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ARTICLE: SYMPOSIUM -- PREVENTION AND SETTLEMENT OF ECONOMIC DISPUTES BETWEEN JAPAN AND THE UNITED STATES: PART III: DISPUTE AVOIDANCE AND DISPUTE SETTLEMENT: INCOMPLETE RULE SYSTEMS, SYSTEM INCOMPATIBILITIES AND SUBOPTIMAL SOLUTIONS: CHANGING THE DYNAMIC OF DISPUTE SETTLEMENT AND AVOIDANCE IN TRADE RELATIONS BETWEEN JAPAN AND THE UNITED STATES

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SUMMARY:

... The objective of this group of trade law and policy specialists is to consider mechanisms for improving trade relations between Japan and the United States. ... However, Japan is a principal owner of export-producing manufacturers in the PRC and elsewhere in Asia, and this may presage a new and more complex type of trade dispute involving the United States and Japan. ... It is doubtful that negotiators for either country to potential disputes would purport to establish an arrangement that was designed to produce outcomes favorable to their own side, nor would trade negotiators acknowledge that their goal was "victory regardless of right." ... The United States and Japan rarely used the GATT 1947 dispute settlement mechanism to resolve bilateral disputes. ... The U.S. complaint against Japan in the photographic film and paper case is largely based on the theory that the Japanese government cooperated with industry in creating market access barriers that were intended to prevent foreign companies from penetrating the domestic Japanese market after the Japanese government had agreed to market-opening measures in the Kennedy and Tokyo Rounds of GATT negotiations. ... It is useful to ask whether Japan's adherence to the NAFTA, or the negotiation of a new bilateral free trade agreement between Japan and the United States, might solve the incomplete rule system problem. ...

TEXT:

[*185] The objective of this group of trade law and policy specialists is to consider mechanisms for improving trade relations between Japan and the United States. This article specifically concerns the avoidance and settlement of trade disputes between the two countries. There are three aspects to the question of dispute settlement and avoidance between Japan and the United States that deserve close attention.

First, the Agreement Establishing the World Trade Organization (WTO) and its related agreements move the General Agreement on Tariffs and Trade 1947 (GATT) system along the continuum from a soft law to a hard law system. There is an increased level of detail in the WTO legal instruments, and dispute settlement procedures are redesigned to reduce political influence in the outcome of proceedings. The WTO legal instruments are intended to channel trade disputes into the WTO dispute settlement forum. The evolution of the GATT legal system should attract Japanese and U.S. trade officials to the WTO dispute settlement forum, and compel its use, in a large number of contexts.

Nevertheless, there are important gaps in the WTO rule system, and these gaps are not always filled by alternative bilateral and minilateral trade instruments. These include the absence of minimum rules on the maintenance of competitive domestic markets, the absence of adequate sectoral coverage among members to the General Agreement on Trade

in Services (GATS), the absence of rules on the treatment of foreign investors (including with respect to corporate governance), the absence of adequate scope of coverage of the plurilateral WTO Government Procurement Agreement, the absence of adequate rules governing civil offset arrangements, and so forth.

Many of the trade disputes between Japan and the United States involve these "gap" areas. Though such disputes might in theory be resolved under a non-violation nullification or impairment action in the WTO Dispute Settlement Understanding (DSU), the lack of clarity of the WTO system in applying the non-violation rules makes such solutions problematic on all sides. Improvement in the system for the avoidance and settlement of trade and investment disputes between Japan and the United States may be brought about gradually through the enlargement and refinement of the rule system governing relations between the two countries. This enlargement and refinement will not necessarily take place in the WTO. There are a variety of bilateral, minilateral and multilateral fora in which more complete systems may be negotiated, including the North American Free Trade Agreement (NAFTA), Asia Pacific Economic Cooperation [*186] (APEC) forum and the Organization for Economic Cooperation and Development (OECD), and the choice of forum will vary according to context. The enlargement and refinement of the rule system will be affected by limitations arising out of system incompatibilities.

