, this task is beyond the scope of the present article. Indeed, on the one hand, such a task might prove fruitless as it is not clear whether meaningful analogies exist between the stages in the two developmental series. On the other hand, perhaps a case could be made that the history of international trade law, particularly since the advent of the General Agreement on Tariffs and Trade (GATT) in 1947, has been the gradual, and not necessarily linear, implementation of the idea that tariff and non-tariff barriers should be reduced in order to promote global economic welfare.

For purposes of this article, the relevance of Hegel's stages is less direct and more inspirational. Hegel's identification of distinct historical stages gives rise to the following insight: each historical stage has its own *Geist*, and the *Geist* evolves from one stage to the next by a dialectical process involving contradictions and their ultimate resolution. This Hegelian insight is the basis for an analogy to the contemporary problem: The *Geist* in the current era of American trade policy is persistent unilateralism, and this *Geist* is caused by a dialectic between free trade and fair trade. In other words, Hegel's stages prod us to consider three connected inquiries about the problem of persistent unilateralism. First, what is the present stage in the evolution of American trade policy? Second, why does that stage exist? Third, how might a new, higher stage be achieved? The first two inquiries are considered in this Part, and the third inquiry is pursued in Part IV below. In sum, the relevance of Hegel's stages is that they suggest a three-step methodology to reflect upon persistent unilateralism.

B. Declaring the Geist.

Persistent unilateralism may be diagnosed as the *Geist* of the current stage in America's trade policy toward the rest of the world. Threatened or actual unilateral trade action pursuant to Section 301 or other statute is not just the means by which the U.S. expresses its desire to be a self-determining state in the

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Hegel's views with Protestantism). The other group, the Young or Left Hegelians, includes Karl Marx. This group argues that the ultimate stage of self-consciousness involves the reconciliation of man with himself. *See* SINGER, *supra* note 47, at 84-86 (discussing the Left Hegelian desire to overcome the opposition between the individual and society, and Marx's particular emphasis on the need to resolve the contradiction between alienated labor and private property by abolishing the capitalist ownership system and replacing it with communism). For an overview of the debate between Right and Left Hegelians, *see* Acton, supra note 47, at 435, 436 and Stephen D. Crites, *Hegelianism*, *in* III ENCYCLOPEDIA OF PHILOSOPHY (Paul Edwards ed., 1967), 451, 452-54. The exact nature of Hegel's ultimate stage in the evolution of *Geist* is not relevant to, and beyond the scope of, the present article.

world trading system. It also reflects our collective mind about how we ought to relate to this system. It is a spirit that resonates through our trade policy.

Yet, perhaps this diagnosis is an inaccurate declaration. It is, to be sure, the starting point for the argument. Is this starting point wrong? Could it be said that unilateralism does not persist in U.S. trade policy? Or, could it be said there is no single *Geist* in U.S. trade policy? Much of the remainder of this article makes clear the answer to these doubts is no. Furthermore, the four questions asked in the first paragraph of this article are strong clues the diagnosis is accurate.

First, the U.S. has not transferred all of its trade disputes to the WTO. Based on the U.S.-Japan auto dispute and the Helms-Burton controversy, it may be inferred that the U.S. remains uncomfortable with the WTO as a forum for resolving a dispute possessing at least two of the following three attributes: the dispute involves (1) a major or politically sensitive sector (like autos or auto parts), (2) an issue regarded as a sovereign prerogative (such as national security), or (3) a large or politically prominent trading partner (such as the EU or Japan).

Second, the U.S. has not forsworn implicit or overt threats of unilateral trade action. To the contrary, such threats remain an important part of U.S. trade policy. It might even be argued that the U.S. appears increasingly willing to deliver on many of its threats. Consider, for example, Professor Malloy's observation about the International Emergency Economic Powers Act of 1977. He writes in his treatise *Economic Sanctions and U.S. Trade* that between 1977-90, "we have seen the declaration of more national emergencies than had been declared during the forty-five year period from 1933 through 1977 — and that earlier period included the Depression and three major wars."[128] Developments since 1990 reinforce this observation. Between 1990-92, President Bush used the 1977 Act against Iran, Iraq, Libya, Serbia and Montenegro, and Haiti, and to deal with the problem of chemical and biological weapons.[129] Since 1992, President Clinton has used it against Iran, Iraq, Libya, Serbia and Montenegro, and Haiti, and to deal with the problems of nuclear weapons and disruption of the Middle East peace process by foreign terrorists.[130] Under the 1977 Act, of course, a unilateral trade sanction — including a trade embargo, asset freeze, and transportation restriction — typically accompanies a presidential declaration of a national emergency.[131] Thus, Professor Malloy's point suggests at a minimum no lessening in the importance of following through on the imposition of sanctions.

128. MALLOY, *supra* note 5, at xix. The 1977 Act empowers the President to declare a national emergency in response to "any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States." 50 U.S.C. § 1701(a).

129. *See* OVERVIEW AND COMPILATION, *supra* note 48, at 162-66.

130. *See* OVERVIEW AND COMPILATION, *supra* note 48, at 162-66.

131. The range of economic sanctions the President is authorized to impose are set forth at 50 U.S.C. § 1702.

Third, the U.S. has not abolished Section 301, or even significantly restricted the statutory bases for unilateral action. To the contrary, several of the amendments to Section 301 made since its initial enactment in 1974 have strengthened the statute. For instance, the Super 301 blacklisting provisions, and Special 301 intellectual property provisions, were added in the Omnibus Trade and Competitiveness Act of 1988.[132]

Until bold reforms are made in these areas, characterizing the collective American mind toward the world trading system as one in which a spirit of unilateralism is manifest in a powerful way seems an entirely reasonable starting point. Unfortunately, no such reforms seem likely even to be considered seriously in the near future. This unhappy forecast is confirmed by scholars no less prominent than Stanford University economist Anne O. Krueger, the former Vice President for Economics and Research at the World Bank. She observes that a "schizophrenia in American trade policy continues" between support for a multilateral trading system and unilateral trade interventions.[133]

> Since the 1970s . . . U.S. policy has become increasingly schizophrenic. On the one hand, there has been support for successive GATT rounds and other trade-liberalizing measures. At the same time, however, the United States has increasingly resorted to restrictive trade measures both in practice and in rhetoric and is no longer unswerving in its support for multilateralism. In rhetoric much of the discussion has used catchwords such as "free trade but fair trade" to imply that intervention is warranted if other countries are "unfair" traders. In the 1980s U.S. official policy shifted away from unequivocal support for the open multilateral trading system to a "two-track" approach under which support for the GATT would be coupled with measures to enter into free trade agreements with particular countries.[134]

Not surprisingly, Professor Krueger concludes that "the United States, while expressing support for the multilateral system, acts in ways that tend to undermine it."[135]

To be sure, as Professor Krueger suggests, unilateralism is not the only element in the collective American mind about trade policy. It is well known that the U.S. was a key force behind the creation and expansion of the GATT-WTO system, and the U.S. is to be commended for submitting many trade disputes to the WTO. Indeed, Section 301 requires reference of a dispute to the DSU if the disputed issue is covered by a Uruguay Round agreement.[136] Accordingly, it would be unfair to label the current *Geist* "consistent" unilateralism, as that would neglect the significant multilateralist tendencies in U.S. trade

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132. For a discussion of Super 301, *see* BHALA, INTERNATIONAL TRADE LAW, *supra* note 2, at 1123-32. For a discussion of Special 301, *see id.* at 1055-59.

133. ANNE O. KRUEGER, AMERICAN TRADE POLICY — A TRAGEDY IN THE MAKING 113 (1995). (Professor Krueger's biography is set forth at p. 141.)

134. KRUEGER, *supra* note 133, at 30.

135. KRUEGER, *supra* note 133, at 114.

136. *See* 19 U.S.C. § 2413(a)(2) (stating that if a Section 301 investigation "involves a trade agreement" and a mutually acceptable resolution is not reached by the earlier of (1) a consultation period specified in the agreement or (2) the 150th day after consultation began, then the USTR must request proceedings under the formal dispute settlement procedures provided under a trade agreement).

policy. This concession, however, is not inconsistent with Hegelian teaching. Hegel is careful in *Philosophy of History* to acknowledge the existence of multiple forces in an historical era. As discussed earlier in this Part, both free individuality and adherence to group custom are manifest in the Greek world. For Hegel, the question is which force is particularly noteworthy, or perhaps dominant, because Hegel seeks to offer a general characterization about each era. Likewise, it is reasonable to generalize about U.S. trade policy, as Hegel did about historical eras, as long as the limitations of a generalization are admitted.[137]

The general characterization of the *Geist* as "persistent" unilateralism implies the U.S. is not as far down the path toward Hegelian enlightenment (consciousness of true freedom, as discussed in Part IV) as, ideally, it should be. Put differently, if "consistent" unilateralism would be an unfair diagnosis, then "residual" multilateralism would be overly optimistic. The term "persistent" is meant to convey the intermediate position of U.S. trade policy on that path. After all, as is apparent from post-Uruguay Round Section 301 investigations and unilateral trade sanctions against Cuba, Iran, Libya, and Burma, there is ample evidence of the existence of unilateral threats and acts.

Moreover, it should not be forgotten that under Section 301, it is for the U.S. to decide whether a disputed issue is covered by a Uruguay Round agreement, and thus whether to take a dispute to the WTO in the first place. Certainly, the other disputant can ask for a WTO panel to be convened. But, whether the U.S. will participate in the proceeding or comply with a panel ruling about subject matter jurisdiction, or whether it will risk an adverse default judgment, is not a certainty. It is particularly uncertain whether the U.S. would accept a WTO panel ruling interpreting the language of Section 301 regarding the necessity of use of the DSU. That language requires use of the DSU if the disputed issue "involves" a Uruguay Round agreement.[138] But, nothing in the DSU establishes a WTO panel, Appellate Body, or the Dispute Settlement Body as the final adjudicator of what "involves" means in a particular context, *i.e.*, of subject matter jurisdiction. Further, nothing in the DSU bars the use of unilateral action in a matter that does not "involve" a Uruguay Round agreement. Its silence on this matter might even be taken as acquiescence.

Finally, it is useful to recall Section 102(a)(1) of the 1994 Uruguay Round Agreements Act.[139] It makes clear U.S. law reigns supreme over any inconsistent provision in any Uruguay Round agreement. In effect, having entered into the broad array of multilateral obligations negotiated in the Uruguay Round, the

137. An interesting and unresolved problem concerns subjective perceptions of different forces in a particular historical era. For example, foreigners might be more sensitive than Americans to threatened or actual unilateral trade action, and thus might be more receptive than Americans to characterizing the *Geist* of U.S. trade as persistent unilateralism. (Indeed, when lecturing at the National Law School in Bangalore, India in December 1996, I saw firsthand the extreme emotional reaction of the law students against Section 301.) Hegel does not provide any guidance as to how to weigh subjective preferences — he was the ultimate judge.

138. 19 U.S.C. § 2413(a)(2) (1993).

139. 19 U.S.C. § 3512(a)(1) (1997).

U.S. declared in its implementing legislation that none of those obligations was as important as U.S. law. The Clinton administration's *Statement of Administrative Action on the Uruguay Round Agreement Establishing the World Trade Organization* makes this point forcefully: "[t]he WTO will have no power to change U.S. law."[140] And, even if the U.S. does turn over a dispute to the WTO, it *still* continues with a Section 301 investigation of its own. This parallel proceeding is not a mere ritual but, rather, an indicium of unilateralism.

In addition to the concern about the reasonableness of the diagnosis, it is important to discuss the shift in the level of analysis associated with the application of Hegel's concept of the *Geist*. In *Philosophy of History*, Hegel wrote of the *Geist* as the collective mind of an entire civilization. The present focus is on a subset of modern civilization — one country, the U.S., for a portion of its history, and its relationship in one realm, trade policy, with the rest of modern civilization. However, this narrowed focus does not result in any injustice to the concept of the *Geist*. It is a flexible concept that seems equally well suited to a period of one country's history in a particular dimension and to the full sweep of that country's existence. Moreover, the shift in levels of analysis should not be exaggerated. After all, Hegel focused on particular countries and regions — China, India, Persia, Greece, Rome, and the German world — in *Philosophy of History*. Thus, it would be unfair to characterize the shift as one from a macro to micro level.

C. The Evidentiary Problem Regarding Cause.

If, indeed, it is fair to diagnose persistent unilateralism as the present *Geist*, then why does this *Geist* exist in the first place? What gives rise to this *Geist*? The answer is an unresolved dialectic between the ideas of free trade and fair trade. More generally, Hegel's concept of the *Geist* and its development suggests U.S. trade policy is a dialectical progression of opposing concepts.[141] Accordingly, unilateral trade action in general, and statutes like Section 301 in particular, can be seen as nothing more — or less — than the outcome of a dialectical progression currently involving the opposing concepts of free versus fair trade.[142]

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140. *See* MESSAGE, *supra* note 1, at 659.

141. Interestingly, a little-known post-Hegelian jurist, Eduard Gans (1798-1839), espoused the belief that law develops in an historical and systematic sense through a dialectical progression of concepts. *See* CRITES, *supra* note 127, at 451.

While this article argues the free trade - fair trade dialectic "causes" the *Geist* of persistent unilateralism, this article does not engage in a scientific causation analysis. It does not, therefore, identify a number of possible causal variables and then by means of a specified methodology test each variable for its significance. Nor does Hegel offer a rigorous methodology on which he bases his arguments about the development of the *Geist* through different historical eras. Rather, he relies on his own knowledge and research of history. Accordingly, it must be admitted that there could be additional causal factors — for instance, political considerations — that prompt unilateral action. At the same time, however, the dialectic may well be the fundamental and primary factor. For example, unilateral action prompted by concern about mistreatment of foreign workers may also be motivated by fear of competition from imports made by cheap labor.

142. It is, perhaps, worth remembering why free trade and fair trade are conceptual opposites. As an ideal, free trade theory calls for the dismantling of tariff and non-tariff barriers, and the

Evidence of the free trade - fair trade dialectic that underlies the present stage in the development of the *Geist* of U.S. trade policy is found in Congressional efforts to enact "fair trade in financial services" legislation during the early and mid 1990s.[143] Discussion of legislation on fair trade in financial services dates back to the Reagan and Bush administrations, which opposed such legislation on the grounds that it would subject U.S. financial service companies to retaliation by foreign governments.[144] Nonetheless, such legislation was proposed many times in Congress, most notably in 1991,[145] 1993,[146] and 1995.[147] Indeed, the *Financial Regulation Report* remarked amusingly that "[f]ew pieces

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minimal use of trade remedies because such use often is disguised protectionism. In contrast, the policy prescriptions following from a fair trade approach typically involve the erection of tariff and non-tariff barriers, and vigorous use of trade remedy actions. Indeed, fair traders may advocate the use of these measures even against a country with relatively open markets if they perceive unfairness arising from circumstances other than governmental policies, such as cheap labor or restrictive business practices.

143. It is also found in other international trade law contexts, for instance, it resonates in the question of free trade areas. *See, e.g.*, the articles in the symposium on *Free Trade Areas: The Challenge and Promise of Fair vs. Free Trade*, 27 L. & POL'Y INT'L BUS. (1996).

144. *See* Philip C. Meyer, *Congress Looks Ready to Approve Fair Trade Legislation in 1994*, 13 BANKING POLY REP., Mar. 7, 1994, at 8 (noting the "mixed emotions" of the Reagan and Bush administrations); Susumu Awanohara, *Banking on Toughness*, FAR EASTERN ECONOMIC REVIEW, Nov. 11, 1993, at 72 (noting the opposition of the Reagan and Bush administrations). The first fair trade in financial services bill was submitted by Senator Jake Garn in 1984. For discussions of the early bills, *see Fair Trade in Financial Services Legislation — Part 1: Joint Hearing Before the Subcomm. on International Development, Finance, Trade and Monetary Policy and the Subcomm. on Financial Institutions Supervision, Regulation, and Insurance of the House Comm. on Banking, Finance and Urban Affairs*, 102nd Cong., 1st Sess. 9 (1991) (statement of Rep. Charles E. Schumer) and 93 (written testimony of Senator Jake Garn).

145. *See* Gary N. Kleiman, *Beyond Bank Reform: The Broader Agenda*, AM. BANKER, July 26, 1991, at 28A (discussing the 1991 Fair Trade in Financial Services bill reintroduced by Senators Donald W. Riegle, Jr. then Chairman of the Senate Banking Committee, and Jake Garn).

The Senate version of the 1991 bill introduced by Senators Riegle and Garn was S. 543, entitled the "Fair Trade in Financial Services Act" and was attached to the Defense Production Act, S. 347. *See Fair Trade in Financial Services Legislation — Part 1, supra* note 144, at 22 (statement of Rep. Mary Rose Oakar), 84-85 (written testimony of Senator Donald W. Riegle, Jr.), and 89 (written testimony of Senator Jake Garn). An earlier version of the 1991 bill, the "Fair Trade in Financial Services Act of 1990," S. 2028, was introduced by Senators Riegle and Garn in 1990. *See* Michael Gruson, *Reciprocal National Treatment: Comparing EC Plan to Riegle-Garn Bill*, 9 BANK EXPANSION REP., Apr. 2, 1990, at 2; *Congress Considers New Bill Seeking National Treatment Reciprocity*, 9 BANK EXPANSION REP., Feb. 19, 1990, at 2 [hereinafter *Congress Considers*]. The 1990 bill followed two previous bills in 1987 and 1988, which were passed by the Senate but not the House. *Id.*

The House version of the 1991 bill, introduced by Representative Charles E. Schumer, was H.R. 3503. *See Fair Trade in Financial Services Legislation — Part 1*, supra note 144, at 8 (statement of Rep. Charles E. Schumer). For a summary of the 1991 bills, *see id.* at 8-9. The text of the Schumer bill is reprinted in *id.* at 471-511.

146. The House version of the 1993 bill, sponsored by Representatives Jim Leach and Charles E. Schumer, was called the "Fair Trade in Financial Services Act of 1993." *See* H.R. 3248, 103d Cong., 1st Sess. (1993); *Fair Trade in Financial Services, Hearing before the Subcomm. on International Development, Finance, Trade, and Monetary Policy of the House Comm. on Banking, Finance and Urban Affairs*, 103d Cong., 1st Sess. 4, 7 (1993) (statements of Lawrence Summers, Under Secretary for International Affairs, U.S. Department of the Treasury and John P. LaWare, Member, Board of Governors of the Federal Reserve) (referring to the bill name and number, respectively). The Senate version, bearing the same title and numbered S. 1527, was co-sponsored by Senators Donald Riegle, Alfonse D'Amato, and others. *See Administration Backs Bill Curbing Foreign Access to U.S. Markets; Protectionist Move is Tied to GATT Negotiations on Financial Services*, 5 THOMSON'S INT'L BANKING REG., Nov. 1, 1993, *available in* LEXIS Banking Library; "*Fair Trade*

of legislation have ever passed both Houses of Congress as many times as the Fair Trade in Financial Services (FTFS) Act has and not ultimately become law."[148]

The proposals was the same.[149]

> The central purpose of all the versions of the FTFS [Fair Trade in Financial Services] Act is to establish a framework for identifying countries that do not provide national treatment to U.S. financial services companies, designate such nations whose failure to provide national treatment has significantly impacted U.S. financial institutions, require negotiations with such countries, impose sanctions on such countries if necessary, and require reports designed to end discrimination against U.S. financial institutions seeking to operate abroad.[150]

However, for four reasons, none of the bills was ever enacted. First, there were jurisdictional squabbles among committees in the House of Representatives.[151]

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in Financial Services" Bills Reintroduced, INVESTORS CHRONICLE, Oct. 22, 1993, *available in* the LEXIS Bankng Library.

As discussed in the text below, the 1993 bill was not enacted in part because of jurisdictional problems in the House. Accordingly, the following year, Representatives Leach and Schumer sponsored a narrower version of the 1993 bill. The 1994 proposal, H.R. 4926, was called the "National Treatment in Banking Act of 1994." For discussions of the 1994 bill, *see, e.g.*, Albert R. Karr, *House Clears Bill To Open Markets For U.S. Banking*, WALL ST. J., Oct. 3, 1994, at A4; *National Treatment in Banking Act*, Fin. Reg. Rep., Oct. 1994, *available in* LEXIS Banking Library; *Fast Track for Fair Trade II: Final Outcome Still Unsure*, 6 THOMSON'S INT'L BANKING REG. No. 35, Sept. 19, 1994, at 2; *Schumer Takes a New Cut at "Fair Trade,"* 18 Bank Letter No. 32, Aug. 15, 1994, at 7; William Acworth, *Schumer Launches New Fight Over Fair Trade*, 4 AM. BANKER'S WASHINGTON WATCH, Aug. 15, 1994, at 5. The 1994 bill was narrower than the 1993 bill in order to try to resolve the jurisdictional disputes in the House. The 1994 bill addressed only the banking industry, and thus came under the jurisdiction of the House Banking Committee. By excluding the securities and insurance sectors, the 1994 bill escaped the jurisdiction of other House committees.

147. The 1995 legislative proposal, introduced by then House Banking Committee Chairman Jim Leach, was called the "Fair Trade in Financial Services Act of 1995." *See* Fair Trade in Financial Services Act of 1995, H.R. 19, 104th Cong., 1st Sess. (1995); *House Banking Chair Introduces Fair Trade in Financial Services Bill*, 12 Int'l Trade Rep. (BNA), Jan. 11, 1995. For discussions of the 1995 bill, *see Rubin Attacks Reciprocity in Leach Bill*, 7 THOMSON'S INT'L BANKING REG., May 22, 1995; William Acworth, *Fair Trade Legislation: Still Simmering*, 7 THOMSON'S INT'L BANKING REG., Feb. 6, 1995, at 5.

148. *Current Status of the Fair Trade in Financial Services Act*, FIN. REG. REP., Apr. 1992, *available in* LEXIS.

149. *Introduction of Bills: Outline of the Proposed Bill Named The Fair Trade in Financial Services Act of 1995: Hearing Before the House Committee on Banking, Financial Services and Urban Affairs*, Jan. 11, 1995, at 2, *available in* LEXIS Banking Library (stating that the 1995 bill "is similar to legislation introduced in the 102nd and 103rd Congresses [*i.e.*, the 1991 and 1993 bills, respectively]").

150. *Current Status of the Fair Trade in Financial Services Act*, *supra* note 148.

151. *See, e.g.*,140 CONG. REC. H6782, H6795 (daily ed., Aug. 4, 1994) (statement of Rep. Charles E. Schumer) (noting "jurisdictional grounds" as a reason the 1993 bill was not enacted) and Karr, *supra* note 146 (stating that the 1993 bill "foundered in a House-Senate conference because of turf disputes" between congressional committees).

Four different House committees had jurisdiction over fair trade in financial services legislation. *See Outlook for Financial Fair Trade Legislation Now Seems A Bit Gloomier for This Congress*, 2 THOMSON'S INT'L BANKING REG., June 1, 1992, at 4; *Current Status of the Fair Trade in Financial Services Act*, *supra* note 148; *"Fair Trade" Takes Jolt from Ways & Means, E & C*, 16 Bank Letter No. 16, at 2 (Apr. 13, 1992). The House Banking Committee, which generally supported the legislation, had jurisdiction because the bills involved banking and finance. The House Ways and Means, Foreign Affairs, and Energy and Commerce Committees, which generally opposed the legislation, had jurisdiction because the bills involved international trade, foreign relations, and securities broker-dealers, respectively.

Second, it was argued that Section 301 could be deployed against foreign countries that engaged in unfair trading practices with respect to financial services.[152] Third, the Japanese economy, particularly the financial services sector, went into a recession. Accordingly, perceptions of a monolithic competitive threat to U.S. financial services firms gave way to more realistic appraisals.[153] Finally, the legislation was superseded by events in the Uruguay Round. During that Round, negotiators agreed upon the GATS, and, as discussed in Part IV

Opposition from the Ways and Means Committee was particularly important, because it raised the important policy question of what part of the executive branch should be responsible for considering and imposing sanctions. *See* William Acworth, *Interstate Branching: Good News as Congress Wraps Up Banking Reforms*, 6 THOMSON'S INT'L BANKING REG., Aug. 1, 1994 (stating that "in the end" it was opposition from the Ways and Means Committee that caused the defeat of the 1993 bill). As discussed in the text below, most of the bills provided the U.S. Department of the Treasury with discretionary authority to impose sanctions on countries that did not provide national treatment to U.S. financial service firms. The Ways and Means Committee, which oversees the USTR, wanted this authority to lie with the USTR, whereas the Banking Committee wanted the authority to lie with the Treasury Department. *See* Olaf de Senerpont Domis, *Bill to Open Up Foreign Markets to U.S. Banks is Revived in House*, AM. BANKER, Sept. 6, 1994, at 2 (describing the Ways and Means Committee as a "strong protector" of the USTR); *Big CDB Bill Edges Closer to House-Senate Conference*, 18 Bank Letter No. 11, at 6 (Mar. 28, 1994) (describing the Ways and Means Committee as "irked" that the 1993 bill "would take financial institutions issues away from the control of the" USTR); *Administration Supports Fair Trade Bill*, 20 CORPORATE FINANCING WEEK 7 (Feb. 7, 1994) (noting the view of Ways and Means Committee members, despite the fact that the USTR supported the 1993 bill and the provision for Treasury Department discretion contained therein); Arthur D. Postal, *Protectionist Banking Legislation Unlikely to Pass U.S. Congress*, 2 THOMSON'S INT'L BANKING REG., Sept. 21, 1992, *available in* LEXIS Banking Library (discussing the Treasury Department - USTR controversy in the context of the 1991 bill). Likewise, the House Energy and Commerce Committee, which oversees the Securities and Exchange Commission (SEC), objected to the granting discretionary authority to the Treasury Department instead of the SEC. *See* Arthur D. Postal, *Tide Turning for Foreign Banks in Halls of Congress*, 4 AM. BANKER'S WASHINGTON WATCH, May 9, 1994, at 2.

As mentioned above, the 1994 bill attempted to resolve these jurisdictional disputes by calling for national treatment only in the commercial banking sector and, therefore, falling within the ambit of only the House Banking Committee. *See supra* note 146. Nonetheless, the 1994 bill appears to have failed for lack of time at the end of the Congressional session in which it was considered. *See Legislative Wrap-Up*, AM. BANKER, Oct. 13, 1994, at 17.

152. *See, e.g.*, *"National Treatment" Bill Seen Set for Markup in House*, 18 Bank Letter No. 34, at 2 (Aug. 29, 1994) (mentioning the argument, in the context of the 1994 bill, that Section 301 makes fair trade in financial services legislation redundant); *Schumer Takes a New Cut at "Fair Trade," supra* note 146, at 7 (observing in the context of the 1994 bill that the House Ways and Means Committee "argues that Section 301 . . . already provides adequate authority to react if a foreign country treats any U.S. industry unfairly"); *With "Fair Trade" Gone, Hopes Persuasion Will Open Foreign Bank Marts*, 18 Bank Letter No. 30, at 1 (Aug. 1, 1994) (noting, after the defeat of the 1993 bill, "unofficial speculation outside the government that Section 301 might be dusted off and put through its paces in a financial services matter").

153. *See, e.g.*, CHRISTOPHER WOOD, THE BUBBLE ECONOMY (1992) (discussing the speculative boom in Japan in the 1980s followed by the dramatic bust in the 1990s); *The Fading of Japanophobia*, THE ECONOMIST, Aug. 6, 1994, at 21 (discussing the political and economic problems plaguing Japan); Joe Hutnyan, *Senate-House Dispute to Weaken Fair Trade in Financial Services Law*, THOMSON'S INT'L BANKING REG., Aug. 17, 1992 (stating that "[a]nti-Japanese sentiment has been on the wane in the U.S. since Japan has fallen on hard times economically"); *Current Status of the Fair Trade in Financial Services Act, supra* note 148 (observing that "[c]ontracting Japanese stock and real estate markets and weakening financial institutions are changing U.S. perceptions of the power of Japanese banks and the attractiveness of their markets," and thus "the work of opponents of . . . [fair trade in financial services legislation] has been made much easier").

below, the U.S. took an exemption from the MFN guarantee.[154] This exemption, in the minds of some observers, lessened the need for fair trade in financial services legislation.[155]

It is indisputable that the principal target of proposed fair trade in financial services legislation was Asia.[156] The bills aimed to pry open foreign financial markets — especially those in Japan, Korea, China, the countries of the Association of South East Asian Nations (ASEAN) (most importantly, Indonesia, Ma-

154. *See, e.g., Fair Trade in Financial Services* (1993), *supra* note 146, at 1, 3, and 14 (statement of Rep. Barney Frank) (noting that to some extent the GATT negotiations will determine the need for fair trade in financial services legislation).

155. A closer examination of the matter casts some doubt as to whether the terms of the GATS, along with the U.S. MFN exemption, guarantee market access to a degree that makes fair trade in financial services legislation unnecessary. As discussed in Part IV below, the U.S. adopted a two-tier approach in the GATS negotiations whereby the EU members, Canada, and certain other countries that give national treatment (the tier one countries) for U.S. financial service providers would receive the most favorable market access commitments from the U.S. Other — principally Asian — countries that did not offer national treatment (the tier two countries) would receive a less favorable commitment from the U.S. In other words, the U.S. would not apply the MFN principle of extending favorable commitments to all countries. As a result, many observers recognized that fair trade in financial services legislation would be useful in that it would give discretionary authority to the Treasury Department to deal with individual tier-two countries that, even after negotiations, failed to provide national treatment. *See Bentsen Presses Access to Asian Financial Services*, REUTERS FIN. SERVICE, Mar. 23, 1994, at 1, *available in* LEXIS (quoting Treasury Secretary Bentsen saying with respect to the 1993 bill that "[i]f the carrot is successful, then we won't need the stick"); *Fair Trade in Financial Services*, 6 THOMSON'S INT'L BANKING REG., Jan. 31, 1994, *available in* LEXIS Banking Library (describing "[t]he need for bargaining power" in the GATS negotiations as "the main reason for the political momentum that has built up behind" the 1993 bill); *Fair Trade in Financial Services* (1993), *supra* note 154, at 12, 19 (statements of Lawrence Summers, Under Secretary for International Affairs, U.S. Department of the Treasury and Robert Pozen, General Counsel and Managing Director, Fidelity Investments) (noting that to some extent the GATT negotiations will determine the need for fair trade in financial services legislation); *Administration Backs Bill Curbing Foreign Access to U.S. Markets; Protectionist Move is Tied to GATT Negotiations on Financial Services*, *supra* note 146 (noting that Rufus Yerxa, Deputy U.S. Trade Representative, explained that the threat of fair trade sanctions is a negotiating tool).

156. Regarding the targets of the 1993 bill, *see, e.g., Fair Trade Update: U.S. Firms Focus on Asia as Main Area of Complaint*, 6 THOMSON'S INT'L BANKING REG., Feb. 28, 1994, *available in* LEXIS Banking Libaray (reporting that "[d]ocuments and letters filed with the Treasury [Department] . . . confirm[ ] widespread reports that Asia has been the main target for the Clinton administration's campaign to open foreign financial markets, and probably will be for some time to come"), *Fair Trade in Financial Services*, *supra* note 146, at 1 (observing that "the Clinton administration seems to view Asia as its No. 1 priority among the so-called emerging markets"), *The U.S. Waves the Protectionist Stick*, THE BANKER, Dec. 1993, *available in* LEXIS, Banking Library) (mentioning some of the difficulties faced by U.S. banks overseas, including (1) Taiwanese ceilings on the foreign exchange liabilities of foreign banks, (2) Indonesia's mandate that a foreign bank cannot own more than 49 percent of a local institution, (3) the Philippines' limitation on foreign bank branching, and (4) Korea's restrictions on the access of foreign banks to local currency funding sources, and also listing Malaysia, India, and Japan as in the "gunsights" of the Clinton Administration), and *Administration Backs Bill Curbing Foreign Access to U.S. Markets; Protectionist Move is Tied to GATT Negotiations on Financial Services*, *supra* note 146, at 2 (identifying Japan, Korea, Taiwan, and India, as well as Brazil, as the "fairly obvious" targets of the 1993 bill).

Regarding the targets of the 1991 bill, see, e.g., *Fair Trade in Financial Services Legislation — Part 1*, *supra* note 144, at 93-95 (written testimony of Senator Jake Garn) (highlighting Asia, as well as Latin America, as targets of the 1991 bill), Karr, *supra* note 146, at A4 (discussing Asia, as well as Latin America, as targets of the 1994 bill), and *Congress Considers New Bill Seeking National Treatment Reciprocity*, *supra* note 145, at 2 (observing that the threat to continued expansion in the U.S. contained in the 1990 bill is aimed at "foreign banks headquartered in Japan and other Far East nations whose policies limit entry abroad by U.S. banks and securities firms").

laysia, the Philippines, Singapore, and Thailand), and the countries of South Asia (most importantly, India and Pakistan) — and thereby ensure that U.S. financial service firms[157] receive national treatment (*i.e.*, substantively equal competitive opportunities).[158] In fact, the 1991 bill expressly exempted financial services firms from the European Union (EU) and Canada from the threat of retaliatory action by the U.S.[159] The 1993 bill contained similar exemptions.[160] Moreover, the *Report on Foreign Treatment of U.S. Financial Institutions*, known as the *National Treatment Study* (NTS), produced every four years by the U.S. Department of the Treasury, documents the ways in which Asian countries have denied market access opportunities to U.S. financial service providers and fuels legislative proposals such as fair trade in financial services.[161] For example, with respect to the commercial banking market, China, Hong Kong, India, Indonesia, Korea, Malaysia, the Philippines, Singapore, and Thailand are identi-

157. The term "financial service firm" or "financial service provider" is used herein to refer to a commercial bank, investment bank (*i.e.*, securities broker-dealer), mutual fund (*i.e.*, investment company), or investment adviser.

158. *See* Kleiman, *supra* note 145, at 28a (discussing "equality of competitive opportunity" with respect to the 1991 bill); Awanohara, *supra* note 144 (noting the ASEAN countries as a target of the 1993 bill); *House Banking Chair Introduces Fair Trade in Financial Services Bill*, *supra* note 147 (discussing "reciprocal national treatment" with respect to the 1995 bill); U.S. House of Representatives, Committee on Banking, Financial Services and Urban Affairs, *Introduction of Bills*, *supra* note 149, at 1-2 (summarizing the 1995 bill); *Trade In Financial Services: Open Sesame*, THE ECONOMIST, Jan. 14, 1995, at 64 (discussing the extent to which Far Eastern countries have opened their services markets).

The national treatment principle is enshrined in Article III of GATT 1947. *See* RAJ BHALA, INTERNATIONAL TRADE LAW: CASES AND MATERIALS — DOCUMENTS SUPPLEMENT 5-8 (1996). It is also one of the specific commitments in the GATS, and is subject to any conditions and qualifications set forth in the Schedule of a Member. *See* GATS art. XVII:1 MESSAGE, *supra* note 1, at 1601. For a discussion of the national treatment principle, *see* BHALA, INTERNATIONAL TRADE LAW, *supra* note 2, at 245-61.

The legislative proposals also served as a way to "extract greater concessions" from other countries during the GATS negotiations. Awanohara, *supra* note 144 (regarding the 1993 bill). *See also House Banking Chair Introduces Fair Trade in Financial Services Bill*, *supra* note 147.

159. *See* H.R. 3503, *supra* note 145, at § 2, at 482 (defining commercial banks from the EU and Canada as "qualifying banks" against which a Federal bank regulatory agency and the Treasury Department may not impose discretionary sanctions), § 3, at 492-93 (defining broker dealers from the EU and Canada as "qualifying Securities Brokers or Dealers" against which the Securities and Exchange Commission and the Treasury Department may not impose discretionary sanctions), and § 4, at 498-99 (defining investment advisers from the EU and Canada as "qualifying foreign investment advisers" against which the Securities and Exchange Commission and the Treasury Department may not impose discretionary sanctions).

160. *See, e.g., Mexico, Canada, and Israel Exempt from Fair Trade in Financial Services Bill*, 21 SECURITIES WEEK No. 12, Mar. 21, 1994, at 4 (reporting that the Senate version of the 1993 bill exempted countries with which the U.S. has a free trade agreement, namely, Mexico, Canada, and Israel); *Fair Trade in Financial Services* (1993), *supra* note 146, at 16 (statement of John Price, Managing Director, Chemical Bank) (urging that "the language of the legislation must be made as clear as possible that this legislation will not be used against the European Community or other nations that afford U.S. banks national treatment").

161. *See* Section 3602 of the Omnibus Trade and Competitiveness Act of 1988, codified at 22 U.S.C. § 5352; *Treasury Sees Progress, But Continuing Barriers to U.S. Banking Abroad*, 14 BANKING POL'Y REP., Jan. 16, 1995, at 7 (providing background information on the National Treatment Study, and discussing the 1994 Study).

fied in the 1994 *National Treatment Study* as "Continuing Problem Areas."[162] These countries engage in one or more of the following practices that discriminate against U.S. (and other foreign) commercial banks: (1) formal moratoria on the issuance of new banking licenses to foreign banks; (2) discouraging (in a *de jure* or *de facto* manner) the establishment of new foreign bank branches; (3) limiting the numerical and geographic expansion of existing foreign bank branches; (4) requiring conversion of existing foreign bank branches to subsidiaries; (5) prohibiting foreign banks from participating in local currency business; (6) applying burdensome capital requirements to foreign bank operations; and (7) denying access to automated teller machine networks.[163] Regarding market access for U.S. (and other foreign) securities broker-dealers, the 1994 *Report* criticizes China, India, Indonesia, Japan, Korea, Malaysia, Pakistan, Singapore, Taiwan, and Thailand for discriminatory practices such as: (1) permitting foreign firms to establish only a representative office; (2) prohibiting foreign firms from establishing a wholly-owned subsidiary, restricting ownership to a minority stake, or requiring ownership only through a joint venture with a local partner; (3) subjecting foreign firms to discriminatory capital requirements; (4) denying membership on local stock exchanges to foreign firms; (5) limiting the percentage of foreign ownership in local publicly traded securities, and (6) imposing *de jure* and *de facto* limitations on the underwriting opportunities for foreign firms.[164] In sum, the various legislative proposals all appraised "our" financial services firms as powerful,[165] even dominant, and "our" global position ought not to be eroded through the denial of national treatment by Asian countries.[166]

To combat discriminatory practices and obtain national treatment for U.S. firms, all[167] of the various fair trade in financial services bills called not only for reports about foreign financial services barriers and negotiations to reduce such

162. U.S. Department of the Treasury, News Release/Executive Summary, *Bentsen Releases National Treatment Study*, Dec. 19, 1994, at 6 (containing the Executive Summary of the *National Treatment Study*). *See also Treasury Readies New Criticism of Foreign Barriers to U.S. Banks*, 13 BANKING POL'Y REP., Dec. 19, 1994, at 2 (stating that the 1994 *National Treatment Study* complains about the "lack of access or expansion opportunities for U.S. banks in Japan and other Far East countries," and encourages Congress to enact fair trade in financial services legislation to address this problem).

163. *See* U.S. Department of the Treasury, News Release, *supra* note 162, at 6-8 (containing the Executive Summary of the *National Treatment Study*).

164. *See* U.S. Department of the Treasury, News Release, *supra* note 162, at 8-9 (containing the Executive Summary of the *National Treatment Study*).

165. *Fair Trade in Financial Services Legislation — Part 1*, *supra* note 144, at 82 (Nov. 20, 1991) (statement of Sen. Donald W. Riegle, Jr.) (noting the traditional dominance of U.S. commercial banks in the global financial services market).

166. *See* Kleiman, *supra* note 145, at 28a (discussing the concern with "the global position of American financial companies").

167. Regarding the similarity of all of the bills, *see* U.S. House of Representatives, Committee on Banking, Financial Services and Urban Affairs, *Introduction of Bills*, *supra* note 149, at 2 (stating that the 1995 bill "is similar to legislation introduced in the 102nd and 103rd Congresses [*i.e.*, the 1991 and 1993 bills, respectively]"). As mentioned above, however, the 1994 bill was limited in scope to the commercial banking sector. *See supra* note 146. For an analysis of the differences between the 1994 and 1993 bills, *see Congress Deliberates Foreign Bank Measure During Final Hours*, 13 BANKING POL'Y REP. No. 18, Oct. 3, 1994, at 8.

barriers, but also discretionary sanctions.[168] If the U.S. Department of the Treasury determined that another country was denying effective national treatment to U.S. financial service firms, and if it determined this denial had a "significant adverse effect" on the firms,[169] then it could retaliate against foreign financial service providers present in the U.S.[170] Retaliation would occur only after two steps. First, the Treasury Department attempted but failed to negotiate with a problem foreign country for the same competitive opportunities, including effective market access, enjoyed by local firms in that country. Second, the Treasury Department recommended retaliatory action to the relevant U.S. regulatory authority, such as the Federal Reserve (for commercial banks) or the Securities and Exchange Commission (for securities broker-dealers and investment advisers), and the relevant authority agreed.[171]

Retaliation could take one or more of three basic forms. First, it could deny foreign financial service firms that already did business in the U.S. any further effective market access by blocking their expansion (in terms of the number of their offices or the range of their business activities) in the U.S.[172] Second, again with respect to a country some of whose financial service firms already operated in the U.S., no additional firms from that country would be permitted to open offices in the U.S. Third, in cases where there were no financial service firms from the foreign country involved, retaliation could mean denial of all applications from such firms to do business in the U.S. In effect, all three forms of retaliation amounted to a freeze order: the first two forms would freeze the *status quo* for foreign financial service providers from a country already represented in the U.S. market, while the third form would freeze out foreign financial service providers from a country not represented in the U.S. market.[173]

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168. *See* Kleiman, *supra* note 145, at 28a (discussing the reporting and negotiation provisions in the 1991 bill); H.R. 3503, *supra* note 145, at § 2, at 475-76 (discretionary sanctions to effect the principle of national treatment for banks and bank holding companies), § 3, at 488-89 (discretionary sanctions to effect the principle of national treatment for securities brokers and dealers), and § 4, at 498-99 (discretionary sanctions to effect the principle of national treatment for investment advisers).

169. *See* Karr, *supra* note 146, at A4 (discussing the retaliation provisions in the 1994 bill).

170. *See* Kleiman, *supra* note 145, at 28a (addressing the retaliation provisions in the 1991 bill); *House Banking Chair Introduces Fair Trade in Financial Services Bill*, *supra* note 147 (discussing the retaliation provisions in the 1995 bill).

171. As a practical matter, the regulatory authorities were given precious few bases for rejecting a Treasury Department "recommendation" for taking unilateral retaliation. For example, the 1993 bill allowed Federal bank regulators to reject a recommendation that foreign bank applications to expand offices or activities in the U.S. be denied if the (1) denial "would likely result in a serious impairment to the safe and sound operation of the U.S. banking system", or (2) denial "would compromise the ability" of the regulator "to resolve a failing or failed financial institution" through a foreign bank representing "the only bona fide reasonable offer available." *Quoted in* Meyer, *supra* note 144, at 8.