Second, there are good faith differences between Japan and the United States concerning the desirable level of government intervention in the domestic and international marketplace. These good faith differences lead to disputes concerning whether actions by governments are taken in order to protect against foreign competition, or are taken instead to promote desirable national domestic policy goals, such as stability in employment. In addition, some differences between Japan and the United States involve the behaviors of consumers, enterprises and political parties which are deeply entrenched. Even assuming that trade officials in both countries can adequately identify ways in which economic practices of Japan and the United States could be made more compatible, and even assuming that such changes were on both sides concluded to be desirable, it is not necessarily within the power of trade officials to mandate such changes.

When system changes are impracticable, and system incompatibilities lead to an imbalance in trade relations, some form of adjustment mechanism may be desirable as a means of diffusing trade friction. Identifying entrenched system incompatibilities and creating an adjustment mechanism present a challenge to trade officials.

Third, the trend of Japan-U.S. relations over the past several decades has been to solve trade disputes through market access agreements that are either explicitly or implicitly enforced by governments. Such agreements are anti-competitive, in effect promoting market allocation by potential private competitors. These solutions are suboptimal from a competitive market standpoint, though they may be preferable to a closed market alternative. This criticism of managed market access arrangements assumes a preference for open competitive international markets. Whether Japanese and U.S. trade officials in fact share this preference on a theoretical basis is an important question.

It should be clear *ab initio* that there is no "magic bullet" solution to trade and investment conflicts between Japan and the United States. These conflicts may in fact become more intense as the "China problem" more directly affects bilateral Japanese-U.S. relations. An incomplete rule system cannot be made complete overnight. Major macroeconomic policy differences cannot be dismissed by each side as aberrational thinking. Suboptimal market allocation solutions must be replaced with better solutions. If this were easy or convenient, it would already have been done.

I. THE BROAD CONTEXT OF JAPAN-UNITED STATES TRADE DISPUTES

There are numerous political, economic and cultural factors that affect whether trade disputes will arise between nations, and how they may best be settled by them. Certain major political, economic and cultural factors that affect trade relations between the United States and Japan, though perhaps self-evident, provide necessary background for an analysis of dispute avoidance and settlement in their trade relations.

[*187] 1. The post-War occupation by the Allied Powers of Japan and subsequent provision by the United States of a security umbrella for Japan has significantly affected the way in which trade disputes between the two countries are approached and settled. The end of the Cold War and relaxation of military tensions between the United States and former Soviet Union has relaxed the perceived security dependence of Japan on the United States. n1 However, the potential military threat posed to Japan by China must still influence Japan's political -- and therefore trade -- relations with the United States. We continue to live in an unsafe and unstable world, and continued protection by United States security forces remains a high priority in Japanese political relations.

2. The United States and Japanese economies have historically operated under different over-arching principles. Japan has placed a priority on business stability and full employment. Economic decisions tend to be reached by consen-

sus, taking into account a broad range of social impacts. Economic stability has been assumed by the Japanese to presuppose a relatively high level of government intervention in business planning. In many ways, the Japan model has proved highly successful in the Japan domestic context. n2

The United States has placed a priority on firm profitability through enterprise decision-making and the operation of market forces. n3 Firm profitability is assumed to result in general economic growth. The distribution of firm profits is largely dictated by market forces, and the impact of the market on individual employees is sharply discounted. Government involvement in business planning is assumed to be unnecessary or counterproductive. In many ways, the U.S. model has proved highly successful in the U.S. domestic context.

The success of each the United States and Japanese economic perspective is to a certain extent reflected in the failure of the other's system. Japan's economy today suffers from overregulation and its concomitant inefficiency effects, while at the same time Japanese social and labor conditions are relatively stable. The United States suffers [*188] from wide disparities in social and labor conditions and concomitant destabilizing effects, n4 while at the same time its economy enjoys a relatively high rate of productivity/efficiency.

3. The high merchandise trade surplus that Japan has maintained with respect to the United States over the past decade has created an impression in the U.S. political arena that there is some element of unfairness in the terms of trade between the two countries. This perception of unfairness places pressure on the U.S. executive branch, and in particular the U.S. Trade Representative (USTR), to take action to balance the terms of trade. The recent decline in the Japanese merchandise trade surplus with the United States, particularly in relation to the rapidly increasing trade surplus of the People's Republic of China (PRC) with the United States, n5 is reducing internal political pressures in the United States to change its terms of trade with Japan. Similarly, the prolonged recession in Japan has diminished the U.S. perception of a threat to its economic well-being. However, Japan is a principal owner of export-producing manufacturers in the PRC and elsewhere in Asia, n6 and this may presage a new and more complex type of trade dispute involving the United States and Japan.