172. *See* Awanohara, *supra* note 144 (discussing the retaliation provisions in the 1993 bill).

173. An obvious fourth form of retaliation would be to take action against the existing U.S. operations of foreign financial service firms — for example, force them to close, reduce in size, or incorporate in the U.S. as a subsidiary. This form was rejected by the Clinton Administration as "too disruptive to capital markets in the U.S." *Administration Backs Bill Curbing Foreign Access to U.S. Markets; Protectionist Move is Tied to GATT Negotiations on Financial Services*, *supra* note 146, at 2.

Clearly, the U.S. felt it was time to end the free ride that Asian financial service firms had enjoyed by virtue of unconditional national treatment provided by the U.S. The proposed legislation, in its various incarnations, signaled "tit-for-tat" retaliation. This sort of retaliation would have marked a major change in American policy toward international trade in services. Traditionally, the U.S. treated foreign financial services firms in a substantively equal manner as it treated American services firms, regardless of whether American firms received such treatment by foreign governments.[174] The classic example of this policy was the International Banking Act of 1978 (IBA), which placed the regulation of foreign commercial banks on equal footing with that of U.S. banks.[175] Fair trade in financial services legislation, had it been enacted, would have changed the policy to one of *reciprocal* national treatment.[176] The U.S. government would have extended substantively equal treatment to financial service firms from a foreign country only if American firms received such treatment from the government of that country.[177]

The above background discussion of fair trade in financial services legislation implies that the easiest way to prove the existence of the dialectic is to identify a "free trade" camp of legislators and a "fair trade" camp of legislators, gather quotations from members in each camp, and show the oppositions and

174. *See What Future for National Treatment?*, Fin. Reg. Rep., Jan 1993, at 1, *available in* LEXIS Banking Library (describing unconditional national treatment as "one of the key underpinnings of U.S. trade policy").

175. 12 U.S.C. § 3101 *et seq. See also Fair Trade in Financial Services Legislation — Part 1*, *supra* note 144, at 82-83 (Nov. 20, 1991) (written testimony of Sen. Donald W. Riegle, Jr.) (summarizing the policy of the IBA); Meyer, *supra* note 144, at 8 (noting that the U.S. has maintained a national treatment policy since enactment of the IBA); Gruson, *supra* note 145, at 2 (stating that the IBA "incorporates the principle of national treatment of foreign banks"). For an argument that the 1991 Foreign Bank Supervision Act amendment to the IBA, enacted in the wake of the scandal surrounding the Bank of Credit and Commerce International, is protectionist, *see* RAJ BHALA, FOREIGN BANK REGULATION AFTER BCCI 45-268 (1994) and Raj Bhala, *Tragedy, Irony, and Protectionism After BCCI: A Three-Act Play Starring Maharajah Bank*, 48 SMU L. Rev. 11 (1994).

176. Regarding the policy shift in the 1993 bill, see, e.g., *Fair Trade in Financial Services* (1993), *supra* note 146, at 6, 11 (1993) (statements of John P. LaWare, Member, Board of Governors of the Federal Reserve and Lawrence Summers, Under Secretary for International Affairs, U.S. Department of the Treasury). Regarding the policy shift in the 1991 bill, *see, e.g., Fair Trade in Financial Services Legislation — Part 1*, *supra* note 144, at 18 (statement of John P. LaWare, Member, Board of Governors of the Federal Reserve), 23-24 (statement of Barry S. Newman, Deputy Assistant Secretary of the Treasury for International Affairs), and 35-36 (statement of Eric W. Hayden, Bank Consultant), and *Fair Trade in Financial Services Legislation — Part 2: Hearing Before the Subcomm. on International Development, Finance, Trade and Monetary Policy of the House Comm. on Banking, Finance and Urban Affairs*, 102nd Cong., 2nd Sess. 7 (Jan. 22, 1992) (statement of Hideki Kanda, Associate Professor of Law, University of Tokyo). Regarding the policy shift in the 1990 bill, *see Congress Considers*, *supra* note 145, at 2.

Reciprocal national treatment should be distinguished not only from unconditional, or pure, national treatment (discussed in the text above), but also from mirror image reciprocity. Mirror image reciprocity would obligate a foreign country to accord U.S. financial services providers in that country the same rights and powers that these providers enjoy in the U.S. In other words, foreign law treats U.S. firms in the same way that U.S. law treats the firms. *Id.*

177. By no means would the U.S. have been the first to adopt a reciprocal national treatment policy toward trade in financial services. As of January 1993, at least 18 of the 24 members of the Organization for Economic Cooperation and Development had this policy, and the Second Banking Directive of the EU adopts this policy. *See What Future for National Treatment?*, *supra* note 174, at 2. For a comparison of the EU policy and the proposed U.S. legislation, *see* Gruson, *supra* note 145.

contradictions between the quotations of the members of the two camps. However, this implication raises both a theoretical and a practical problem. Because of these problems, this easy methodology is not adopted here.

As a theoretical matter, Hegel does not teach us how to prove the existence of a dialectic. He does not lay out a generic methodology to answer the question, "how do you demonstrate the existence of a certain dialectic underlying the *Geist* you have declared to exist?" At the same time, the *Philosophy of History* leaves the impression that Hegel is not prone to quick fixes. Hegel relies on his majestic grasp of world history. He discerns and declares the *Geist* and the underlying dialectic in each historical epoch on the basis of his accumulated knowledge.

As for the practical problem, there may well be a few pure free traders (most likely trade policy officials from the Reagan Administration who champion Adam Smith and David Ricardo), and a few avid protectionists (most likely among small and independent financial service firms, and their congressional representatives, who are threatened by foreign competition). However, the numbers in each camp are, in all probability, relatively few. Accordingly, a division into separate camps is simplistic because it misses the "big, grey middle." To attempt such a division would miss a crucial point: the free trade - fair trade dialectic resonates to some degree *within* the minds of most American trade policy officials, legislators, jurists, and commentators — and, therefore, in our collective mind, or *Geist. To some degree, each individual among us is cursed with this dialectic.*[178]

D. Solution: Analysis of Rhetoric Associated with Proposed Fair Trade in Financial Services Legislation.

Plainly, the very fact that fair trade in financial services legislation was proposed and defeated repeatedly suggests the existence of a dialectic. But, if a simplistic division into free trade and fair trade camps is not evidence of the very existence of the dialectic, then what is? One clue is to examine the rhetoric associated with congressional efforts to enact this legislation. This rhetoric reveals an unmistakable belief that free trade is impossible without fair trade. That is, the free trade - fair trade dialectic animating in the present *Geist* of our trade policy is evidenced in the rhetoric surrounding the debate about fair trade in financial services proposals.

To be sure, rhetorical evidence is circumstantial. While the rhetorical evidence is not too subtle, it is hardly "in your face" direct evidence of the dialectic. Rather, it creates an *impression suggesting* an underlying free trade - fair trade dialectic animates within each of us, and thus underlies our collective mind about trade policy from which persistent unilateralism results. It also must be admitted that the circumstantial evidence presented is not overwhelming — but,

178. I do not exempt myself from this statement. In preparing this article, I came upon a sentence I had written in 1995 in my casebook: "[f]air trade in financial services is as important as free trade." *See* BHALA, INTERNATIONAL TRADE LAW, *supra* note 2, at 1409.

for reasons of space, not availability. The evidence below arises from the narrow, but economically important, confines of America's trade in financial services with Asian countries. However, even a casual observer of recent international trade disputes in non-financial sectors involving non-Asian U.S. trading partners would likely find plenty of circumstantial evidence of the dialectic.

The analysis of trade rhetoric begins with the classification of statements from American trade policy makers, jurists, scholars, and commentators into one of two categories. The first category of statements reflect a concern about "cheating," or being "taken for a ride," by other countries. These statements may be dubbed "free trade, but. . ." statements. A simple example is as follows:

> The President [George Bush] was over there [in Japan] selling economic philosophy. He is lecturing the Japanese on free trade and the benefits of open markets. He might as well be on another planet. The Japanese are not buying that. That is not their system. They don't practice free trade.[179]

Why are such statements circumstantial evidence of an underlying dialectic? They suggest the speaker would like to advocate an unreserved free trade position, but cannot do so because the behavior of other countries will not permit it. Other countries engage in unfair trade practices, namely, the denial of market access to U.S. financial service firms. Thus, the speaker is forced to voice two concepts simultaneously: free trade and fair trade. In brief, a "free trade, but. . ." statement is characterized by a simultaneous affirmation of a commitment to free trade in theory, and a concern about the unfair trading practices of other countries.

A second category of rhetorical evidence suggesting the presence of a free trade - fair trade dialectic consists of "scorecard" statements. A simple example is the following: "foreign nations are going to have to understand that international finance is a two-way street."[180] Why are these statements circumstantial evidence of an underlying dialectic? In these statements, the speaker acknowledges — at least implicitly — the possibility of a global financial marketplace in which stateless multinational banks compete against one another in a positive sum game.[181] But, the possibility is not realized fully because of protectionism in foreign countries. Accordingly, the express thrust of "scorecard" statements is "us versus them." The speaker keeps score of how "our" financial services firms are doing against "their" providers. That is, the speaker dwells on the

179. *Fair Trade in Financial Services Legislation — Part 2*, *supra* note 176, at 33 (statement of Kevin Kearns, Senior Fellow, Economic Strategy Institute, Washington, D.C.).

180. *Fair Trade in Financial Services Legislation — Part 2*, *supra* note 176, at 4 (statement of Rep. Sam Johnson).

181. Among the many excellent discussions of the global nature of banking are HAZEL J. JOHNSON, THE BANKING KEIRETSU (1993) (comparing and contrasting banking systems throughout the world and assessing various factors that impact on the global competitiveness of banks), HERVE DE CARMOY, GLOBAL BANKING STRATEGY (1990) (considering the impact of technology, competition, regulation, and human resources on the global competitiveness of banks), ROY C. SMITH, THE GLOBAL BANKERS (1989) (discussing trends in American, European, and Japanese finance), and Christine Pavel & John N. McElravey, *Globalization in the Financial Services Industry*, *in* READINGS ON FINANCIAL INSTITUTIONS AND MARKETS 345-60 (Peter S. Rose ed., 5th ed., 1993) (discussing the global integration of many financial markets and services).

relative performance of the U.S. and foreign financial services firms in foreign markets, and highlights bilateral trade imbalances in financial services sectors. In addition, the speaker contrasts the openness of U.S. financial service markets with the barriers to entry in foreign financial service markets. Again, the speaker feels compelled to voice two concepts simultaneously, free trade and fair trade: financial services markets would be truly global if only other countries practiced free trade, but in fact many foreign markets are inaccessible to U.S. financial services providers. Thus, like the first category of rhetoric, the second category suggests the presence of an underlying dialectic.[182]

1. "Free Trade, but. . ." Statements.

Consider a few examples of rhetoric in the first category, "free trade, but" statements. The testimony of Congressman Charles Schumer, who introduced into the House of Representatives a version of the 1991 fair trade in financial services legislation, is a clear instance of the dialectic residing within a policy maker. He complains of unfair services trade practices by the Japanese, focusing in particular on the infamous scandal in which major Japanese securities firms paid roughly $1.5 billion to compensate their clients for stock market losses.[183] At the same time, he asserts his fervent belief in free trade:

> [E]vents that took place this summer [1991] in Japan demonstrated once again that *American financial services firms abroad continue to struggle in closed and unfair markets. Foreign rivals of our firms do not play by the rules, often with the blessings of their own governments.*
>
> World financial markets were rocked by revelations that Japan's Big Four, Nomura, Nikko, Daiwa, and Yamaichi, *cheated for years to get business that American firms would have won had the Japanese Government created a level playing field* where business contracts were rewarded on the basis of expertise rather than criminal guarantees.
>
> These four brokerage houses . . . secretly covered the stock market losses of some of their most favored clients, and at least one was financing the operations of a member of the Japanese underworld. So what happened in response? The chairman of these firms resigned supposedly in disgrace, quote unquote, yet they remain as advisors to their firms.
>
> There have been some slaps on the wrists of firms involved, but nothing very onerous; and the [Japanese] Ministry [of Finance] actually expects the whole

182. The two categories of rhetoric are related. The concern about unfair trading practices in the first category leads to the compulsion to keep score in the second category.

183. *See* James Sterngold, *Treasury Official Rebukes Japan*, N.Y. TIMES, Oct. 18, 1991, at D1 (stating that 21 Japanese firms "admitted to making more than $1.5 billion in improper payments to compensate favored clients for stock trading losses," and that two of the firms acknowledged dealings with Japanese organized crime figures); Michiyo Nakamoto, *A Slap in the Broker's Face*, FIN. TIMES, Sept. 4, 1991, at 19 (noting that the scandal has alienated private investors); Kenichi Ohmae, *The Scandal Behind Japan's Financial Scandals*, WALL ST. J., Aug. 6, 1991, at A16 (arguing that the Japanese government has profited from anomalies in the Japanese securities markets); T.R. Reid, *Japan Stock Scandal Beneficiaries Identified*, WASH. POST, July 30, 1991, at E1 (observing that 228 Japanese corporations and pension funds secretly received compensation for losses); Robert Thomson, *Japan's Cycle of Compromise*, FIN. TIMES, July 15, 1991, at 15 (discussing possible regulatory reform implications of the scandal); Paul Blustein, *In Japan, A Market Dominated By Insiders*, WASH. POST, June 26, 1991, at F1 (noting that payments by Nomura and Nikko of more than $100 million each triggered the scandal).

world to be impressed with this new, tough stance. These moves by the Ministry, like all their previous, quote, punishments, were a sham.

The Prime Minister of Japan used to be the Minister of Finance, so things don't bode well from the top of the Japanese government to create a level playing field. Unlike U.S. regulators who reacted swiftly and decisively to the Salomon Brothers and Drexel scandals, the Japanese Ministry of Finance continues to protect its own to the detriment of world markets.

Essentially, . . . Japanese financial services firms continue to conduct their business as usual, hiding behind unfair government regulation in their own markets, while continuing to grasp for more and more in the free markets of the West. And that is the nub of it; here, open, fair, free competition. There, closed competition.

. . . .

And enough is enough already. In the past, the United States could live with the kind of discrimination that has shut us out from doing what our firms do best. International capital markets were less vital to our overall macroeconomic position, while the United States itself was so strong economically that we could bear the burden of trade discrimination and still come out on top.

. . . [T]his era of U.S. economic domination is over. We can no longer silently suffer discriminatory trade practices in financial services of our largest and most vital economic competitors.

Madam Chairwoman, as you know, I am a free trader, and I have been one ever since I entered Congress. I voted against protectionist trade measures which have come before the House, and . . . most recently I voted for fast track, for GATT, and the Mexico Free Trade Agreement. But I believe we can't stand by and let our competitors cynically use our Nation's commitment to free trade and fair play to their own economic advantage.

Barring a cultural revolution in the Japanese financial markets, U.S. negotiators need to have the tools to create a level, worldwide playing field. And for this reason, I have strongly supported the Fair Trade in Financial Services Act of 1991. . . .[184]

Likewise, consider the statement of then Representative Robert Torricelli during the 1991 hearings:

These scandals revolved about the actions of these Big Four security houses [Nomura, Nikko, Daiwa, and Yamaichi] in covering the losses of influential investors, in addition to reports that at least two of those had loaned millions of dollars to underworld figures in Japan and artificially inflated stock prices in which they were investing.

These findings . . . follow those already disclosed about well-known figures in the big security firms providing inside tips and other advantages to people in the political life of Japan. These charges are so serious, indeed the magnitude so

184. *Fair Trade in Financial Services Legislation — Part 1*, *supra* note 144, at 6-8 (statement of Rep. Charles E. Schumer) (emphasis added).

Unfortunately for Nomura, the 1991 loss compensation scandal was hardly the end of its difficulties. In the spring of 1997, it admitted to bribing corporate gangsters — *sokaiya* — not to disrupt shareholder meetings and criminal charges against it were filed. *See* Norihiko Shirouzu, *Nomura Banned From Japanese Bond Auctions*, WALL ST. J., May 14, 1997, at A18 (reporting the criminal charges); *Out of Nomura*, FIN. TIMES, Apr. 24, 1997, at 15 (discussing "how little some aspects of Japanese business practices have changed since the bursting of the stockmarket bubble in 1990"); Gillian Tett, *Nomura Directors to Quit Over Bribery Scandal*, FIN. TIMES, Apr. 23, 1997, at 1 (noting that more than Nomura paid via stock deals more than $555,000 into accounts linked to gangsters). From the fair trade perspective, the recent bribery scandal is another illustration of the "rigged" Japanese business climate in which American firms must compete.

incomprehensible, that perhaps they are only understood by putting it in an American context.

Imagine . . . if Merrill Lynch, Shearson, Salomon Brothers, and Goldman Sachs had provided multimillion dollar refunds to the biggest of the Fortune 500 industrial companies in America when they lost in the stock market, but allowed American citizens and small businesses and governments to absorb their losses? Complete security for the wealthy, capitalism at its worst for the average citizen. That is what happened.

But imagine if, in addition to that, it were found that stock prices were fixed for organized crime figures. And then imagine as well if after all this having been disclosed, covering the losses of big business, at the same time manipulating stock prices for organized crime, illegal payments were made to politicians to keep it all quiet. It would rock the foundations of the U.S. Government, Wall Street would never be the same. . . . That is what happened in Tokyo. No exaggeration.

There are several frightening ramifications of this scandal for both the Japanese market and for American business and investors. During recent years, American investments in Japanese equities have grown rapidly, especially through the unwitting participation of the small investor who has his or her pension in American pension funds. Because of the unstable and corrupt nature of the Japanese security system, these American investors, and unknowingly small participants in pension funds, are unable to rely upon market signals to decide whether to buy and sell, and therefore are at great risk.

. . . People who believe that their pension funds are [in]vested in the Japanese market and protected by signals from the free market are at enormous risk, because there is no free market.

. . . .

. . . *I do not come before this subcommittee*, as Mr. Schumer does not . . . *as one who is known for bashing Japan, or as one who has sought protection for the world economy. I,* like Mr. Schumer, *consider myself a free trader. I am an admirer of Japan. . . .*[185]

The Schumer and Torricelli statements are emblematic of the dialectic in each of us: we can easily envision asking them whether they believe in free trade, and their responses being "yes, but. . . ."[186]

This internal dialectic is apparent not only in statements reacting to the Japanese loss compensation scandal, but also in statements that "set the discussion" about fair trade in financial services "in a larger context."[187] Consider the testimony of Kevin Kearns, a Senior Fellow at the Economic Strategy Institute

185. *Fair Trade in Financial Services Legislation — Part 1*, *supra* note 144, at 10-12 (statement of Rep. Robert G. Torricelli) (emphasis added). Torricelli's statement was made in support of legislation related to the fair trade in financial services bill sponsored by Schumer. The Torricelli bill, which was not enacted, called for "a comprehensive study of the Japanese financial markets and the manner in which Japanese financial practices impact the individual American investor, their pension funds, and our national interests." *Id.* at 11-12.

186. Representative Schumer uses nearly identical rhetoric in support of the 1993 bill. In his 1993 testimony, he avers that his "view has been one that favors free trade, that each country which does best should be able to predominate." But, he goes on to say that "[w]e have been basically closed out, by both de facto and de jure means, of the Japanese market" and that "the greatest difficulty we face in the free trade area is exactly when countries that are relatively open . . . like the United States, have good products and cannot sell them." *See, e.g.*, *Fair Trade in Financial Services* (1993), *supra* note 146, at 2-3 (statement of Rep. Charles E. Schumer).

187. *Fair Trade in Financial Services Legislation — Part 2*, *supra* note 176, at 25 (statement of Kevin Kearns, Senior Fellow, Economic Strategy Institute, Washington, D.C.).

in Washington, D.C. He begins with the observation that in 1990 Japan invested two and a half times more per capita in plant and equipment than the U.S.[188] This difference, he contends, is due to Japan's closed financial system, which lowers the cost of capital for Japanese manufacturing companies seeking to upgrade existing, or to purchase new, machine tools, robots, and computers.

> [C]ontinued Japanese stalling [with respect to opening Japanese financial markets to foreign competition] . . . means that the international competitiveness, not only of our financial sector is imperiled, but that of our manufacturing sector as well.
>
> Given the importance of the availability of inexpensive capital to all types of firms, if Japan continues to engage in exclusionary banking practices, which provide significant advantage to its corporations and its financial institutions, Japanese firms will be operating, not just in Japan but throughout the world, with an unfair competitive advantage.
>
> . . . .
>
> Just to use one example, Sony's takeover of Columbia Pictures was financed at approximately a 2-percent interest rate. That is what the Japanese financial system is all about. Its purpose is to funnel money to the manufacturing sector so that the manufacturing sector can triumph in the game of global competitiveness.
>
> . . . .
>
> We know that the constant competition of our own open market has stimulated the creation of innovative financial products and has helped to create great wealth by introducing the efficiency and discipline of the free market into financial services. But the Japanese are not interested in our philosophy and approach. They do not practice our brand of capitalism and they don't need our lectures on economic theory. . . . By keeping their markets closed as long as possible, and by delaying and dragging out reforms demanded by the American side, Japan has grown into the second largest economy in the world. If present growth trends continue, the Japanese economy will replace our economy as the world's number one economy about the turn of the century.
>
> Unlike ours, Japanese financial markets are not set up to provide maximum returns to investors. They are organized on an entirely different principle, to provide long-term, patient capital to industry.
>
> Stockholders, dividends, consumer choice are almost meaningless concepts in Japan. . . . They are preaching free trade to us while maintaining a closed system at home. Patient capital in Japan is prepared to take losses long after the directors of equivalent American firm[s] would have replaced the senior management for almost criminal negligence.
>
> . . . As long as [the] cost of capital is significantly higher for an American firm, then it is harder for an American firm to invest at the same rate and be as competitive.
>
> . . . .
>
> . . . If the Japanese were to open their financial system . . . the very essence of their economic miracle would be threatened. . . . If American firms were to take over large portions of the function that Japanese firms now control, Japanese manufacturing could not be assured that the continuous supply of cheap capital would come its way.[189]

188. *Fair Trade in Financial Services Legislation — Part 2*, *supra* note 176, at 25 (statement of Kevin Kearns, Senior Fellow, Economic Strategy Institute, Washington, D.C.).