The fact that Japan is in a merchandise trade surplus position *vis-a-vis* the United States creates an imbalance in effective power in dispute resolution in favor of the United States. The intuitive assumption is that Japan has more to lose from a breakdown in trade relations with the United States than the United States does from a breakdown in trade relations with Japan. This is not to suggest that the actual result of a breakdown in trade relations between the two countries will necessarily follow this intuitive model.

The United States maintains a consistent services trade surplus with Japan. n7

4. As a matter of fundamental principles of international political and legal relations, neither the United States nor Japan should seek to intervene in the domestic political decision-making process of the other. n8 Subject to the overriding constraints of the international law of human rights that establish the basic norms of treatment [*189] applicable to all individuals regardless of their status as nationals of a state, n9 each nation in the international system is responsible for its own internal system of governance. Each nation may be bound by international legal obligations to which it has consented, whether by treaty or by acceptance of rules of customary international law. n10 Both the United States and Japan are parties to the Agreement Establishing the WTO, n11 are parties to the Japan-United States Treaty of Friendship, Commerce and Navigation, n12 and are members of the Organization of Economic Cooperation and Development (OECD) n13 and the Asia-Pacific Economic Cooperation (APEC) forum. n14 These international agreements and obligations with respect to membership organizations provide a juridical framework for trade relations between the United States and Japan.

5. In addition to the basic legal framework for trade relations between the United States and Japan, there have been a series of formal and informal agreements and understandings entered into between the two countries over the past several decades. n15 These range from the early steel arrangements of the late 1960s, n16 to the automobile arrangements that have persisted since the 1970s, to arrangements involving semiconductors, n17 cellular telephone service, and supercomputers, n18 to the most recent arrangements with respect to automobiles and parts, n19 and insurance. n20

[*190] As a matter of international economic principle these arrangements are a suboptimal solution to U.S. trade complaints concerning Japan because they represent the formal or informal allocation of markets among private manufacturers and service providers under intergovernmental supervision. It is the objective of antitrust/competition laws in both the United States and Japan precisely to prevent the formal or informal allocation of markets among potential competitors. The U.S. government position with respect to this suboptimal solution is that the Japanese government

does not take effective action to make the first best option of competitive markets available. Market allocation is viewed by the U.S. government as a second best option, preferable to the third option of relative exclusion of U.S. exporters and investors from the Japanese market.

The WTO Agreement on Safeguards attempts to eliminate the use of voluntary restraint agreements and similar arrangements. n21 This agreement provides that "members shall not encourage or support the adoption or maintenance by public and private enterprises of non-governmental measures equivalent to the [governmental measures otherwise prohibited]." n22

6. U.S. Section 301 of the Trade Act of 1974 provides a statutory mechanism for U.S. persons to initiate a review of Japanese trade laws and practices in the U.S. Trade Representative's Office; and in some cases requires the USTR to initiate negotiations toward resolution of a complaint or formal dispute resolution with the government of Japan. Lack of a satisfactory negotiated solution to such a complaint may lead to the imposition of sanctions by the United States. n23

The USTR also prepares an annual National Trade Estimate Report on Foreign Trade Barriers (FTB Report) that identifies policies and practices of U.S. trading partners that the USTR considers inconsistent with legal obligations or otherwise unfair to U.S. industry. This report may provide the basis for Section 301 negotiations with countries whose practices are identified; and Section 301 requires that the USTR initiate Section 301 proceedings against alleged "priority" foreign country intellectual property rights violators. n24 Japanese trade policies and practices are customarily discussed in the NTB Report.

[*191] 7. The government of Japan has become considerably more active in promoting its side of the trade story. The Annual MITI White Paper on International Trade seeks to explain the complex nature of Japanese international economic relations, and it reflects a self-awareness of some of the domestic difficulties that arise as a consequence of government overregulation of industry. n25 In addition, the Industrial Structure Council of Japan, an official advisory body to MITI, publishes an Annual Report on the WTO Consistency of Trade Policies by Major Trading Partners. n26 This includes a report on U.S. trade policies and practices.

8. There is a very substantial literature that informs trade relations between Japan and the United States. Much of this literature concerns the structure of economic relations between the two countries. Perhaps the most influential publication of this kind of the 1990s was Laura D'Andrea Tyson's *Who's Bashing Whom?* (1992). n27 This book examined trends in the high technology industries in the United States, Japan and Europe. The author suggested that higher technology producers make a greater contribution to domestic economic growth in all three countries/regions than do lower technology producers, and that Japan has pursued economic policies intended to shield its high technology industries from foreign competition. Tyson examined U.S. efforts to penetrate Japanese high technology markets through the Market-Oriented, Sector Specific (MOSS) talks and arrangements in the 1980s and the semiconductor market access arrangements in the late 1980s and early 1990s, and concluded that such efforts had made a positive impact on U.S. exports and domestic economic growth. This led Tyson to argue that the United States should pursue a policy of "cautious activism" in its trade relations with Japan. This book must be considered influential because Professor Tyson was appointed by President Clinton to chair his Council on Economic Advisers during his first term in office, and this appeared to signal the executive branch's sympathy with the theme of Professor Tyson's book.

9. Trade relations of both the United States and Japan are significantly affected by the trend toward structural regionalization of the world economy. The United States is party to the NAFTA, and is embarked on an effort to create a western hemispheric free trade area (under the Free Trade Area of the Americas program). n28 Both the United States and Japan are members of the APEC forum, which deliberately lacks a formal institutional structure, but is nevertheless showing considerable dynamism. n29 Both the United States and Japan are affected by the European Union (EU) and its common commercial policy, n30 as well as the more recent innovation of the Mercosur. n31 There are [*192] a myriad of other regional integration arrangements (RIAs). Those mentioned are the most important from the standpoint of their present economic impact on the global trading system.

II. THE GOALS OF DISPUTE SETTLEMENT

Disputes between nations whose nationals are engaged in a high level of reciprocal trade and investment are certain to arise. Disputes will also arise among private parties who are nationals of these nations. This article is primarily concerned with intergovernmental disputes (or public law disputes), though recognizing that many public disputes have at their root a private party (or private law) concern. The context of intergovernmental disputes will naturally differ, as the economic history of relations between Japan and the United States amply demonstrates. Stability in intergovernmental

relations is unlikely to be achieved with an *ad hoc* dispute settlement system that would vary according to the context of each complaint. This article will therefore focus on the institutional structure of dispute settlement systems. In order to consider such systems, it is useful to first identify some general objectives that may be sought in the settlement of disputes. n32

1. Achieve "equitable" or "legal" results. One of the most difficult questions that must be answered in considering the goals of dispute settlement relates to the kind of result that is most desirable. It is important to distinguish between the possibilities of equitable and legal results. An equitable result would seek to achieve some form of balance between the interests of the parties, reflecting what a neutral arbiter would consider fairness. A legal result would mean that the parties would be directed to comply with the legal rules applicable to their actions. It should be recalled that U.S. Section 301 legislation makes a distinction between law and equity. In other words, the United States is not as a matter of policy necessarily satisfied with the settlement of a trade dispute by a result that conforms to applicable rules of law. It reserves the right to impose sanctions on countries that have not agreed to a result that is "reasonable."

The possibility of a counter-hypothesis to the achievement of a legal or equitable result must be mentioned. That is the result of "victory" by one or the other of the disputing parties. In other words, dispute settlement might be characterized as a win-lose struggle, in which the objective of each party is to gain an advantage over the other party in a posited competitive struggle for trade supremacy. It is doubtful that negotiators for either country to potential disputes would purport to establish an arrangement that was designed to produce outcomes favorable to their own side, nor would trade negotiators acknowledge that their goal was "victory regardless of right." Nevertheless, there is a strain of economic literature that characterizes international [*193] economic relations as a competitive struggle for supremacy and survival, n33 and a logical outgrowth of such philosophy would be the objective of "winning" trade disputes.

2. Assurance of adequate opportunity to present facts. When one government has a complaint about the practices of another government, it will want an opportunity to present its case to the other government.