189. *Fair Trade in Financial Services Legislation — Part 2*, *supra* note 176, at 26-27 (statement of Kevin Kearns, Senior Fellow, Economic Strategy Institute, Washington, D.C.).

The rhetoric in this sample of testimony is particularly intriguing because it highlights the confusion that sometimes accompanies the inner dialectic. The speaker here is not opposed to free trade in principle. Indeed, he praises the efficiency gains that have resulted from open U.S. financial markets. Yet, the speaker objects to free trade in practice insofar as it is "inexorably leading to the deindustrialization" of America.[190] Here we have the basic "free trade, but" statement, with an added feature: it is inherently confused. How can Japanese manufacturers have an assured supply of cheap capital, whereas American manufacturers cannot have this supply, if Japanese financial markets are closed and the U.S. financial markets are open? The speaker presents no data — only one tidbit about Sony's takeover of Columbia Pictures — to buttress the claim that the cost of capital is lower in Japan.[191] Neoclassical economic theory suggests exactly the opposite result: *ceteris paribus*, Japan's protected financial markets ought to result in a reduced supply of capital and, therefore, more expensive capital. In contrast, the cost of capital in the U.S. should be cheaper than in Japan because of the openness of the U.S. financial markets, which assures both foreign and domestic suppliers of capital.[192] Thus, Japan's failure to practice free trade in financial services hurts *its* corporate borrowers. In sum, "free trade, but" statements often are made with such an emotional fever pitch that they make no substantive sense upon careful reflection.

The above samples of "free trade, but" statements might suggest that these statements are usually long winded. In fact, they may be quite short. Perhaps the most succinct "free trade, but" statement associated with the 1991 bill is set forth in the written testimony of Senator Jake Garn, a co-sponsor of the Senate version of the bill.

> . . . *I am firm in the view that the United States should honor its international commitments*. However, the requirement in various international agreements that the United States provide national or MFN treatment *cannot be considered absolute* if the other country is denying U.S. persons national treatment. It makes no sense for us to blindly provide [*sic*] open market access given a specific finding that market access is being denied to U.S. firms. This is the very essence of trade law and policy — taking action when there is a finding of injury.[193]

Senator Garn's statement is not, of course, the only concise example of the free trade - fair trade dialectic animating in each of us.[194] Another pithy illustration

190. *Fair Trade in Financial Services Legislation — Part 2*, *supra* note 176, at 25 (statement of Kevin Kearns, Senior Fellow, Economic Strategy Institute, Washington, D.C.).

191. This critique is not meant to suggest such data are non-existent. For example, it has been suggested that previous Japanese interest rate regulations covering 50 percent of the deposits in Japanese commercial banks provided Japanese banks with "a cost of capital advantage over U.S. and other foreign banks." *See Congress Considers*, *supra* note 145, at 2.

192. *See generally* R. Taggart Murphy, *Power Without Purpose: The Crisis of Japan's Global Financial Dominance*, 67 HARV. BUS. REV. 71, 81 (Mar.-Apr. 1989) (noting that protectionist walls lead to "horrendous inflation, soaring interest rates, depression, and a precipitous drop in our standard of living" and "will also cause severe problems for Japan").

193. *Fair Trade in Financial Services Legislation — Part 1*, *supra* note 144, at 96-97 (written testimony of Sen. Jake Garn) (emphasis added).

194. Indeed, for another illustration from the 1991 legislative debate, see *Fair Trade in Financial Services Legislation — Part 2*, *supra* note 176, at 21-22 (statement of Rep. Mary Rose Oakar) (asserting that "if the Japanese entrepreneurs want to compete in our country, and we have passed

comes from the debate regarding the 1994 fair trade in financial services bill. Then Chairman of the House Banking Committee, Representative Henry Gonzalez remarked: the bill was "a common sense, about-time reversal of the United States' all-too-often role of being a patsy of the international financial markets."[195] One interpretation of what Gonzales is saying here is that traditionally the U.S. has adhered to an unabashed free trade approach to financial services. Unfortunately, the U.S. no longer can do so without harming its own financial service providers because of the lack of commitment to free trade by other countries. The difference in commitments is unfair, and the U.S. must temper its traditional approach. Likewise, consider the observation of the *The Economist* about the 1995 fair trade in financial services bill:

> The United States says that if emerging economies do not open their doors, America will not open its own: under the rules of the World Trade Organisation (WTO), any offer to liberalise would have to be made on a non-discriminatory basis, and *America is loth to treat protectionists as kindly as free traders.*[196]

The highlighted language summarizes nicely the fear that America's trading partners are trying to "get more than they give." It suggests the U.S. is the pure champion of free trade in financial services, but is being used by foreign service providers who do not face much or any competition from U.S. service providers in their home markets. The conclusion, for the policy makers, jurists, scholars, and commentators trapped in the rhetoric, is obvious: America reluctantly must embrace a significant limitation on free trade: fair trade.

2. "Scorecard" Statements.

The second rhetorical category of circumstantial evidence of the free trade - fair trade dialectic covers "scorecard" statements. In these statements, a speaker implicitly acknowledges the potential for a global financial services marketplace, but dwells on imbalances in America's service trade with certain other countries. Like the first category of rhetoric, this category evinces a free trade - fair trade dialectic animating within the speaker — and, therefore, according to Hegelian principles, in the present *Geist*. There is at least a veiled aspiration for a borderless financial services marketplace, and a hint that services trade is, or can be, a positive sum game. But, there is an express bunker-like us-versus-them mentality in which such trade is viewed as a zero sum game.

Consider the statement of Representative Mary Rose Oakar, former Chairperson of the House Subcommittee on International Development, Finance, Trade and Monetary Policy concerning the Treasury Department's 1990 *National Treatment Study*, during the debate about the 1991 bill.

> [The 1990 National Treatment Study] . . . contrasted the relative symmetry of financial service industry relationships between the United States and the European common market — where U.S. firms owned $223 billion in assets in Europe

laws that make our markets more open, then there ought to be a quid pro quo," and that "if your country [Japan] expects us to treat your entrepreneurs fairly, then we have to have the same level playing field").

195. *Quoted in* Karr, *supra* note 146, at A4.

196. *Open Sesame*, *supra* note 158, at 65 (emphasis added).

> and European banks owned $187 billion in assets here — to the lack of symmetry as to Japan — where U.S. firms owned $21 billion in assets in Japan, and Japanese banks owned $404 billion in assets in the United States.
>
> That is the situation, despite 8 years of active negotiation on behalf of equal competitive opportunity for American financial institutions in Japan.
>
> I would also note that among the 100 largest banking organizations in the world by size of assets, the standard measure, only 10 are U.S. banks or bank holding companies.
>
> . . . .
>
> . . . The best evidence of the unequal treatment of foreign banks in Japan comes from the bottom line. In June 1990, the 18 U.S. banks operating in Japan controlled four-tenths of 1 percent of Japanese bank assets. At the same time, Japanese banks operating in the United States held 1.3 percent of U.S. bank assets. These unequal statistics demonstrate the need for Congress to encourage preferred treatment of foreign banks in Japan.[197]

Implicit in this statement is a recognition of the increasingly global nature of the financial services industry: the three most important financial services markets are the U.S., the EU, and Japan, and the most significant commercial and investment banks come from the U.S., EU, and Japan. Trade between the U.S. and EU in these markets is free and fair, but trade between the U.S. and Japan in these markets is highly restricted. Hence, there is a need to keep score until the restrictions are lifted. Similarly, consider the statement of Eric W. Hayden, a prominent bank consultant testifying in support of the 1991 bill:

> In 1978 when the original legislation [*i.e.*, the IBA] was passed, *ours* were among the largest and most powerful banks in the *world.* Two of the world's three largest [banks] were from our shores, and we controlled 30 percent of all *international* loans.
>
> *Our* largest bank is only 24th on the list of the *world's* largest banks, and *we* account for less than 15 percent of all *cross-border* lending. In contrast, however, the *Japanese* banks now control 40 percent of international bank assets and account for the majority of the world's 25 largest banks.
>
> Meanwhile, the three dozen *Japanese* banks that operate in this country of *ours* control over $400 billion in assets, while half as many *American* banks operating in *Japan* control less than 5 percent as much.[198]

Here, the references to "international loans" and "cross-border lending" (*i.e.*, loans in which the borrower and lender are headquartered, or have their principal place of business, in different countries), and the acknowledgment that powerful banks come from around the world, seem to suggest a dim recognition of the increasingly global nature of many banking transactions. But, the thrust of the statement is "us-versus-them."[199]

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197. *Fair Trade in Financial Services Legislation — Part 1*, *supra* note 144, at 2-3 (statement of Rep. Mary Rose Oakar) (emphasis added).

198. *Fair Trade in Financial Services Legislation — Part 1*, *supra* note 144, at 36 (statement of Eric W. Hayden, bank consultant) (emphasis added).

199. A Tokyo-based investment banker, Mr. R. Taggart Murphy, made the same point, but more clearly recognized the global nature of banking, in his congressional testimony: "[w]hat is not so clear is whether *global* trading systems and *globally integrated* capital markets can long withstand a behemoth of a player for which *foreign* controls and *national* goals of unlimited industrial expansion take precedence over the profit motive and the rule of law." *Fair Trade in Financial Services*

In Congressional hearings about the 1993 bill, an excellent example of a "scorecard" statement, which focuses on the mutual fund industry, is provided by Robert Pozen, then General Counsel and Managing Director of Fidelity Investments.

> In the United States, we have true national treatment for fund management. Any firm from another country can come here, register with the SEC [Securities and Exchange Commission], and start a mutual fund. They have to play by our SEC rules, our accounting rules, and our tax rules. This is what we call customized funds, *which we think are reasonable to try to have in all countries.*
>
> . . . .
>
> If we look at Canada, Canada, like the United States, provides national treatment to customized funds.
>
> . . . .
>
> Under NAFTA [the North American Free Trade Agreement], we would have full market access . . . .
>
> . . . .
>
> Europe, like the United States and Canada, provides reasonable national treatment for customized funds.
>
> . . . .
>
> *In Asia that is where the real problem is.* There are really two categories of countries in Asia. There are countries like Korea which absolutely prohibit United States fund managers from selling to local customers.
>
> . . . [T]here are no safety and soundness reasons [regarding the Korean financial system to justify this prohibition, *i.e.*, such sales would not threaten the system from a prudential supervisory view]. There are three large Korean investment management firms that do sell mutual funds. It is simply the case that they don't want the competition from U.S. mutual funds. We cannot get in there on any grounds. We have gone, we have asked nicely. Negotiators have gone and talked to them. So far, after about 10 years, we still have nothing.
>
> The other case is Japan. Japan is a much more complicated case. For 30 years the Japanese Government enforced an oligopoly in the mutual funds area. It would only allow about 15 Japanese firms to sell mutual funds. They have built up a large industry that is roughly half the size of the U.S. industry. All these 15 firms got very large.
>
> Three years ago, they said, we will now accept applications from foreign firms. But they apply the same criteria that they use for the large firms to the very small new entrants. Nomura had to maintain capital of $8 million for many funds. They said if you want to come in and start one firm, you will also have to put up $8 million.

Legislation — Part 1, *supra* note 144, at 44-45 (statement of R. Taggart Murphy, Tokyo-based investment banker) (emphasis added).

For still other "scorecard" statements made during the hearings about the 1991 legislation, *see Fair Trade in Financial Services Legislation — Part 1*, *supra* note 144, at 4-5 (statement of Rep. Jim Leach) (mentioning the "increasingly interdependent financial world" but expressing concern about "foreign competitive market access" to the Japanese market), 87 (written testimony of Sen. Donald W. Riegle, Jr.) (discussing the symmetry in the U.S.-EU banking trade, but the lack of symmetry in the U.S.-Japan banking trade), and 90, 94-95 (written testimony of Sen. Jake Garn) (acknowledging that "[i]nternationally, the financial services sector is an increasingly important component of competitiveness in world trade, since services are a large and growing traded sector and financial services facilitate trade in goods," but that "there are still significant denials of national treatment to U.S. firms in nations that have benefitted from the system of free trade, developed major financial markets, and assumed positions of leadership in the world economy").

> I guess you could argue that is national treatment in the sense that you are treating the foreign entrants like the local firms. However, given the history of Japan of maintaining this tremendous oligopoly, we think that the treatment of new entrants raises very serious questions.
>
> In areas like pension fund management, the Japanese are still keeping us out. At the moment, they say we can only manage post-1990 money, only contributions that were made to pension funds after 1990 but not before. That is in the private pension fund market. In the government pension fund market, which is huge in Japan, we are not allowed even to bid on those contracts.[200]

Here, the speaker recognizes the potential global nature of the mutual fund business in which Fidelity, Merrill Lynch, and other major U.S. mutual fund complexes seek to compete. (Indeed, the potential is enormous: the total value of assets managed by mutual fund companies world-wide is roughly $20 trillion, and such companies are located from Houston to Hong Kong.[201]) Thus, the speaker is keen on developing opportunities for U.S. mutual fund companies beyond Canada and the EU. But, his focus is on the unrealized potential in Asian countries that results from protectionist policies in those countries.

In expressing his disappointment that the 1993 bill was not enacted, Representative Charles E. Schumer, who co-sponsored the bill, furnishes a very obvious "scorecard" statement using an analogy to the U.S. Olympic basketball team.

> We have the most advanced and most competitive financial services industry in the world.
>
> We are the champs.
>
> But in certain countries, like Japan, our firms cannot even play the game. It's like having an international basketball competition but not allowing the Dream Team to play. Our financial services industry is the dream team of the finance world. But, because [the] U.S.T.R. is notoriously weak when it comes to the service sector — particularly the financial service sector — our team cannot even get off the bus.
>
> . . . .
>
> What we have lost by not including fair trade in financial services is the chance to improve our trade balance by billions of dollars. Our dream team, financial service sector, if allowed to fully compete [*sic*] in Japan, South Korea, Brazil and elsewhere would generate billions of dollars in wealth for our country. By having our banks in these countries, our companies would be able to find capital to expand our businesses abroad. . . .
>
> . . . .
>
> Unfortunately, we have missed a great opportunity, and one of our strongest industry sectors will continue mostly as a spectator in the competition of world trade.[202]

Again, the speaker begins with a cursory recognition of the global nature of financial services competition, and here the speaker also concludes with this

200. *Fair Trade in Financial Services* (1993), *supra* note 146, at 17-19 (statement of Robert Pozen, General Counsel and Managing Director, Fidelity Investments).

201. *See* Barry Riley, *Growth on a Grand Scale*, FIN. TIMES (Survey of Global Fund Management), Apr. 24, 1997, at I.

202. 140 CONG. REC. H6782, H6795 (daily ed., Aug. 4, 1994) (statement of Rep. Charles E. Schumer).

recognition. But, the speaker emphasizes that "our" financial service providers would be the best competitors if only they were allowed to compete in a fair game.

A final and succinct, but subtle, example of a "scorecard" statement, also from the legislative debate surrounding the 1993 bill, is made by Deputy U.S. Trade Representative Rufus Yerxa: "[t]here are a lot more horses that want to get into this barn . . . and [our] ability to limit access to this market . . . affords us quite significant leverage."[203] Yerxa's comment rests on two implicit presuppositions. First, while there may be a potential for a global marketplace in financial services, it is made up of discreet components — the barns. Second, trade in financial services is a two-way street whereby foreign financial service providers may have free access to our larger, more important market as long as our firms have fair access to smaller, less important foreign markets. Thus, we would like to keep the doors to our big barn open, but not if the doors to other smaller barns are closed.

IV.
CURE.

Globalization is a reality of our time.

. . . .

With the opportunities of globalization, however, come the responsibility for governments, international organizations like the World Trade Organization, and the private sector, to manage the process in a cooperative and constructive way. The challenge is not simply to design institutions to manage friction among nations, but to find ways to harness our collective powers to address broader global problems.

The WTO is rare among international institutions in that it is an organization BASED ON A SET OF RULES governing trade and economic policy. These rules remove much of the uncertainty surrounding transactions across national frontiers. This system helps ensure that the economic relations among nations are based on the rule of law.

THESE RULES . . . ACTUALLY SERVE TO EXTEND NATIONAL SOVEREIGNTY BEYOND BORDERS AND ENSURE THAT MEMBERS' INTERESTS ARE PROTECTED IN THE GLOBAL MARKETPLACE.

Renato Ruggiero, Director General, World Trade Organization, *The High Stakes of World Trade*, WALL ST. J., Apr. 28, 1997, at A18 (emphasis added).

A. Understanding Hegel's Concept of Freedom.

The first two steps of the argument thus far may be summarized as follows. The starting point is a diagnosis of persistent unilateralism as the present *Geist* of American trade policy. Thereafter, this *Geist* is said to be caused by a free trade - fair trade dialectic. Evidence for that dialectic includes two types of rhetoric present in the debate surrounding fair trade in financial services legislation during the early and mid 1990s: "free trade, but. . ." statements, and "scorecard" statements. The final step in the argument is to consider the reason this

203. *Quoted in* Awanohara, *supra* note 144.

Geist has not evolved to a higher level. That is, what is the cure for the problem of persistent unilateralism? The answer, seen through an Hegelian lens, requires use of Hegel's concept of freedom. In brief, the U.S. clings to a misconception of freedom of action in the world trading system. Only when our collective mind about trade policy accepts the more sublime Hegelian concept of freedom will unilateralism cease to persist and the *Geist* evolve.

Even though an underlying theme in *The Philosophy of History* is the dialectical progression of the *Geist* toward absolute freedom, Hegel never defines "freedom." (It is, therefore, somewhat disingenuous of him to assert that *Geist* reaches its ultimate mature development in the Germany of his era!) Indeed, Hegel admits that freedom is "an indefinite, and incalculably ambiguous term . . . liable to an infinity of misunderstandings, confusions and errors."[204] Fortunately, however, Hegel establishes a theory of freedom in *Philosophy of Right*, a book praised as "one of the greatest works of social and political philosophy ever written, equal in philosophical and historical importance to Plato's *Republic*, Aristotle's *Politics*, Hobbes' *Leviathan* and Rousseau's *Social Contract*."[205]

In *Philosophy of History*, Hegel points out that freedom is typically defined in terms of the pursuit of a particular option. That is, according to Hegel, the "negative" (or "classical liberal") conception of freedom[206] means the ability to make, and more importantly withdraw from, commitments — to act, and to keep options open.

> Liberals generally see freedom as the absence of restrictions. I am free if others do not interfere with me and do not force me to do what I do not want to do. I am free when I can do as I please. I am free when I am left alone.[207]

(It should be noted that it is preferable to use the term "negative" rather than "classical liberal" when discussing the conception of freedom against which Hegel reacts. No doubt classical liberal philosophers like John Stuart Mill would dispute the Hegelian characterization of their view as simply the ability to withdraw from commitments. They would agree that freedom ought to be constrained in accordance with the harm principle, *i.e.*, one should be free to act up until the point that one harms another. Put differently, for A to have a claim on the behavior of B, B must consent to that claim. Thus, for example, classical liberals would not agree that one should have unconstrained freedom to breach contracts. Accordingly, the term "classical liberal" is used herein sparingly, and then only parenthetically.) Hegel rejects this negative definition.

> If we hear it said that the definition of freedom is ability to do what we please, such an idea can only be taken to reveal an utter immaturity of thought, for it contains not even an inkling of the absolutely free will [*i.e.*, not formal but sub-

204. *See, e.g.*, HEGEL, THE PHILOSOPHY OF HISTORY, *supra* note 62, ¶ 18, at 28.

205. HOULGATE, *supra* note 47, at 77.

206. *See* HEGEL, PHILOSOPHY OF RIGHT, *supra* note 62, ¶¶ 2, 5, at 14-15, 21-22 (discussing negative freedom).

207. SINGER, *supra* note 47, at 25. *See also* HOULGATE, *supra* note 47, at 80 (noting that Hegel identifies negative freedom as "not being tied down to any particular state of mind or interest, but rather having the ability to cut oneself loose from any particular engagement").

> stantive freedom], of right [*i.e.*, the immediate right, discussed below], ethical life [*i.e.*, the ethical will, discussed below], and so forth.[208]

In part, Hegel's rejection is grounded in real-world observation. He was horrified at France's practical experience with unrestrained freedom during its revolution. In the Reign of Terror, the negative conception of freedom ran amuck, hence Hegel associates this conception with nothing more than "force and death."[209]

> Men enjoy concrete [*i.e.*, true] freedom when the various orders and groups of civilized life are maintained in and by the state. . . . Hegel also emphasized that in submitting their private wills to the laws of the state and to the rules of its subordinate but free institutions, men were submitting their passions to the control of reason. Thus, the argument comes full circle. The theoretical reason is inseparable from will and from freedom; necessity and negative freedom are only abstractions; *in concrete freedom the negative, destructive element is held in check and rendered fruitful by being realized in institutions*; the individual enjoys concrete freedom when he is educated to live in a civilized state and to be guided by the reason that permeates it.[210]

More generally, the result of unchecked negative freedom might be a master-slave environment in which powerful members, through their physical and economic superiority, dominated weak members. In such an environment, the freedom of the dominated obviously is not protected. Further, and paradoxically, the powerful members become dependent on their servants for the provision of goods and services. Hence, the freedom of the powerful members is delimited in part by this reliance.[211] Plainly, constraints are needed as stopgaps against chaos and anarchy.