3. Permit input from interested and affected parties. The customary diplomatic model of dispute settlement that characterized international relations through the Second World War emphasized confidentiality in relations between governments. There are a number of reasons advanced for confidentiality. Perhaps the most important is that governments may use bargaining tactics that would involve positions unacceptable to their home constituencies, when in fact such tactics are not intended to become part of a final result. Governments have sought a free hand to bargain without domestic political pressures, being required to convince their domestic constituencies only of the efficacy of final results.

It is questionable whether this model is appropriate to the information age. Governments are not omniscient, and from time to time fail to take into account important domestic interests in trade negotiations.

4. Encouraging system stability through compliance with rule of law. The maintenance of stable trade relations is likely to produce positive economic welfare benefits to both countries. The logical path to stability is compliance with established rules of conduct. One objective of dispute settlement may be to encourage stability through compliance with established rules of conduct. The converse hypothesis is that stability for its own sake is counterproductive. Rules of law that produce suboptimal outcomes should be challenged, even if instability results. This is the foundation of the "aggressive unilateralism" approach to trade relations. n34

5. Resolve disputes with relative efficiency. Prolonged intergovernmental trade disputes, particularly when coupled with the prospect of trade sanctions (in the event of breakdown), create market uncertainties and increase risk premiums with respect to private transactions. There is an apparent advantage to governments and market participants in the expeditious resolution of trade disputes.

6. Protection of the overall stability of the international trading system. A dispute settlement mechanism that is designed to improve bilateral relations between two countries must nevertheless be established with awareness that such a system will have a broader impact on multilateral relations. For example, Japan and the United States might well solve their bilateral differences by agreeing to allocate to each other certain internal market shares, but that result will destabilize relations of each of them with third countries and regions. A dispute settlement system for Japan and the United States should accommodate third country ramifications.

[*194] 7. Enhance public welfare. The ultimate goal for the rule system for international trade is to enhance public welfare in the constituent countries of the system. It is generally accepted that this result will be brought about by rules that liberalize markets, allowing the efficient allocation of productive resources throughout the world. It is likewise generally accepted that open market rules will be subject to governmental constraints that operate in the public interest,

such as by restricting oppressive labor conditions for children. Dispute settlement mechanisms may promote open market conditions, and they may also be used to restrict markets, for example by the acceptance of market/quota allocations. A dispute settlement mechanism must be evaluated for its market effects, and its effects on public welfare.

The concept of public welfare as between the United States and Japan might also be viewed in a limited context. There might be dispute settlement mechanisms that would improve economic relations and public welfare in Japan and the United States, yet have an adverse affect on public welfare in third countries. In some circumstances, a choice of public welfare goals might need to be made.

III. THE WTO DISPUTE SETTLEMENT UNDERSTANDING AS A POTENTIAL SOLUTION

In light of recent improvements to the WTO dispute settlement framework, we must naturally inquire whether or not this system in fact meets the relevant criteria for an improved dispute settlement and avoidance system for Japan and the United States. The Japanese government has signaled its intention to make more frequent use of the WTO forum. After an initial repudiation of the system, ⁿ³⁵ the United States government appears more inclined to bring its complaints against Japan into this system. Could the task of considering improvements in the settlement of disputes between Japan and the United States be solved by the expedient of recommending heightened attention to the use of this system?

A. Background

The entry into force of the World Trade Organization Agreement on January 1, 1995 culminated nearly a decade of negotiations aimed at restructuring the liberal international trading system. These negotiations were in many ways more successful than knowledgeable observers had expected. A single integrated rule system was adopted in place of the GATT *a la carte*. Services, investment measures and intellectual property rights protection were the subject of new area agreements. Hard-fought inroads into agricultural protectionism were made. The dispute settlement system was revised in important ways.

Many of the changes brought about by the Uruguay Round negotiations were intended to address perceived defects in the legal structure of the GATT. The changes addressed perceptions that the GATT was insufficiently law based; that it operated on ^[*195] the basis of the effective economic and political power of its members, and dealt unfairly with the interests of members lacking effective bargaining power.