There are also two theoretical reasons for Hegel's objection to the negative conception of freedom. First, it is inherently contradictory. The freedom to choose among different options assumes the existence of a set of options from which to choose, but the options are given or pre-determined. For instance, the freedom to make or withdraw from commitments presupposes a set of potentially viable bargains worth considering or rejecting, yet the range of such bargains depends on uncontrollable exogenous economic and political factors.[212]

Second, the negative definition provides no insight into why a particular option is chosen. For Hegel, "individual choice, considered in isolation from

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208. HEGEL, PHILOSOPHY OF RIGHT, *supra* note 62, ¶ 15, at 27 (Remark). *See also* HOULGATE, *supra* note 47, at 78-79 (stating that "Hegel is critical of the traditional 'liberal' insistence that individuals are free to the extent that their activity is not restricted by society or the state").

209. ACTON, *supra* note 47, at 446. *See also* CHARLES TAYLOR, HEGEL 372-73 (1975) (discussing the implications of the Reign of Terror for Hegel's political philosophy). Regarding Hegel's use of the term "negative" freedom, *see id.* at 447 (noting that Hegel "stigmatized as negative" the "liberal view that man is free to the extent that he is guaranteed a sphere within which he can do what he wishes without interference from others who are guaranteed a like position").

210. ACTON, *supra* note 47, at 447 (emphasis added).

211. For a discussion of Hegel's treatment of the master-slave relationship in *Phenomenology of Spirit*, *see* SINGER, *supra* note 47, at 59-62.

212. *See* HEGEL, PHILOSOPHY OF RIGHT, *supra* note 62, ¶ 15, at 27, 230 (Remark and Addition) (observing that being allowed to act as one wants to act is not true freedom because the content of the actor's will is not intrinsic to self-determining activity but rather dependent on material given from without).

everything else, is the outcome of arbitrary circumstances;" therefore, such choice "is not genuinely free."[213] Hegel gives the pointed example of material items designed to increase our comfort.

> What the English call "comfort" is something inexhaustible and illimitable. Others can reveal to you that what you take to be comfort at any stage is discomfort, and these discoveries never come to an end. Hence the need for greater comfort *does not exactly arise within you directly; it is suggested to you* by those who hope to make a profit from its creation.[214]

In other words, "the freedom to do as we please is effectively the freedom to be pushed to and fro by the social and historical forces of our times."[215]

Hegel's conception of freedom begins with the observation that true freedom (the objective realization of freedom) means focusing not on the pursuit of a particular engagement or withdrawal therefrom, but rather on the process of freedom of choice. The object of a truly free will is to preserve freedom of choice among a range of options that is more or less given.[216]

> Such a will is no longer dependent for its object upon external factors, but wills an object or content — namely freedom — which is derived from itself and is thus wholly its own. Yet, paradoxically, it only gains its freedom through its willingness to give up its unlimited ability to choose, and let itself be determined by the character of its own freedom.[217]

In addition, a truly free will focuses on creating, or willing, the conditions necessary to become autonomous. (Hegel speaks of "autonomy" in the original Greek sense of the word "autonomos," which is "self-governing."[218]) One such condition is the identification of abstract rights, or in Hegelian terms, the "immediate right." Freedom to choose must be claimed by an individual as a matter of immediate right.[219] Assertions of this immediate right are objectively manifest through actions like entering into contracts, trading goods and services, and owning property.[220]

However, for Hegel, true freedom cannot mean that a free will has an absolute entitlement to satisfy every desire or promote its own welfare or happiness. Mere assertion of immediate right is not a long-run guarantee of freedom of choice. The assertion by one individual's free will must not conflict with the free wills of other individuals. If one individual asserts its immediate right in a

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213. SINGER, *supra* note 47, at 26.

214. HEGEL, PHILOSOPHY OF RIGHT, *supra* note 62, ¶ 191, at 269 (Addition).

215. SINGER, *supra* note 47, at 28. Professor Singer provides an excellent and amusing example of anti-perspirant and deodorant. *See id.* at 26-28.

216. *See* HEGEL, PHILOSOPHY OF RIGHT, *supra* note 62, ¶ 27, at 32 (stating that the absolute goal of the free will is to make freedom its object, which means not simply doing what the will wishes to do, but actually willing the free will).

217. HOULGATE, *supra* note 47, at 83.

218. *See* WEBSTER'S COLLEGIATE DICTIONARY 117, 118, 491 (10th ed. 1993) (definition of "aut-" or "auto-" and definitions of "autonomous" and "freedom").

219. *See* HEGEL, PHILOSOPHY OF RIGHT, *supra* note 62, ¶ 29, at 33 (asserting that freedom is a matter of immediate right); HOULGATE, *supra* note 47, at 83 (stating that "freedom is a matter of simple and immediate right" (emphasis original)).

220. *See* HOULGATE, *supra* note 47, at 85 (noting that immediate rights include "the right to own property, to exchange goods, to enter into binding contracts and to 'own' one's body (i.e. not to be enslaved)").

way that violates the immediate right of another individual, then the freedom of choice of the second individual is undermined. The second individual will not recognize the violative assertion as legitimate, hence mere assertion of immediate right does not ensure respect for that assertion. In general, if one individual's freedom of choice is undermined, then no individual's freedom of choice is safe (*i.e.*, any individual's freedom of choice could be threatened).

In contemporary terms, Hegel is saying that to safeguard its own freedom of choice, a free will must accept the principle of reciprocity, or reciprocal respect for the freedom of choice of others.

> [T]he most basic . . . [specific rights belonging to a free person] is simply the right to have one's freedom as a person recognized and respected as a right, that is the right to be considered a bearer of rights. [As Hegel puts it,] "[t]he absolute right is [the right] to have rights." . . . This generates what Hegel considers to be the first imperative of immediate . . . right: "Be a person and respect others as persons."[221]

For instance, X willingly submits to constraints on its freedom and thereby respects the autonomous behavior of Y, because X then can be assured that Y will respect the autonomous behavior of X.[222] Here, then, is a clear indication that in contrast to the negative conception of freedom, Hegel's concept of freedom involves constraint.

In a practical sense, how does an individual free will recognize and comply with the principle of reciprocal respect? After all, the possibility exists that one individual will respect others only if it is in that individual's self-interest, or that an individual will commit fraud by promising respect but not fulfilling the promise.[223] Hegel's answer is that the free will must become a "moral will."[224]

> Hegel does not think that the right to personal satisfaction gives me the right to do absolutely anything I please. The only personal satisfaction to which I am entitled as my *right* is that which can be conceived of as universal, as something that any free, self-determining individual can enjoy. . . .
>
> [A]s a moral individual I cannot lay claim to the right to promote my own welfare at the expense of everyone else's right to promote theirs. Nor indeed . . . can I claim the right to further my own welfare at the expense of others' rights to security of their property. As a moral individual I can only further my welfare to

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221. HOULGATE, *supra* note 47, at 85. *See also* HEGEL, PHILOSOPHY OF RIGHT, *supra* note 62, ¶¶ 29-38, at 33-38 (suggesting the need for reciprocal respect of rights).

222. For example, with respect to property ownership,

> [b]y appropriating external natural objects as his property, the person transforms them from potential limits on his freedom into expressions of it, and so affords himself a way of giving his freedom an external, objective form which others must recognize and respect. . . . [S]ince property must be respected as the objectification of a person's right, my freedom to appropriate, own and use natural objects can only apply to those objects which do not already belong to others.

HOULGATE, *supra* note 47, at 86.

223. *See* HEGEL, PHILOSOPHY OF RIGHT, *supra* note 62, ¶¶ 84-92, 99, at 65-67, 69-70 (discussing violations of rights); HOULGATE, *supra* note 47, at 90 (observing that "[t]he fact that one recognizes that freedom and rights *must* be respected does not mean that one *will* actually respect them" (emphasis original).

224. *See* HOULGATE, *supra* note 47, at 90 (defining the moral will).

> the extent that I recognize it as the right of any and every free agent to do so. . . .[225]

How does a free will become a moral will? Hegel's answer is that the free will develops a moral conscience. What is this "moral conscience"? It is the internal subjective mechanism by which a free will decides what is "good" with respect to pursuing or refraining from an action in relation to the acts or omissions of other persons, *i.e.*, it is knowledge of what is right and giving effect thereto.[226] As Hegel explains, conscience is "the expression of the absolute title of *subjective* self-consciousness to know in itself and from within itself what is right and obligatory, *to give recognition only to what it thus knows as good. . . .*"[227] "Good" is not defined simply from the perspective of one's own self-interest. It also encompasses the perspective of the interests of others and, ultimately, a systemic or universal perspective.[228] "A good will, for Hegel, is one which puts what it understands to be objectively good *above its own subjective preferences* and potentially wayward inclinations, and which wills only what it understands to be good."[229] Applying this definition, moral conscience acts as a check against assertions of immediate right that would violate the immediate rights of others and thereby threaten the freedom to choose that is the primary object the will seeks to preserve. It ensures that the rights one person claims for herself are also repeated for other persons. In brief, moral conscience is a necessary constraint on freedom.

Hegel further argues that moral conscience cannot be the exclusive constraint. If it is the only and absolute judge of what is good, then the moral will may blur the line between good and evil from the perspective of others and from a universal perspective. In brief, the moral will may become self-righteous because it is individual and subjective.[230] There must be some mechanism to ensure that moral conscience is not the only constraint on the free will to ensure reciprocal respect for the freedom of choice of others. The moral will, therefore, cannot be the final stage in the evolution of the free will toward true freedom. It must become an "ethical will."[231]

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225. HOULGATE, *supra* note 47, at 93 (emphasis original).

226. *See* HOULGATE, *supra* note 47, at 98. Unfortunately, Hegel says little about the origins of this conscience.

227. HEGEL, PHILOSOPHY OF RIGHT, *supra* note 62, ¶ 137, at 90-92 (Remark).

228. *See id.* ¶¶ 130, 134, at 87, 89 (discussing welfare and the meaning of good).

229. HOULGATE, *supra* note 47, at 98-99 (emphasis added).

230. *See* HEGEL, PHILOSOPHY OF RIGHT, *supra* note 62, ¶ 139, at 92-93 (Remark), ¶ 140, at 96-98 (Remark (d)) (discussing the risk of moral conscience "slipping into evil" because it is subjective); HOULGATE, *supra* note 47, at 99 (discussing the evil of self-righteousness).

231. As one Hegel scholar puts it,

> [t]his danger [of a self-righteous moral will] cannot be averted by resolving to commit oneself more thoroughly to the good [because the moral will would become more entrenched in its belief in the sanctity of its own conscience]. It can only be averted by giving up the conviction that one's own conscience is the sole or primary source of moral guidance, by letting go of one's exclusive right to determine what the good is, that is, by becoming an *ethical* . . . will which recognizes that the good must be something genuinely objective and publicly understood.

HOULGATE, *supra* note 47, at 100-101 (emphasis original).

The "ethical will" acknowledges that what is good is determined not merely by one's own conscience, but also by the civil society and state of which an individual is a member.[232] It recognizes that there is an objective, universal good to be found in the world through interaction with other individuals. The universal good is (or ought to be) expressed in laws and customs of civil society.[233] Another, and more sophisticated, source of legal and customary expressions is the state (which may be drawn up on geographical, cultural, or other lines).[234] In the context of civil society and the state, an individual free will asserting its immediate right consistently with its own moral conscience voluntarily participates in a large group.

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232. *See* HEGEL, PHILOSOPHY OF RIGHT, *supra* note 62, ¶ 144 at 105 (defining the ethical will in terms of an acknowledgment that the universal good must take precedence over "subjective opinion and caprice").

233. *See* HOULGATE, *supra* note 47, at 101-03 (discussing the ethical will) and 105-06 (discussing civil society).

234. *See* HEGEL, PHILOSOPHY OF RIGHT, *supra* note 62, ¶¶ 257 (describing the state as "the actuality of the ethical Idea"), 258 (declaring that the state is the union of autonomous individuals, ethical freedom is fully realized in the state, and "[t]he march of God in the world, that is what the State is"), and 268 (treating the two moments of the state, law and political sentiment to follow the law), at 155-59, 163-64; HOULGATE, *supra* note 47, at 108-119 (discussing the role of the state and corporations in dealing with the problem of poverty in a free market economy), and 120-23 (treating the state and law and noting Hegel's view that the state "is the most developed form of ethical freedom"); and SHLOMO AVINERI, HEGEL'S THEORY OF THE MODERN STATE 99-101, 151-54 (1972) (commenting on bourgeois freedom as a cause of poverty and the role of the state in addressing this problem). For an excellent discussion of Hegel's philosophy of law, *see generally* Hoffheimer, *supra* note 69, at 823; and Kenneth Westphal, *The Basic Context and Structure of Hegel's Philosophy of Right*, *in* THE CAMBRIDGE COMPANION TO HEGEL 234-69 (Frederick C. Beiser ed. 1993).

Hegel points out that the ethical will operates in a third forum in addition to civil society and the state, namely, the family. Like civil society and the state, the family — and, in particular, marriage, is a source of laws and customs. *See* HEGEL, PHILOSOPHY OF RIGHT, *supra* note 62, ¶ 152 at 109 (discussing the family as the first stage of social morality); HOULGATE, *supra* note 47, at 104.

Hegel also explores the possibility that a state or civil society may not be rationally organized or ethical. No loyalty is owed to this kind of state or society. *See* HEGEL, PHILOSOPHY OF RIGHT, *supra* note 62, ¶ 265, at 281 (Addition) (noting that "the footing of the state itself is insecure" if its members do not find the state as a means to their satisfaction). Hegel contends that true freedom exists within the context of a rationally organized state because extrinsic regulations are consistent with self-governing propensities.

> [A]ll social institutions — including law, property, social morality, government, constitutions, and so on — must be made to conform to *general principles of reason.* Only then will individuals freely choose to accept and support these institutions. Only then will law, morality and government cease to be arbitrary rules and powers which free agents must be compelled to obey. *Only then will human beings be free and yet fully reconciled with the world in which they live.*

SINGER, *supra* note 47, at 20 (emphasis added).

But, what is Hegel's conception of a "rationally organised" or "ethical" state? (This question is important in part because Hegel asserts "only rational choices are free." *Id.* at 41. *See also id.* at 67 (stating that "[t]he kind of freedom Hegel believes to be genuine is to be found . . . in rational choice")). Asked differently, what are the general principles of reason with which social institutions must conform to ensure true freedom? Hegel is short on details. In *The Philosophy of History*, "[h]is rosy description of the Germany of his own day, coupled with his statement that the progress of the idea of freedom has now reached its consummation, can only mean that he believes his own country, in his own times, to have achieved the status of a rationally organised society." *Id.* at 22. However, Hegel provides little defense that his Germany represents the ultimate stage in the dialectical development of the *Geist.*

For example, the will exercises what Hegel calls "bourgeois freedom," which involves economic activity such as production, exchange, and consumption so as to satisfy individual needs.[235] While it further surrenders any pretense that its assertions are unconstrained, it finds new freedom in living with rather than against others.[236] Drawing from Adam Smith's *The Wealth of Nations*, Hegel points out that the individual free will understands that economic activity is highly specialized and that it cannot satisfy all of its wants through its own efforts.[237] (A doctor, for example, does not provide her own legal services.) Accordingly, in exercising bourgeois freedom, the will realizes the economic interdependency that links all members of civil society and the state to one another. As Hegel puts it, "the livelihood, happiness, and legal status of one man is interwoven with the livelihood, happiness and rights of all."[238]

Thus, each individual member of a civil society and state exercises bourgeois freedom by promoting its self-interest through the pursuit of a specialized economic activity and the attendant assertions of immediate right like entering into contracts, trading, and owning property. Yet, each member also identifies with the civil society and state whose applicable laws and customs provide a necessary objective check against self-righteousness and help ensure reciprocal respect among individuals in their exercise of bourgeois freedom.[239] Such identification is natural because civil society and the state are not (or at least ought not to be) exogenous forces.[240]

> [T]he will which sees freedom as a matter of right . . . recognizes that freedom itself entails necessary commitments, indeed obligations and responsibilities, which derive immanently from the structure of freedom itself, and from which, as a free will, it cannot choose to disengage itself without denying its own freedom. Hegel thus puts forward a conception of true freedom in which what is traditionally viewed as the opposition between freedom and necessity or constraint is dissolved. The truly free will does not understand the requirement that it recognize rights or laws simply as a necessary or prudent *restriction* on its freedom, but rather as something which has been determined as necessary by freedom itself and thus as a positive element of what it means to be free. . . .

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235. *See* HEGEL, PHILOSOPHY OF RIGHT, *supra* note 62, ¶ 187, at 124-26 (discussing bourgeois freedom).

236. *See* HOULGATE, *supra* note 47, at 119.

237. *See, e.g.*, HEGEL, PHILOSOPHY OF RIGHT, *supra* note 62, ¶ 198, at 129 (discussing division of labor).

238. *Id.* ¶ 183, at 123. *See also* ¶¶ 191 (Addition), 193, at 127-28, 269 (observing that the exercise of bourgeois freedom spawns new desires and needs as consumers are exposed to new goods marketed by producers).

239. To be sure, Hegel identifies another objective check to promote this aim: corporations, by which he means voluntary trade associations, or guilds formed by members of a particular profession. Corporations are a self-regulatory device to help prevent excesses that sometimes occur in a free market economy such as over-production, which can lead to unemployment and poverty. The further check of the state is needed because a corporation represents only one profession whereas the state has a "bird's eye" perspective on what is good from a systemic perspective. Moreover, a corporation may abuse its position by seeking monopoly power. *See* AVINERI, *supra* note 234, at 166-67. Thus, Hegel asserts it is the duty of each individual free will to join both a corporation and a state.

240. *See* HOULGATE, *supra* note 47, at 84 (stating that "the laws, obligations and responsibilities to which the free will submits issue from the free will itself, not from some alien authority").

> [For Hegel,] the truly free will is the will which willingly submits itself to laws. . . .[T]he laws, obligations and responsibilities to which the free will submits itself issue from the free will itself, not from some alien authority.
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> . . . [T]he laws and customs which set out the duties of ethical consciousness do not constitute an alien authority to which consciousness must submit itself. Rather, they are recognized by the ethical individual to be institutional structures and practices in which and through which his or her *own* interests as a free being are actually articulated and fulfilled. The ethical individual may not have determined those laws and customs by himself or have personally decided what they should be, but [as Hegel states] "his spirit bears witness to them as to its own essence, the essence in which he has a feeling of his selfhood, and in which he lives as in his own element which is not distinguished from himself." [Citation omitted.] In other words, the ethical individual finds freedom in the laws and customs of the society in which he lives because he recognizes that they accord with his innermost will and make it possible for him to be who he is.[241]

In sum, laws are not externally-imposed constraints demanding slavish adherence, but rather voluntary creations of the ethical will that the will recognizes as essential to the preservation of the freedom of choice of that will. As Hegel puts it, "the right of individuals to their particularity is also contained in the ethical substantial order."[242] Thus, the ethical will complies with the laws because they are *immanent* in that will.[243]

Moreover, there is (or ought to be) a close link between the content of laws and the universal good. Laws express a *common* interest of members of a state to safeguard freedom of choice, and the members share a political sentiment to follow these laws and customs. Insofar as laws express what is universally good, they enhance freedom, because true "freedom is to be found in what is universal."[244]

> Hegel's concern is with freedom in the sense in which we are free when we are able to choose without being coerced either by other human beings or by our natural desires, or by social circumstances. . . . Hegel believes such freedom can exist only when we choose rationally, and we choose rationally only when we choose *in accordance with universal principles*. If these choices are to bring us the satisfaction which is our due, the universal principles must be embodied in an organic community organised along rational lines. In such a community *individual interests and the interests of the whole are in harmony*.[245]

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241. HOULGATE, *supra* note 47, at 84, 101 (emphasis in italics original, emphasis in bold added).

242. HEGEL, PHILOSOPHY OF RIGHT, *supra* note 62, ¶ 154, at 109.

243. *See id.* ¶¶ 150 (stating that an ethical individual "has simply to follow the well-known and explicit rules of his own situation") and 258 (Remark) (observing that the authority of the state is founded upon the immanence of the state in the ethical wills of its members, not "opinion" or "capriciously given express consent"), at 107-08, 279; TAYLOR, *supra* note 209, at 374 (observing that "to be governed by a law which emanates from oneself is to be free").

244. SINGER, *supra* note 47, at 31. Professor Singer argues forcefully that Hegel's theory is based on Kant's categorical imperative: "[a]ct only so that the maxim of your action can be willed as a universal law." *Id.* at 30. In other words, freedom consists in acting in accordance with one's conscience, which in turn is based on "a rational acceptance of the categorical imperative as the supreme moral law." *Id.* at 31.

245. SINGER, *supra* note 47, at 39 (emphasis added).

From this emphasis on universal principles follows the seemingly paradoxical Hegelian proposition, namely, that there can be no true freedom without law.

> Freedom is inherent in the universe from the beginning and is realized fully in a human being in a society which makes for freedom. Progress, for Hegel, is the development of the consciousness of freedom.
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> . . . .
>
> Hegel taught that universal reason reaches its height in a society of free individuals, *each subordinating its individual reason to the universal reason. The individual, if living by himself and exercising his own caprice, is not free. Only as he blends himself with the group does he attain true freedom.* History, he held, has been striving throughout time toward the realization of a perfect state, a state in which each member so blends himself with the whole that the will of the whole is his will.[246]

In essence, for Hegel "*[f]reedom is not something merely opposed to constraint; on the contrary, it presupposes and requires constraint.*"[247] The Hegelian proposition that there is no true freedom without law means that the exercise of true freedom reaches its fullest expression by each individual in the context of civil society and the state wherein the individual willingly submits to the constraints of laws and customs.[248] "[T]he very . . . concept of freedom . . . requires us to recognize that freedom is not simply to be found in unrestricted individual choice or in the unregulated pursuit of self-satisfaction, but in living in accordance with law within a just political constitution."[249]

From the above discussion it is obvious that the Hegelian concept of freedom is both more sublime and subtle than the negative (or "classical liberal") approach. It rejects the crude assertion of immediate right, and the dangerous evaluation of good solely on the basis of conscience. It begins with the original meaning of freedom, which pertains to self-government and thus connotes the establishment of constraints and the maintenance of a disciplined life. The Hegelian concept continues with an identification of four related elements of freedom. First, the immediate right is asserted. Second, the assertion of the immediate right is gauged by the moral will. Third, the moral will, in order not

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246. FROST, *supra* note 47, at 149, 199-200 (emphasis added).

247. ACTON, *supra* note 47, at 446 (emphasis added).

248. Clearly, this proposition rests on Hegel's optimistic belief in the possibility of harmony between individual freedom, on the one hand, and societal and state needs, on the other hand. As one philosopher observes,

> [i]t would not be sufficient to have individuals governing themselves according to their own conscience and convictions. This would be only 'subjective freedom.' As long as the objective world was not rationally organised, individuals acting in accordance with their own conscience would come into conflict with its law and morality. Existing law and morality would therefore be something opposed to them, and a limit upon their freedom. Once the objective world is rationally organised, on the other hand, individuals following their consciences will freely choose to act in accordance with the law and morality of the objective world. Then freedom will exist on both the subjective and objective level. *There will be no restrictions on freedom, for there will be perfect harmony between the free choices of individuals and the needs of society as a whole.* The idea of freedom will have become a reality and the history of the world will have achieved its goal.

SINGER, *supra* note 47, at 22 (emphasis added).

249. HOULGATE, *supra* note 47, at 79.

to become a self-righteous or evil conscience, is tempered by an ethical will. Finally, the ethical will consists of laws and norms established by the civil society and the state.

B. Moving from the Micro to Macro Level.

What is the connection between this Hegelian conception of freedom, on the one hand, and the development of the *Geist* of U.S. trade policy, on the other hand? It is the argument that only when America's collective mind about trade policy accepts the Hegelian concept of freedom will unilateralism cease to persist and the *Geist* evolve.[250] In other words, the link is that the evolution of the *Geist* is an evolution in the consciousness of freedom. As discussed in Part III above, the *Geist* develops through a rational dialectical process of sublation in which opposites negate one another and yield a new, higher stage of consciousness. Its history *is* the development of the consciousness of freedom.[251] Each stage in this development is a more complete and accurate conception of what true freedom means than the previous stage.

This connection between Hegel's concept of freedom and the future evolution of the *Geist* of U.S. trade policy raises an immediate problem: is it appropriate to move from the micro level of the individual, where the discussion of free will, moral will, and ethical will is conducted, to the macro level of states in the international system, where the *Geist* and its evolution operates? Is the argument that the U.S. needs to adopt the Hegelian conception of freedom in its trade policy based on a misapplication of that concept? In brief, is Hegel's concept simply inapplicable to the problem of persistent unilateralism? This problem is especially poignant in light of Hegel's view of relations among nations and international law, which is discussed more fully below.[252] Hegel does not ascribe to the community of nations a role in establishing laws and norms that form part of the ethical will. Hegel observes that states always seems to go to war and, foreshadowing the strict positivist jurisprudence of John Austin, asserts there is no authority to oversee sovereign states.[253]

For three reasons, it is reasonable to apply Hegel's concept in the manner suggested. First, Hegel's concept of freedom in part is conditioned by the international political context in which he lived and wrote. There was no WTO, World Bank, or International Monetary Fund in the 18th and 19th centuries. Hegel correctly perceives international relations as they exist in his time. Diplomacy is a refined form of intrigue; it focuses on military alliances and balances of power, and often it leads to armed conflict.

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250. *See* CARL JOACHIM FRIEDRICH, THE PHILOSOPHY OF LAW IN HISTORICAL PERSPECTIVE 137 (2nd ed. 1963) (stating that "Hegel's freedom is one which is contained within the law, which unfolds as part of the dialectic of history").

251. *See* HOULGATE, *supra* note 47, at 77.

252. *See infra* notes 300-302 and accompanying text.

253. HOULGATE, *supra* note 47, at 124. Because of the constant possibility of war among states, Hegel concluded that absolute freedom is not attainable in the context of a state, but rather through the pursuit of art, religion, and philosophy. *See id.* at 125.

> Whatever else is involved in . . . [Hegel's] view that the state is man's highest social achievement, it undoubtedly implies that there is no superior body or group by which its claims may be assessed. States are necessarily independent beings. Their relations are regulated to some degree by custom, and there is an international law that regulates dealings between subjects of different states and requires adherence to treaties, as if they were a sort of contract. When the vital interests of states clash, however, there is no alternative except war. War between the states, Hegel had said . . . ., does not decide which of the rights of the conflicting states is the true right, for both are, "but which right has to give way to the other."[254]

(Interestingly, Hegel wrote his famous *Phenomenology of Spirit* in Jena at the time it was being sacked by Napoleon's troops and the Holy Roman Empire was crumbling,[255] which might help explain the poor organization of, and extremely dense prose in, this work!) Multilateral mechanisms obviously are more advanced in the present era, and such mechanisms have emerged as a possible new aspect of the ethical will. The suggested application is, therefore, a simple extension of Hegel's ideas into the modern international political economy.

A second reason why it is appropriate to move from the micro to macro level stems from Hegel himself. He did not rule out the possibility that the need for reciprocal respect of freedom of choice might be generalized to the macro level. One Hegel scholar writes that Hegel "held that states are individuals and that all individuals persist in their existence by ensuring that other individuals recognize them as they recognize others".[256] A second Hegel scholar comments that "[t]he organic community will no more disregard the interests of its members than I would disregard an injury to my left arm."[257] A third Hegel scholar suggests that moving from the level of the nation-state to the world system (admittedly a somewhat different sort of micro-to-macro shift than the individual-to-state shift) is quite natural in Hegelian thinking.

> Law, state, and ethics are expressions of a historical development which is the manifestation of a national spirit, and these national spirits in their entirety are manifestations of the world spirit. They must be understood as concrete projections of this world spirit. The world spirit is not something outside them, but in and through them it is what it is.[258]

Indeed, it might even be argued that because much of Hegel's work is concerned with the *Geist*, an inherently macro-level concept, applying his theory of freedom in the manner suggested is entirely appropriate.

Finally, even though the application of Hegel's concept of freedom to the problem of persistent unilateralism means moving from the micro to the macro level, the result may justify the move. Hegel's "immediate right," "moral conscience," and "ethical will" stimulate thought about a resolution of the problem of persistent unilateralism. Insofar as this problem threatens the vitality of the world trading system, looking to Hegel for a solution could be accepted on utilitarian grounds.

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254. ACTON, *supra* note 47, at 443.
255. *See* ACTON, *supra* note 47, at 435; SINGER, *supra* note 47, at 1, 6, and 66.
256. ACTON, *supra* note 47, at 443.
257. SINGER, *supra* note 47, at 35.
258. FRIEDRICH supra note 250, at 131.

C. *Evidence of an Inaccurate Conception of Freedom: The U.S. MFN Exemption During the 1993-95 GATS Negotiations.*

Recent events in international trade in financial services evince a vivid contrast between the negative (or "classical liberal") conception of freedom and Hegel's concept of freedom. The current *Geist*, persistent unilateralism, lingers on in American trade policy because of the American misconception of what true freedom is in the world trading system. To preserve freedom in international trade law and trade policy, the U.S. believes it is necessary to preserve its ability to strike its own bargains and withdraw from commitments. Simply put, the U.S. adheres to what Hegel terms the negative conception.

The inherent contradiction[259] in this conception of freedom that Hegel identifies is obvious: The foreign government acts, policies, or practices that the U.S. confronts and that might be actionable under Section 301 or other statute are to a large extent exogenously determined. After all, they are established by sovereign foreign governments. In many if not most instances, the U.S. must accept them as a given, and then decide whether to retaliate or threaten to retaliate. (Of course, over time the U.S. may be able to exert some influence through a variety of means, including Section 301, on the acts, policies, or practices of certain foreign governments. But, it bears repeating that Section 301 is about 50 percent effective, and it is more likely to be influential against smaller countries.[260])

Hegel's second basis for criticizing the negative definition of freedom also is apposite. The U.S. deceives itself when it believes threatened or actual unilateral trade action is entirely of its own volition, or even that it is the Prime Mover in the implementation of this statute. There may well be exogenous, uncontrollable economic and political pressures that influence a decision by the U.S. to take, or refrain from taking, unilateral action. For example, in general the more vulnerable U.S. workers and corporations are to counter-retaliation by a foreign country, the less likely the U.S. will take such action against that country.[261]

While the application of Hegel's concept of freedom may be straightforward, none of the above comments amounts to proof this application is appropriate. Stated more precisely, what evidence exists that a prerequisite for curing persistent unilateralism, for the *Geist* to evolve, is to clear up a misconception of freedom?[262] One piece of evidence concerns U.S.-Asian financial services

259. *See supra* note 212 and accompanying text.

260. *See supra* note 23.

261. The 1995 U.S.-Japan auto dispute provides an example. The U.S. was forced to settle the dispute in part due to the global nature of automobile production and sales. Thousands of American employees of Japanese car companies — such as Lexus and Infiniti dealers and sales people in the U.S. — might have lost their jobs if punitive tariffs had been imposed on luxury Japanese cars. The U.S. "choice" was a bow to the reality of multinational corporations. *See supra* note 38.

262. Aside from international trade in financial services, there are several striking pieces of evidence of the American misconception of freedom as the ability to withdraw from commitments. Consider the agreement between the Clinton administration and former Senate Majority leader Robert Dole. The Clinton-Dole agreement is reprinted in BHALA, INTERNATIONAL TRADE LAW, *supra* note 2, at 174-78. The agreement, which was not enacted into law, raised the possibility of withdrawal from the WTO in the event a panel of U.S. judges found that WTO panels had manifestly

trade. This evidence arises in the context of the U.S. position in the 1993-95 negotiations on the GATS. It is a poignant illustration of America's mistaken belief that freedom merely involves the assertion of the "immediate right," and an identification of right from wrong through the "moral will," without any tempering influence of the "ethical will."

The GATS, set forth in Annex 1B of the WTO Agreement, is a noteworthy step toward the development of a free trade regime for the cross-border trade in services. It is the first multilateral agreement to liberalize trade rules in this important sector in which seven out of ten Americans work. The GATS calls for the provision of MFN treatment,[263] as well as for increased transparency and market access.[264] Unlike the plurilateral agreements in Annex 4 of the WTO Agreement, which cover government procurement, civil aircraft, bovine meat, and dairy products,[265] and unlike the post-Uruguay Round agreements on information technology and telecommunications,[266] the GATS is a truly multilateral accord. A country cannot be a WTO Member and decline to accept obligations under the GATS.

Ostensibly, then, the most pressing issue pertaining to the cross-border trade in services is simply the proper implementation and execution of the GATS. As long as WTO Members comply with its provisions, then surely the world will witness a boom in services trade. However, to declare this issue to be the most pressing is to presume that the enforcement of GATS obligations pursuant to the DSU is a process in which the WTO Members have full faith. In fact, the U.S. harbors suspicions about this process, in part because of its doubts about the sincerity of other Members' declarations to open their services markets as manifest in their offers (*i.e.*, proposed schedules to the GATS).

These suspicions were manifest by the early fall of 1993.[267] At that time, the U.S. took the extraordinary unilateral step of threatening to declare an exemption from the MFN principle with respect to financial services.

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exceeded their authority in ruling against the U.S. in dispute resolution cases on three or more occasions within five years.

263. *See* GATS art. II:1, *in* MESSAGE, *supra* note 1, at 1589.

264. *See* GATS arts. III (transparency), XVI (market access), *in* MESSAGE, *supra* note 1, at 1589-90, 1600.

265. *See* MESSAGE, *supra* note 1, at 1682.

266. Regarding the information technology agreement, *see* Mark Felsenthal, *39 Nations Finalize Agreement Scrapping Information Technology Tariffs*, 14 Int'l Trade Rep. (BNA) 586 (Apr. 2, 1997); Frances Williams, *IT Talks Inch Towards "Critical Mass,"* FIN. TIMES, Feb. 3, 1997, at 3; and *Ministerial Declaration on Trade in Information Technology Products, Released at the World Trade Organization Meeting, Singapore, Dec. 13, 1996, reprinted in* 13 Int'l Trade Rep. (BNA) 1968 (Dec. 18, 1996). Regarding the telecommunications pact, *see Summary of Country Commitments in WTO Telecommunications Talks As Of Feb. 24, 1997, Prepared by USTR, reprinted in* 14 Int'l Trade Rep. (BNA) 393 (Feb. 26, 1997); *Not Quite Magic*, THE ECONOMIST, Feb. 22, 1997, at 67; and *Lists of Countries Agreeing to Foreign Investment, Regulatory Principles, International Services and Facilities, and Satellite Services and Facilities Under WTO Basic Telecommunications Services Agreement, Released By USTR Feb. 15, 1997*, 14 Int'l Trade Rep. (BNA) 318 (Feb. 19, 1997).

267. *See The U.S. Waves the Protectionist Stick*, *supra* note 156 (noting the timing of the U.S. declaration); Lyndsay Griffiths, *U.S. Changes Tack in GATT Financial Services Sector*, REUTERS FIN. SERVICE, Oct. 22, 1993, at 1, *available in* LEXIS, Banking library (reporting the new two-tier

> We want to open foreign markets, not to close our own. We have said that *unless and until we are able to negotiate adequate commitments from other countries, we will not lock our markets open to free riders; we will maintain an MFN exemption if necessary.*
>
> In an effort to move the [GATS] negotiations in Geneva along, we have modified the MFN exemption; and we are prepared to make a substantial commitment to market access by guaranteeing nondiscriminatory treatment for current operations of financial institutions from all countries established in the United States; providing reasonable access to U.S. financial markets for institutions from countries not already established here; and making additional commitments on new entry and expansion of existing operations and activities to those countries — *but only those countries* — which make commitments to substantially full market access and national treatment now or within a reasonable transition period.
>
> . . . .
>
> [Thus,] the current U.S. position is that the United States will take an exemption from MFN unless and until other countries make sufficient commitments toward liberalization.[268]

The U.S. threat was to grant access to financial service firms from another country on the basis of reciprocity (*i.e.*, in accordance with the access granted by that Member) — the same threat that lay behind the proposed fair trade in financial services legislation discussed in Part III above. Indeed, former Treasury Secretary Bentsen explained the U.S. strategy in the GATS negotiations in terms reminiscent of the debate surrounding that legislation: while the U.S. would guarantee national treatment for financial service firms from countries that open their markets to U.S. firms, "we will not assure countries that keep their markets closed the right to expand operations here, or to take advantage of new powers or benefit from future reforms."[269]

In effect, the U.S. threatened a two-track, or two-tier, approach to global financial services liberalization. First-tier countries that offered U.S. financial service providers appropriate market access and national treatment would receive more generous concessions regarding access of their financial service firms to the U.S. markets than would second-tier countries that denied U.S. providers appropriate access and national treatment. The U.S. would retain the option of pursuing bilateral agreements with the second-tier countries.[270] Moreover, it was clear that many Asian countries would be the principal target of the MFN exemption and placed in the second tier.[271] In sum, like the fair trade in

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approach). For an excellent summary of the GATS negotiations from 1993 through the spring of 1997, *see GATS Negotiations on the Liberalization of Financial Services*, INT'L ECON. REV. 15-18 (U.S. ITC Pub. 3040, Apr. 1997).

268. *Fair Trade in Financial Services* (1993), *supra* note 146, at 4-5, 12 (statement of Lawrence Summers, Under Secretary for International Affairs, U.S. Department of the Treasury) (emphasis added).

269. *Quoted in GATT at Critical Stage, U.S. Pledges Effort — Bentsen*, REUTERS FIN. SERVICE, Oct. 25, 1993, at 1, *available in* LEXIS Banking Library.

270. *See Gloomy Outlook Seen for GATS Negotiations*, 7 THOMSON'S INT'L BANKING REG. NO. 25, at 1 (June 26, 1995) (discussing the consequences of the U.S. threatened MFN exemption).

271. *See* Nancy Dunne, *White House Says Bargaining Power Boosted*, FIN. TIMES, July 27, 1995, at 6 (observing that U.S. Treasury Secretary Rubin "has been campaigning for a significant improvement in offers from Asian countries"); James R. Kraus, *U.S. Bankers: GATT Doesn't Get Job Done*, AM. BANKER, Dec. 27, 1994, at 4 (quoting former Treasury Secretary Lloyd Bentsen's

financial services bills, the MFN exemption threat was designed to resolve the free rider problem. The exemption would preserve America's ability to split countries into non-free rider and free rider camps, offer different concessions to the two camps, and offer different concessions to countries in the second camp.[272]

In contrast to the unenacted fair trade in financial services bills, however, the U.S. delivered on its threat of an MFN exemption in the GATS negotiations. In December 1993, it took the exemption for the entire financial services sector, in large part because foreign — principally Asian — countries refused to incorporate a standard of reciprocal national treatment in the GATS.[273] (To be sure, this action was technically lawful under Article II:2 of the GATS, which allows WTO Members to derogate from the MFN obligation and thus admits the possibility of conditional MFN treatment.[274]) The U.S. concluded it was better to decide for itself the Asian service markets that are in need of prying open than to sign a dubious multilateral deal and accept the "ethical will" of the MFN obligation. Further, dissatisfied with the commitments offered in the services schedules of other — especially Asian[275] — Members to open their markets to foreign service providers, the U.S. did not want to leave disputes to the DSU. Better to do the prying itself, in accordance with its own "moral will," through direct negotiations under the threat of unilateral retaliation, than to rely on the community of WTO panelists or Appellate Body members for recommendations of changes to Asian services measures.[276]

The unilateral U.S. action changed the course of the GATS negotiations. The initial round of GATS negotiations ended with the broader Uruguay Round conclusion on December 15, 1993. The unilateral U.S. action meant that these

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remark that "national treatment is still the exception rather than the rule in too many important markets," and observing that Malaysia, Singapore, and Thailand have "halted issuing banking licenses to foreign institutions); Griffiths, *supra* note 267, at 1 (noting that "Washington wants to retain leverage over Japan and developing nations, the top trouble spots"); *GATT at Critical Stage, U.S. Pledges Effort — Bentsen*, *supra* note 269, at 1 (quoting former Treasury Secretary Lloyd Bentsen's remark that the U.S. was "making a major push" to encourage "the key emerging markets of Asia," as well as Latin America, "to offer better commitments").

272. *See Fair Trade in Financial Services* (1993), *supra* note 146, at 15-16 (statement of John Price, Managing Director, Chemical Bank) (discussing the U.S. strategy and noting the EU countries were not free riders); *The U.S. Waves the Protectionist Stick*, *supra* note 156 (noting that the U.S. exemption infringes on the MFN principle by enabling it to offer more concessions to some countries than to others).

273. *See* Meyer, *supra* note 144, at 8.

274. To be sure, the U.S. was not the only country to list an exemption from the MFN obligation of the GATS. At least 60 countries listed and MFN exemption of one sort or another, typically in the areas of audio-visual services, transportation, or financial services. *See* MARTIN & WINTERS, *supra* note 54, at 21.

275. *See Double Trouble: Trade in Financial Services*, THE ECONOMIST, June 17, 1995, at 79 (noting the U.S. disappointment at financial service offers from Asian countries).

276. The MFN reservation is not the only example in the context of the GATS of America's assertion of its freedom. Paragraph 2(a) of the GATS Annex on Financial Services contains an exception to the basic GATS commitments such as MFN and transparency for "prudential reasons." *See* MESSAGE, *supra* note 1, at 1611. Despite examples of such reasons, including the protection of investors, depositors, and policy holders, this exception easily can be manipulated for unilateral protectionist purposes. For an argument that U.S. amendments to its foreign bank regulatory scheme during the Uruguay Round negotiations are protectionist, *see supra* note 276.

negotiations were incomplete. Accordingly, negotiators agreed to extend the time to reach an acceptable set of schedules of commitments on service trade liberalization until June 30, 1995, and this deadline was later extended to the end of July 1995.[277]

When the extended deadline was reached, the U.S. still found the offers from Asian countries wanting, and held to its MFN exemption.[278] In effect, the negotiations collapsed because the U.S. maintained its MFN exemption for the entire financial services sector, agreeing only to protect existing investments of financial services providers. The *Financial Times* correctly observed that "[a]fter pressing for years for a multilateral deal to liberalize financial services, the U.S. seems to have decided that unilateral action is preferable after all."[279] *The Economist* rightly argued that traditionally the U.S. had been the leader in multilateral negotiations to liberalize services, and its "snub" meant it had "forfeited much of the authority that leadership brings" and, most significantly, rendered the multilateral system "weaker."[280]

Many of the remaining WTO Members, led by the EU, reached a "second-best result," as WTO Director General Renato Ruggiero put it,[281] in which the U.S. refused to take part: an interim agreement on commitments designed to last from August 1, 1996 until the end of 1997.[282] During this interim period, the U.S. pursued its two-track approach, allowing foreign financial service providers relatively free access to the U.S. market if those firms were from countries that gave national treatment to U.S. firms, but denying such access to firms from countries that did not provide such treatment to U.S. firms.[283] In brief, the U.S. adhered to a conditional MFN policy in the financial services sector and accused certain, particularly Asian, WTO Members of being free riders, wanting their financial services firms to have free access to the U.S. market on an MFN basis while only slightly opening their markets to U.S. firms.[284] As of this writing, negotiations in which the U.S. is an active participant are underway to reach a

277. *See* Bhushan Bahree, *WTO Extends Financial-Services Talks As U.S. Balks at Opening Market Further*, WALL ST. J., July 3, 1995, at A4; *Next Month, Uruguay Round Redux — For Banking Industry*, 18 Bank Letter No. 13, at 6 (Apr. 4, 1994).

278. *See* General Accounting Office, World Trade Organization — Observations on the Ministerial Meeting in Singapore, GAO/T-NSIAD-97-92 (Feb. 26, 1997), (testimony of JayEtta Z. Hecker, Associate Director, International Relations and Trade Issues, National Security and International Affairs Division); Snape & Bosworth, *supra* note 54, at 185, 192; Gary G. Yerkey, *U.S. Welcomes EU Plan for Interim Accord on Financial Services, But Will Not Join*, 12 Int'l Trade Rep. (BNA) 1265 (July 26, 1995).

279. *The WTO Cuts a Deal*, FIN. TIMES, July 28, 1995, at 17.

280. *US Against Them: Trade in Financial Services*, THE ECONOMIST, July 29, 1995, at 53.

281. *Quoted in id.* at 53.

282. *See* Frances Williams et al., *Global Financial Services Deal Agreed*, FIN. TIMES, July 27, 1995, at 1; Frances Williams, *Financial Services Deal Sidelines the U.S.*, FIN. TIMES, July 27, 1995, at 6.

283. *See* Gary N. Kleiman, *Comment: Better Forum Needed to Negotiate Terms of Foreign Competition*, AM. BANKER, Jan. 4, 1996, at 5 (identifying the EU and Japan as having "foreign-friendly home regimes," but noting the "bilateral reciprocity standard" for aspiring new entrants to the U.S. market).

284. Jeffrey Shafer & Jeffrey Lang, *In Defense of A Modest Outcome*, FIN. TIMES, July 25, 1995, at 11.

permanent and broadly acceptable set of GATS schedules. Whether Asian WTO Members will make sufficiently liberalizing commitments to cause the U.S. to alter its conditional MFN policy remains uncertain at this writing.[285] Already, Thailand has indicated that it "will refuse U.S. requests to offer national treatment to foreign finance companies and allow majority foreign ownership" in financial service firms, because Thai financial firms are "not ready to compete with their more sophisticated overseas counterparts."[286] In turn, the U.S. "has warned that a successful conclusion depended on good market-opening offers" from such countries.[287] In the current GATS negotiations, the U.S. has offered to open its financial services market to foreign firms on the condition that, as U.S. Trade Representative Charlene Barshefsky and Treasury Secretary Robert Rubin said, "our trading partners, especially the key emerging markets, submit significantly improved offers that establish a level playing field for U.S. firms to compete effectively."[288]

To be sure, the final agreement on liberalizing cross-border trade in financial services under the auspices of the GATS, in which the U.S. participates, that was reached in December 1997 (while this article was in the process of publication), is a welcome development. However, American participation in the new accord in itself would *not* constitute sufficient evidence to signify a fundamental and complete change in the U.S. view of freedom of action in the world trading system. Thus, it does *not* render the argument of this article outdated. To the contrary, happily it might reinforce the argument by suggesting the U.S. is moving toward "Hegelian enlightenment" in its trade policy.

To appreciate why the U.S. MFN exemption is so extraordinary, and why it illustrates our misconception of freedom from an Hegelian perspective, it is necessary to recall the importance of the MFN principle in GATT-WTO jurisprudence. It is, as the *Restatement (Third) of the Foreign Relations Law of the United States* indicates, "central" to that jurisprudence.[289] It is enshrined in the first paragraph of the first Article of GATT 1947,[290] and for good reason: only through the application of an unconditional MFN principle are trade concessions

285. *See Financial Services Talks Resume*, 19 WTO FOCUS NEWSLETTER 1 (May 1997); *May 2 Chairman's Statement from Toronto Meeting of Trade Ministers*, 14 Int'l Trade Rep. (BNA) 836 (May 7, 1997) (urging WTO Members to submit offers to achieve "significantly improved market access and national treatment commitments"); Gary G. Yerkey, *U.S., Quad Partners to Press Other Nations to Improve Offers in Financial Services Talks*, 14 Int'l Trade Rep. (BNA) 760 (Apr. 30, 1997) (reporting that the U.S. will press Asian and Latin American countries to improve their offers to open their financial services markets, and quoting Deputy U.S. Trade Representative Jeffrey M. Lang's statement that the current offers "don't provide for fair competition in financial services").

286. *See Thailand Will Not Budge In WTO Financial Services Offer*, 14 Int'l Trade Rep. (BNA) 1021 (June 11, 1997).

287. Frances Williams, *U.S. Warns on Financial Services*, FIN. TIMES, June 6, 1997, at 6. *See also* Gary G. Yerkey, *President Urged to Press APEC Leaders to Open Financial Services Markets to U.S.*, 14 INT'L TRADE REP. (BNA) 932 (May 28, 1997) (discussing the pressure placed by U.S. financial services firms on President Clinton to push Asian countries to open their services markets to U.S. firms under the auspices of the GATS negotiations).

288. *Quoted in* Robert S. Greenberger, *U.S. Will Offer Access to Its Market To Spur Global Financial Services Pact*, WALL ST. J., July 14, 1997, at A2.

289. § 802 cmt. a.

290. *See* BHALA, DOCUMENTS SUPPLEMENT, *supra* note 158, at 1.

realized immediately on a multilateral basis. Any condition on that principle placed by one country, much less an exemption made therefrom, means that concessions by that country must be negotiated with other countries on a bilateral basis. The country placing the condition, or taking the exemption, thus retains unilateral discretion as to whether to make concessions in these negotiations, whether the concessions should be substantively similar to concessions made to other countries, and whether to revoke in the future any concessions that are made.

The unilateral U.S. action in the GATS negotiation is, therefore, a classic example of our adherence to what Hegel identifies as the negative conception of freedom. The *Financial Times* reported that the U.S. "pulled part of its package of commitments from the negotiating table" and astutely pointed out that "[m]ost of the world believes the U.S. walked away from the bargaining table in Geneva when it did not get what it wanted."[291] The *American Banker* properly characterized the action as "[t]he U.S. walkout at Geneva."[292] These journalistic impressions suggest a deep-seated insistence on retaining autonomy to make or not make, and to withdraw from, commitments — precisely the conception of freedom that Hegel attacks.

In Hegelian terms, the exemption was an assertion of the "immediate right" to make our own bargains and withdraw from our own commitments. If it was constrained, it was by a unilateral moral conviction that the principle of reciprocal, instead of unconditional, national treatment was universally good and, therefore, should be adopted by the world trading community. This conscience became self-righteous. When other WTO Members would not adopt this principle, the U.S. "walked." The MFN exemption meant that the U.S. would decide on its own which WTO Members are providing national treatment to U.S. financial service providers. At no point during the GATS negotiations did the U.S. demonstrate an understanding that there may be an objective, universal good, such as unconditional national treatment, that ought to take precedence over its subjective individual preference for reciprocal national treatment. Nor did it indicate any understanding that its own subjective preferences ought to be secondary, if only to help preserve and strengthen, instead of corrode, the world trading system. In simple Hegelian terms, its moral conscience became self-righteous in professing what it thought was good.

These Hegelian reflections are equally apposite to any unilateral trade action the U.S. undertakes. The only limitation on American unilateral trade action is a moral conscience convinced that its assessments of foreign trading practices are correct. For example, in a Section 301 investigation it decides for itself whether a foreign government's act, policy, or practice is "unjustifiable" under Section 301(a),[293] or "unreasonable" or "discriminatory" under Section

291. Dunne, *supra* note 39, at 6.

292. Kleiman, *supra* note 283, at 5. Mr. Kleiman offered a quixotic answer to the U.S. MFN exemption: the creation of a "World Financial Services Organization" that would "unify trade regulation and crisis approaches." *Id.*

293. *See* 19 U.S.C. § 2411(a)(1).

301(b).[294] In the recent action against Burma, the U.S. decided for itself what human rights were relevant and were being violated. In all such cases, the U.S. is the proverbial judge, jury, and executioner.

Furthermore, in Hegelian terms, it is not simply that America's moral conscience is self-righteous. The U.S. moral will has failed to evolve into an ethical will. The distinction between the two types of will made by a Hegel scholar describes perfectly America's relationship to the world trading system.

> The moral will always confronts the world with what *it* knows to be right and good, with what *it* knows ought to be, but invariably is not, the case. It finds itself PERMANENTLY DISSATISFIED with a world which it knows could be better. And in the terms which the moral will sets, it is probably right: the world could always be "better." However, for all its moral integrity and rectitude, the moral will always has to forgo the deeper freedom of being at home in the imperfect world of real human beings, and of knowing that good behavior has become second nature to it, has become habitual, not through its own efforts, but simply because it has been educated into the practices and customs of society. Furthermore, the moral will which insists on doing what its conscience dictates and on preserving its moral integrity will never understand the freedom to be found in *civility*, that is in doing as one's neighbors do in trivial matters such as fashion, or, where matters are more serious, *in participating in a public discussion with a willingness to let one's deepest convictions be debated and perhaps be shown to be wrong, and a willingness even to defer to established customs and norms if one's own powers of persuasion fail to sway others.* The moral will will also find it hard to understand that *one can be morally in the right about a particular issue and yet, at the same time, ethically in the wrong because of one's refusal to heed any voice other than that of one's own conscience.*
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> . . . .
>
> [Thus,] [e]thical freedom is partly a matter of having a *disposition* towards civility: of being able to let go of one's insistence that one's conscience is the ultimate moral authority in one's life, *of being open to the value of laws, customs and institutions and of knowing how to trust them and find freedom in them.*
>
> . . . .
>
> [T]he individual cannot claim the right as a truly free, ethical individual to determine through his conscience alone what is to count as good in the society as a whole or what his public duties are, but must allow this to be determined either by public debate, *by the legally constituted or publicly recognized institutions within the society,* or by custom. The moral individual becomes an ethical individual, therefore, when he recognizes that his own voice need not always utter the last word on a given matter, but rather that he should be understood as *participating in and giving life to ongoing social and political practices* which no private individual or particular group of private individuals has the exclusive right to determine.[295]

America's unilateral trade actions suggest the lack of a "disposition towards civility" regarding the world trading system. They bespeak not just a dearth of trust in the laws of the system, but also a failure to acknowledge the possibility that those laws embody an objective, universal good that safeguards the freedom of each WTO Member more effectively than unilateral action. Indeed, the threat

294. *See* 19 U.S.C. § 2411(b)(1).

295. HOULGATE, *supra* note 47, at 101-103 (emphasis in italics original, emphasis in bold added).

or use of unilateral trade action is not a rational choice in accordance with a universal principle, because such action is not a principle condoned by the world trading community. Each unilateral action stands as a rejection of the very idea of an ethical will that assimilates laws and customs of the multilateral community, such as those embodied in the DSU. *In sum, in Hegelian terms America's trade relations with the rest of the world are morally self-righteous and unethical.* We do not appreciate the Hegelian insight that the best guarantor of our freedom in the world trading system is the willing acceptance of constraints on the exercise of that freedom that are reflected in laws and customs embodying a universal good. As a result, we appear "permanently dissatisfied" with the system.

D. The Corrosive Effects of America's Misconception.

America's negative conception of freedom, or in Hegelian terms the failure of its moral will to become an ethical will, could corrode the world trading system if other WTO Members believe and behave as the U.S. does. Neither the WTO nor the Uruguay Round rules (and the customs associated therewith) would be immanent in the ethical wills of WTO Members, because such a will could not be ascribed to the Members. Therefore, unlike Hegel's state, the WTO would not be seen as an essential guarantor of the freedom of choice of the Members with respect to trade laws and policies. Each member guarantees the freedom of choice and reserves the right to take unilateral trade action. To the contrary, while conceived of by the Members, the WTO would be seen as an alien creature. Each actor would be an independent contractor that voluntarily assents to membership in the WTO. The independent contractors individually, not the WTO as a collective body, would be the irreducible minimum in the world trading system. Therefore, each independent contractor would be at liberty to "go it alone" should it choose to do so. Stated differently, each independent contractor would affirm its right of *self*-definition and *differentiation* with respect to its trade laws and policies. Each contractor would fear that to adopt a collective definition of itself, and to maintain only those trade laws and policies condoned by the collective, would undermine its freedom from that collective. It might even reflect a lack of confidence in a contractor's own critical appraisal abilities, or some deeper insecurity. Every unilateral trade action would be an exercise in self-definition and statement of differentiation from the collective. Confidence and bravado would be exuded. Hence, the rhetoric would involve "us" versus "them," as in the fair trade in financial services example discussed in Part III, or the behavior would stake out a unique position, as in the MFN exemption example discussed earlier in this Part. In brief, if our negative conception of freedom is contagious, then other WTO Members will view the world trading system as nothing more than an amalgam of independent contractors.

Plainly, the American view, if adopted more generally, would have a corrosive effect on the system. Inherent in that view is a conceptual distinction between "decentralized multilateralism" versus "centralized multilateralism." Decentralized multilateralism suggests the WTO's powers, and its rules and cus-

toms, spring from the independent contractors. These contractors retain all powers not expressly delegated to the WTO, and each contractor owes no fidelity to the rules and customs except insofar as it voluntarily chooses to pay such fidelity. In contrast, centralized multilateralism is the mirror image: the WTO's powers, and its rules and customs, have a life of their own that is larger than any one independent contractor. Once a country becomes a WTO Member, it is an indistinguishable part of the world trading community. Like a drop of rain that falls into the ocean, a country that becomes a WTO Member surrenders to forces larger than itself.

Each trade action the U.S. undertakes unilaterally is an affirmation of our belief in decentralized multilateralism. No cure to the problem of persistent unilateralism is possible under these circumstances. As argued below, to cure the problem, a new synthesis is needed that resolves the underlying free trade - fair trade dialectic, and thereby avoids the independent contractor and decentralized multilateralist implications of the U.S. misconception of freedom of action.

E. Toward a New Synthesis.

1. Abandoning the Hegelian Conception of International Law and Developing a Reservoir of Experience with the DSU.

To summarize the argument thus far, persistent unilateralism has been diagnosed as the *Geist* of current American trade policy. The first body of evidence consists of rhetoric concerning the proposed fair trade in financial services and suggests the existence of a free trade - fair trade dialectic that underlies and causes this *Geist*. A second piece of evidence is the U.S. MFN exemption in the GATS negotiations and is relevant to understanding why this *Geist* has not yet evolved. It bespeaks what Hegel identifies as a misconception of freedom and, therefore, suggests the need for a better understanding of how to safeguard freedom in the world trading system. Put differently, a better Hegelian conception of safeguarding freedom in the world trading system is a prerequisite for curing the free trade - fair trade dialectic and the development of the *Geist* to a higher stage of consciousness.

The final matters to be addressed concern the cure. How, as a practical matter, might the cure work? What might the cure look like? If, in an Hegelian sense, law develops through a dialectical progression of opposing concepts, and if this progression leads to a more accurate understanding of the freedom of the addressees of the law, then what might this new synthesis be?

A new synthesis obviously implies a resolution of the free trade thesis and fair trade antithesis. It is not simply a question of "balancing" between these opposites so as to manage the tension between them. Rather, it is necessary to reject all implications of these ideas that are inconsistent with the new post-Uruguay Round multilateral dispute resolution system. Such implications include the independent contractor view of the system and the decentralized multilateralism associated with this view. In brief, the U.S. must stop thinking in terms of free versus fair trade.

To think in a new manner and reach a more informed collective mind about international trade policy requires a more accurate conception of how freedom is best preserved in the world trading system. The U.S. must abandon its negative conception that its trade policy is free insofar as it can make or withdraw from commitments and keep its options open. It must re-define its freedom in terms of being able to choose among legal and policy options consistent with the GATT-WTO regime, and realize that unilateral retaliation is not among these options. Therefore, it needs to accept the Hegelian proposition that freedom is protected through willing acceptance of constraints thereon. After all, willing submission of all trade disputes to the DSU and forbearance from threatened or actual unilateral retaliation would better ensure it has true freedom of choice in the formulation and execution of trade policy than unilateral trade actions. The constraint of the DSU would promote freedom of choice for every WTO Member, and thus promote its *reciprocal* respect and realization among Members. Moreover, this constraint would prevent a devolution of world trade relations into a Hobbesian state of nature in which each nation competes ruthlessly against each other for export markets and tries to keep the goods of other nations out of its own territory.[296] Instead, the U.S. would develop an individual will that is more sensitive to the world trading community, which would represent a positive evolution of that will. After all, for Hegel, the ability to see one's own potential and freedom is enhanced when one voluntarily internalizes an ethical will.

In sum, the U.S. must accept the world trading system as an Hegelian civil society writ large, and thereby appreciate the economic interdependence of WTO Members and the need for the WTO to ensure that specialized national pursuits are not incongruous with systemic good. It must choose freely to serve the universal principles established for resolving disputes embodied in the DSU and thereby shed its moral self-righteousness and develop an ethical will.

In theory, it ought not to be difficult for the U.S. to accept the world trading system as an Hegelian civil society writ large.[297] Civil society is precisely the sphere in which members engage in economic activity and exercise bourgeois freedom, *i.e.*, where "individuals produce goods to meet their needs and to exchange for other goods which they themselves cannot produce."[298] Obviously, production and exchange is what nations do in the world trading system. Moreover, the importance of the reciprocal promotion of freedom based on economic interdependence is evident.

> [T]hrough his efforts to satisfy his *own* interests, the bourgeois individual is brought to recognize that the economic system itself is the condition of his own

296. *See* THOMAS HOBBES, LEVIATHAN ch. 13, at 78 (Edwin Curley ed., Hackett Publishing Co. 1994) (1651) (arguing that states are perpetually in the posture of war); CHARLES R. BEITZ, POLITICAL THEORY AND INTERNATIONAL RELATIONS 27-34 (1979) (discussing the application of Hobbes' concept of the state of nature to international relations).

297. In contrast, for legal, political, and cultural reasons, it seems impossible for the foreseeable future for the U.S. to accept the WTO as analogous to the Hegelian state. Thus, no effort is made here to extend the analogy to this level.

298. HOULGATE, *supra* note 47, at 105.

> freedom and satisfaction, and that *he must further the interests of the others who participate in that system if he wishes to find fulfilment himself.*[299]

This point is no less true for nations in the world trading system than for individual free wills in the conventional Hegelian civil society. But how, in practice, is the U.S. likely to make the choice to serve the universal principles of the DSU ?

The obvious answer is to develop a reservoir of positive experience with the DSU. The sheer force of litigating a large number of cases at the WTO, and of watching other countries litigate cases at the WTO, may well persuade the U.S. that the new multilateral dispute resolution mechanism is worth using not only in the cases that clearly are covered by a Uruguay Round agreement, but also in those cases involving issues that are at the fringe of an agreement. It ought not to matter whether the U.S. wins or loses its cases, or whether in cases between other Members the side the U.S. favors wins or loses. What ought to matter, in terms of building U.S. confidence to minimize use of, and ultimately do away with, unilateral trade actions, is the integrity of the multilateral dispute resolution mechanism. A full and fair hearing of all the relevant issues in the case, followed by a cogent, well-reasoned decision, ought to persuade the U.S. that its freedom is not at risk by submitting to this mechanism.

The problem with this answer is that it puts the cart before the horse. The U.S. is unlikely to seek to build this reservoir of experience unless it has some faith in the enforceability of the WTO's adjudicatory outcomes. However, the U.S. seems to cling to a general perception of the enforceability of international law that obfuscates its vision of the WTO dispute settlement process. A change in that perception will create an interest in increased use of the DSU.

What is that outdated perception? Ironically, it is distinctly Hegelian. In *Philosophy of Right*, Hegel discusses the enforceability of international law, arguing that it is not really "law" but rather an "ought to be."

> International law springs from the relations between autonomous states. It is for this reason that what is absolute in it retains the form of an ought-to-be, since its actuality depends on different wills each of which is sovereign.
>
> The nation state is . . . the absolute power on earth. It follows that every state is sovereign and autonomous against its neighbors.
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> . . . .
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> The fundamental proposition of international law (i.e. the universal law which ought to be absolutely valid between states, as distinguished from the particular content of positive treaties) is that treaties, as the ground of obligations between states, ought to be kept. But since the sovereignty of a state is the principle of its relations to others, states are to that extent in a state of nature in relation to each other. Their rights are actualized only in their particular wills and not in a universal will with constitutional powers over them. This universal proviso of international law therefore does not go beyond an ought-to-be, and what really happens is that international relations in accordance with treaty alternate with the severance of these relations.
>
> It follows that if states disagree and their particular wills cannot be harmonized, the matter can only be settled by war.[300]

299. HOULGATE, *supra* note 47, at 107 (emphasis in italics original, emphasis in bold added).
300. HEGEL, PHILOSOPHY OF RIGHT, *supra* note 62, ¶¶ 330-31, 333-34, at 212-14.

Hegel's point is that nations are independent actors and there is no meta-adjudicatory body that can enforce nations to follow law. International "law" is aspirational — an expression of what ought to be — and in the absence of a supreme power reigning above nations, the only way to resolve a dispute is war.

> There is no Praetor to judge between states; at best there may be an arbitrator or a mediator, and even he exercises his functions contingently only, i.e. in dependence on the particular wills of the disputants. Kant had an idea for securing "perpetual peace" by a League of Nations to adjust every dispute. It was to be a power recognized by each individual state, and was to arbitrate in all cases of dissension in order to make it impossible for disputants to resort to war in order to settle them. This idea presupposes an accord between states; this would rest on moral or religious or other grounds and considerations, but in any case would always depend ultimately on a particular sovereign will and for that reason would remain infected with contingency.[301]

Plainly, Hegel's conception of international law resembles very closely that put forth by John Austin in *The Province of Jurisprudence Determined* (1832) eleven years after *Philosophy of Right* was published.

> The positive moral rules which are laws improperly so called, are *laws set* or *imposed by general opinion* . . . [f]or example, [s]ome are set or imposed by the general opinion . . . of a larger society formed of various nations.
>
> . . . [T]here are laws which regard the conduct of sovereigns or supreme governments in their various relations to one another. And laws or rules of this species, which are imposed upon nations or sovereigns by opinions current amongst nations, are usually styled *the law of nations* or *international law.*
>
> Now a law set or imposed by general opinion is a law improperly so called. It is styled *law* or *rule* by an analogical extension of the term. When we speak of a law set by general opinion, we denote . . . the following fact. — Some *intermediate* body or *uncertain* aggregate of persons regards a kind of conduct with a sentiment of aversion or liking. . . . In *consequence* of that sentiment, or in *consequence* of that opinion, it is likely that they or some of them will be displeased with a party who shall pursue or not pursue conduct of that kind. And, in *consequence* of that displeasure, it is likely that *some* party (*what* party being undetermined) will visit the party provoking it with some evil or another.
>
> The body by whose opinion the law is said to be set, does not *command,* expressly or tacitly, that conduct of the given kind shall be forborne or pursued. For, since it is not a body precisely determined or certain, it cannot, *as a body,* express or intimate a wish. . . . The so called *law* or *rule* which its opinion is said to impose, is merely the *sentiment* which it feels, or is merely the *opinion* which it holds, in regard to a kind of conduct.
>
> . . . The so called law of nations consists of opinions or sentiments current among nations generally. It therefore is not law properly so called. But one supreme government may doubtless *command* another to forbear from a kind of conduct which the law of nations condemns. . . . If the government receiving the command were in a state of subjection to the other, the command, though fashioned on the law of nations, would amount to a positive law.
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> . . . .
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> It also follows . . . that . . . [a so called law set by general opinion] is not armed with a sanction, and does not impose a duty. . . . For a sanction properly so called is an evil annexed to a command. And duty properly so called is an obnoxiousness to evils of the kind.

301. *Id.* ¶ 333 (Remark), at 213-14.

> . . . .
>
> [T]he law obtaining between nations is not positive law: for every positive law is set by a given sovereign to a person or persons in a state of subjection to its author. . . [T]he law obtaining between nations is law (improperly so called) set by general opinion. The duties which it imposes are enforced by moral sanctions: by fear on the part of nations, or by fear on the part of sovereigns, of provoking general hostility, and incurring its probable evils, in case they shall violate maxims generally received and respected.[302]

The strict Austinian positivist notion is that law is an order backed by a threat, *i.e.*, a command of a sovereign that is habitually followed because the sovereign can impose penalties against a violator. International law lacks these elements and is thus nothing more than positive morality.

What is the connection between this Hegelian/Austinian positivistic approach to international law, on the one hand, and the need for the U.S. to develop a reservoir of experience with the DSU, on the other hand? The U.S. cannot develop this reservoir until it changes its perception of the enforceability of international law, because its perception is essentially the same as the Hegelian/Austinian one. Despite U.S. use of the DSU in many cases, this perception seems to render many U.S. trade policy makers, jurists, and commentators skeptical of the WTO as a dispute settlement body. Therefore, it is a barrier to submitting *all* our trade disputes to that body, forswearing threats of unilateral action, and repealing statutes like Section 301. Indeed, every U.S. unilateral trade action or threat thereof reveals our skepticism. With each such action, the U.S. declares to the world "we will enforce what is right because you cannot."

Fortunately, there is good reason for the U.S. to alter its perception. In contrast to the Hegelian concepts of the *Geist*, the dialectic, and freedom, the Hegelian/Austinian approach to international law is outdated — at least in the context of international trade law. All of these concepts provide insight into the problem of persistent unilateralism, but the last one must be repudiated if that problem is to be resolved. The discussion of the new and improved multilateral dispute resolution system in Part I above establishes that an obligation created by a Uruguay Round agreement is not a mere "ought-to-be" or expression of general opinion. There is a "Praetor," namely, the WTO's DSB. A Uruguay Round obligation is a "command" backed by the "evil" of a DSU proceeding and, ultimately, trade remedies. There is no need for unilateral action, the trade equivalent of "war," to settle disputes. In sum, the U.S. must get over the idea that "all international law is by its nature weak compared with domestic laws backed by more vigorous court systems and penalties."[303]

2. *Multilateral Freedom?*

If the U.S. abandons the Hegelian conception of international law and develops a reservoir of positive experience with the DSU, then perhaps a new synthesis might emerge that would replace the free trade - fair trade dialectic.

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302. JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 123-25, 171 (Wilfrid E. Rumble ed., Cambridge Univ. Press 1995) (1832) (emphasis original).

303. WHALLEY & HAMILTON, *supra* note 8, at 138.

This synthesis could be dubbed "multilateral freedom." The synthesis covers all trade disputes, which may be disaggregated into three categories: (1) the "easy cases," which are disputes concerning obligations clearly arising from a Uruguay Round agreement; (2) "gray area cases," which are disputes concerning obligations that arguably arise from a Uruguay Round agreement; and (3) "hard cases," which are disputes concerning matters that clearly fall outside the scope of a Uruguay Round agreement. The third, and to some extent the second, categories imply a significant expansion of the WTO as an adjudicatory forum.[304]

First, consider easy cases, those disputes clearly within the ambit of a Uruguay Round agreement. They would be submitted to the WTO and adjudicated according to the DSU and any supplementary dispute resolution rules contained in the relevant agreement.[305] A parallel Section 301 investigation would not be undertaken, it would be duplicative in light of the WTO panel hearing the case and would reflect an unfounded lack of trust in the panel's ability to protect the freedom of the complaining and responding Members. Instead, Section 301 would be repealed, or amended drastically to allow for retaliation whenever authorized by the DSB without the necessity of a prior investigation by the USTR.

Who would decide whether a case is clearly within the ambit of a Uruguay Round agreement? In the multilateral freedom synthesis, the answer is the DSB. Gray area cases — disputes arguably covered by an agreement — would be submitted to a WTO panel, at least for resolution as to whether subject matter jurisdiction exists. If this jurisdiction exists, then the case would proceed as an easy case. If the panel decides it does not have jurisdiction under an applicable agreement, then the U.S. would not automatically resort to a Section 301 investigation. Instead, the U.S. would seek resolution of this *bona fide* gray area case

304. A common rationale for the existence of Section 301 is that it is needed to deal with trade controversies that are not covered by an agreement containing multilateral dispute resolution procedures.

> Increasingly . . . section 301 cases have been brought against practices that are not covered by GATT disciplines, or that fall into a gray area which GATT jurisprudence was unable to clarify . . . . [B]road loopholes in the coverage of GATT obligations encouraged the United States to respond unilaterally under Section 301.

SCHOTT, THE URUGUAY ROUND: AN ASSESSMENT, *supra* note 54, at 130-31.

However, a glaring defect in this explanation is that the Uruguay Round agreements cover an enormous array of matters, from tariff and non-tariff barriers on goods and services to the protection of intellectual property rights and the maintenance of sanitary and phytosanitary standards. *See, e.g.*, HOUSE COMM. ON WAYS AND MEANS, URUGUAY ROUND AGREEMENTS ACT, H.R. REP. NO. 826, 103d Cong., 2d Sess. 16 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3773 (stating that "[t]he Uruguay Round Agreements are the broadest, most comprehensive trade agreements in history. . . ."); SENATE COMM. ON FIN., SENATE COMM. ON AGRIC., NUTRITION, AND FORESTRY, AND SENATE COMM. ON GOVERNMENTAL AFFAIRS, URUGUAY ROUND AGREEMENTS ACT, S. REP. NO. 412, 103d Cong., 2d Sess. 3 (1994) (discussing the array of achievements of the Uruguay Round); *Results of the Uruguay Round Negotiations: Hearings before the Senate Committee on Finance*, 103d Cong., 2d Sess. 6-7 (1994) (statement of Ambassador Mickey Kantor, U.S. Trade Representative, regarding the merits of the "largest, broadest trade agreement in history"). Consequently, the scope for unfettered use of unilateral trade weapons like Section 301 has narrowed. The multilateral synthesis would eliminate this scope.

305. Several Uruguay Round agreements contain dispute resolution rules that supplement the DSU. *See, e.g.*, Agreement on Subsidies and Countervailing Measures, arts. 4, 7, 9, and 13, *in* MESSAGE, *supra* note 1, at 1535-36, 1539-40, 1544, and 1549-50.

by invoking the informal multilateral dispute resolution mechanisms that have been available since the founding of GATT in 1947: direct bilateral consultations, consultations involving multiple interested parties, the good offices of the Secretariat to mediate a dispute, and ultimately binding arbitration. Using such mechanisms would ensure that the U.S. does not act as the proverbial judge, jury, and executioner in gray area cases.

What about matters clearly not covered by a Uruguay Round agreement? The new synthesis of multilateral freedom that could replace the free trade - fair trade dialectic animating in the present *Geist* means the U.S. also would avoid immediate resort to coercive action even in these hard cases. Rather, it would rely on the aforementioned traditional informal multilateral mechanisms.

Would such reliance be well founded? Interestingly, for all their faults (discussed in Part I above), some witnesses who testified before Congress on fair trade in financial services legislation found the informal pre-Uruguay Round dispute resolution mechanisms preferable to the threat or actuality of unilateral action. Federal Reserve Board Governor LaWare, testifying against the 1991 bill, argued "the Federal Reserve feels that there are better ways to encourage other countries to open their markets, *including through bilateral and multilateral discussions*, which have thus far resulted in substantial liberalization in foreign markets."[306] During the debate about the 1993 fair trade in financial services bill, two of the banking industry's most important trade associations, the American Bankers Association (ABA) and the Bankers Association for Foreign Trade (BAFT), echoed the Federal Reserve's point. While the ABA and BAFT supported the bill, they warned that unilateral retaliation would be "harmful to the interests of U.S. banks abroad, and would be unfair to the U.S. operations of foreign banks."[307] Accordingly, they preferred to see obstacles to market access abroad cleared through "broader talks" under the auspices of the GATT.[308] The concern of the ABA and BAFT was pragmatic: Japan's market liberalizing measures had led to national treatment for U.S. banks, but not yet for U.S. securities broker-dealers or insurance companies.[309] If the U.S. acted against Japanese securities or insurance firms in an effort to pry open the securi-

306. *Fair Trade in Financial Services Legislation — Part 1*, *supra* note 144, at 19 (statement of John P. LaWare, Member, Board of Governors of the Federal Reserve). *See also id.* at 344-46 (stating that "continuing bilateral and multilateral negotiations will in the long run prove more beneficial than sanctions," and asserting that "reliance on market forces [complimented by such negotiations] may actually be the most potent force working to liberalize financial markets abroad") *and Fair Trade in Financial Services Legislation — Part 2*, *supra* note 176, at 25 (written testimony of the Association of Reserve City Bankers, a group of the highest ranking executives of major U.S. commercial banks) (stating that fair trade in financial services legislation was "inappropriate at this time when negotiations are in progress to enhance the development of free trade in all business and financial sectors). Ironically, the Federal Reserve supported the protectionist 1991 Foreign Bank Supervision Enhancement Act. *See id.* at 20; *supra* note 175.

307. *Quoted in* James R. Kraus, *U.S. Banking Trade Groups Oppose Retaliation Against Foreign Countries that Deny Equal Access*, AM. BANKER, Jan. 21, 1994, at 28.

308. Kraus, *supra* note 307, at 28.

309. *See* William Acworth, *Why So Much Delay on Interstate Banking? The Answer's in Japan*, 4 AM. BANKER'S WASHINGTON WATCH, July 25, 1994, at 1; *Letter May Delay Passage of Fair Trade Bill*, 4 AM. BANKER'S WASHINGTON WATCH, April 25, 1994, at 2; *Fair Trade Update*, *supra* note 156, at 1; *USTR Support Buttresses Fair Trade Bill*, 26 WALL ST. LETTER 7 (Feb. 7, 1994).

ties and insurance markets in Japan, then Japan might retaliate against U.S. commercial banks. In other words, cross-sectoral retaliation could prove counterproductive to the interests of the U.S. commercial banking sector.[310]

Furthermore, resolving hard cases through traditional informal multilateral dispute resolution mechanisms under the auspices of the WTO instead of by unilateral action might have three salutory effects. First, it might give the U.S. confidence in the ability of the WTO to handle new matters. The better the quality of the process and its outcome, the greater the confidence that will develop. Second, adjudicating hard cases might lay the foundation for the WTO to expand its subject matter coverage to new areas in the next round of world trade negotiations. Examples include the intersection of national security and trade (as in the Helms-Burton dispute), competition law questions (as in the U.S.-Japan Kodak-Fuji film dispute[311]), restrictive business practices (as in the U.S.-Japan auto dispute), official corruption in trade-related contracts,[312] all disputes involving non-WTO Members (most notably China, until it accedes to the

310. Kraus, *supra* note 307, 28. As discussed above, the 1994 fair trade in financial services bill was limited to the commercial banking sector. *See supra* note 146; Domis, *supra* note 151, at 2. Therefore, it did not raise the specter of cross-sectoral retaliation.

311. In this regard, an interesting example is the current dispute between the U.S. and Japan over the Japanese photographic film market. The case began in 1995 with a Section 301 petition filed by Kodak against Fuji alleging denial of market access opportunities for photographic film made by Kodak and sold in Japan. *See* Frank J. Schweitzer, *Flash of the Titans: A Picture of Section 301 in the Dispute Between Kodak and Fuji and a View Toward Dismantling Anticompetitive Practices in the Japanese Distribution System*, 11 AM. U. J. INT'L L. & POL'Y 847 (1996); Kees Jan Kuilwijk, *Behind the Shutters*, FIN. TIMES, Mar. 4, 1997, at 14. Since then, the case has moved to the WTO. Arguing on behalf of Kodak against Fuji, the U.S. asserts a non-violation nullification and impairment claim under Article XXIII:1(b) of GATT 1947. *See* Frances Williams, *U.S. Takes Photofilm Row to WTO Panel*, FIN. TIMES, Feb. 21, 1997, at 6; Mark Clough, *Shadow Cast Over WTO*, FIN. TIMES, Apr. 17, 1997, at 9. The claim states that the U.S. is being denied the benefits of Japanese tariff concessions made during the Kennedy and Tokyo Rounds. This denial allegedly results from the Japanese single brand, vertically integrated distribution system, competition between small and large stores in Japan, and Japanese promotion practices deny market access in Japan. However, the U.S. claim is weak because none of the government measures of which the U.S. complains pre-dates the development of the Japanese distribution system or the Kennedy and Tokyo Round tariff concessions. *See* Clough, *supra*. In other words, there appears to be no causal link between a Japanese government measure and Kodak's problems in marketing its photographic film in Japan. Thus, what underlies much of the U.S. complaint is a competition law issue — whether the Japanese vertically integrated distribution system, competition between small and large stores in Japan, and Japanese promotion practices deny market access in Japan to Kodak film. *See id.* Competition law, however, is not covered by GATT 1947 or any Uruguay Round agreement. Thus, the U.S. is not permitted to raise a competition law issue in the garb of a non-violation nullification and impairment claim. Under the multilateral freedom synthesis, rather than try to access the DSU by the "back door" through creative (if not strained) pleading, the U.S. and Japan would rely on the traditional informal dispute resolution mechanisms mentioned above. This synthesis avoids using WTO panels for cases lacking merit under the scope of the Uruguay Round agreements, and thus avoids upsetting one side or another with a panel outcome. Instead, it encourages both sides to recognize the limitations on the scope of the agreements, but at the same time use the WTO's informal mechanisms. Interestingly, in the Kodak-Fuji case, under a 1960 GATT Decision on Arrangements for Consultations on Restrictive Business Practices, the Japanese government has requested reciprocal consultations on the U.S. film market, but thus far the U.S. has balked. *See id.*

312. U.S. trade officials have called for the use of trade remedies to combat foreign government corruption. *See* Nancy Dunne, *Kantor Calls for Bribery Action*, FIN. TIMES, July 26, 1996, at 3; Helene Cooper, *Kantor Suggests Using Trade Sanctions As a Way to Fight Foreign Corruption*, WALL ST. J., Mar. 7, 1996, at A2.

WTO), disputes involving labor issues (other than those governed by the NAFTA Labor Side Agreement), disputes involving environmental issues (other than those involving environmental retro-fitting subsidies under the Uruguay Round Agreement on Subsidies and Countervailing Measures, or those governed by the NAFTA Environmental Side Agreement), and disputes involving industrial espionage.[313] After all, international trade is not a static field, as the new coverage of intellectual property in the Uruguay Round agreements, and of labor and environmental side agreements in the North American Free Trade Agreement (NAFTA) side agreements, illustrate. Submission of hard cases now to the WTO on an informal basis enhance the capability and quality of WTO expertise so as to make these cases easy in the future.

Finally, giving hard cases to the WTO will persuade the U.S. that the WTO can withstand a dispute among giants. Concern whether the WTO could handle the auto dispute the U.S. and Japan may have been one reason why the U.S. skirted the WTO.[314] If the dispute had been taken to the WTO, then at least one of the world's two largest economies would have been upset with the outcome. Yet, the fact is that a multilateral dispute resolution system that successfully manages disputes between the likes of Bangladesh and Bermuda is not worth much, because most of the world's great trade disputes involve giants like the U.S., Japan, EU — and, upon its inevitable accession to the WTO, China.

In sum, "multilateral freedom" would be a resounding commitment to the new and improved multilateral dispute resolution mechanism not only for easy cases, but also for gray area and hard cases. The commitment would ensure the protection of U.S. freedom — defined in an Hegelian sense as distinct from the negative (or "classical liberal") sense — in the world trading system. It would also signify an individual U.S. will that is more sensitive to systemic needs and interests, and thus represent the metaphysical development of that will to a higher state of consciousness of its own freedom in the system. No longer would the U.S. think in terms of free versus fair trade and in consequence resort to unilateral action.

V.
CONCLUSION

Reflecting upon the problem of persistent unilateralism through an Hegelian lens provides a contrast to the conventional way of thinking about U.S.

313. Use of Section 301 in this context is suggested in Marc A. Moyer, Comment, *Section 301 of the Omnibus Trade and Competitiveness Act of 1988: A Formidable Weapon in the War Against Economic Espionage*, 15 NW. J. INT'L L. & BUS. 178, 190-204.

314. In this raucous 1995 dispute, President Clinton's USTR, Mickey Kantor, argued that unilateral retaliation pursuant to Section 301 — in the form of a 100 percent tariff on imports of luxury Japanese car models such as the Lexus and Infiniti — was not inconsistent with America's obligations under the Uruguay Round agreements because the core of the dispute involved restrictive business practices in the Japanese auto parts market. He claimed that restrictive business practices were not covered by the regime. The Japanese — along with most of the international trade community — were singularly unimpressed with this assertion. For a discussion of the dispute and its implications, *see* the references cited *supra* note 38.

trade policy in terms of a tension between unilateralism and multilateralism. To *diagnose* the problem (*what* is it?), Hegel's concept of the *Geist* helps us see persistent unilateralism as the collective American mind about trade policy. To understand the *cause* of the problem (*why* does it exist?), Hegel's dialectic helps us realize that underlying persistent unilateralism is a free trade - fair trade contradiction that, eventually, may be resolved. To speculate about the *cure* of the problem (*how* might it be resolved?), Hegel's concept of freedom offers the optimistic possibility that the U.S. might yet develop a more sophisticated understanding of self-determination in the post-Uruguay Round world trading system. In sum, Hegel helps us understand where we are, why we are where we are, and where we might be going.

While the argument has addressed the "what?," "why?" and "how?" issues, it has not considered a fourth matter: the *"when?"* issue. When might we move to a resolution of the present contradiction and toward a synthesis of multilateral freedom? Unfortunately, it seems impossible to predict the timing of this evolution with any degree of certainty. The two illustrations of Hegelian concepts discussed above are recent: Congressional efforts to enact fair trade in financial services legislation during the early and mid 1990s illustrate the present *Geist* and its dialectical condition; and the U.S. MFN reservation during the 1993-95 GATS negotiations illustrates the present American misconception of freedom. Nonetheless, at least one general prediction may be offered: no evolution in the *Geist* is likely in the short term. As suggested in the opening paragraph, the U.S. has not yet transferred all trade disputes to the WTO, forsworn the threat of unilateral trade action, or repealed Section 301, and it continues to enact new unilateral sanctions legislation. Sadly, at least in the short term, it appears to have no intention of seriously considering any of these three bold steps.