Dissatisfaction with the legal character of the GATT was not limited to developing countries and newly industrialized countries (NICs). The Japanese government appeared anxious to strengthen GATT rule enforcement. Japan operates outside a formal regional integration mechanism like the EC Treaty or NAFTA. Regional structures will provide fallback trade environments if the global trading system becomes unglued. Japan does not have this fallback. It is important to Japan to assure that the multilateral trading system continues to function effectively. The Japanese government perceived that the GATT would best serve its interests with a more enforceable set of rules. ⁿ³⁶

B. The Transition from a "Soft Law" to a "Hard Law" System ⁿ³⁷

Changes in the GATT system brought about as a consequence of the Uruguay Round negotiations and as embodied in the WTO reflect a certain transition from a "soft law" to a "hard law" system. The term "soft law" has been used as a term of art by international lawyers for a number of years to characterize legal norms that do not effectively compel compliance. Examples of soft law include various United Nations General Assembly Resolutions that urge states to behave in one way or another, but do not provide a concrete basis for enforcement through the International Court of Justice or U.N. Security Council. The term "soft law" has also been used to describe some of the results of the 1992 Rio Conference on Environment and Development. At that conference, governments adopted a number of non-binding declarations, including the Rio Declaration on Environment and Development. The Rio Declaration is ascribed a soft law character because it does not impose the type of concrete legal obligations on its adherents such as would be imposed by a treaty. ⁿ³⁸ The GATT 1947 General Agreement was of course a treaty, and it did impose specific legal obligations on its members. A characterization of the GATT 1947 as soft law should not be understood to equate it to a U.N. General Assembly Resolution or the Rio Declaration. A soft law characterization of the GATT 1947, though perhaps imprecise, is intended to reflect the operational reality of the GATT from 1947 through the Uruguay Round. ⁿ³⁹

^[*196] The seminal description of the GATT as a soft-law system is found in Olivier Long's *Law and Its Limitations in the GATT Multilateral Trading System*. ⁿ⁴⁰ Long, a former GATT Director-General, suggested that the GATT functioned effectively as an international organization because its Members chose to operate through a flexible process of political bargaining as opposed to demanding attention to a fixed set of rules. If the demands of a block of

Members were inconsistent with existing rules, new rules would be fashioned. n41 If the express mechanisms for amending the General Agreement appeared inconvenient, a new and less demanding amendment mechanism might be employed. n42 Disputes were resolved by consensus and not by the imposition of measures on a recalcitrant member.

"Hard law" refers to a system of norms as to which a relatively high expectation of compliance exists. The changes brought about by the entry into force of the WTO Agreement may be characterized as part of a transition of the GATT/WTO from a "soft law" to a "hard law" system. n43 The principal evidence of this trend may be found in two areas. The first is in the progressive refinement of rules from the general to the specific. The second is in the transformation of the dispute settlement system from consensus-based to quasi-judicial. These two manifestations have occurred to some extent independently of one another. The phenomenon of rule refinement has been underway since the founding of the GATT, and was a major theme of the Tokyo Round negotiations which culminated in 1979. n44 The transformation of the dispute settlement system in the conclusion of the Uruguay Round, on the other hand, represented a fairly substantial break with the consensus practice that had evolved since 1947.

[*197] C. The Refinement of Rules

1. From the Tokyo to the Uruguay Rounds

The GATT General Agreement as adopted in 1947 contained a set of general principles drafted at a fairly high level of abstraction. The two most important general principles, the most favored nation (MFN) n45 and national treatment principles, n46 in theory are capable of application in the most diverse circumstances. However, in neither case has the application of the general rule proven straightforward. In part this is because the General Agreement itself contains exceptions from the general principles, and the interaction of the general principle and the exception gives rise to complications. In part this is because parties may in good faith differ as to the intent of the general principle in a specific case.

To illustrate with respect to exceptions, GATT Article XXIV establishes an exception from the MFN principle to permit the creation of customs union and free trade areas. n47 While the MFN principle itself is relatively straightforward, the customs union exception is not, and interpretation of the customs union exception has been problematic since the founding of the GATT. In order to resolve some of the ambiguities surrounding the customs union exception, the Uruguay Round negotiations included an Understanding on Article XXIV which seeks to clarify the meaning of certain of its terms. The Understanding on Article XXIV is quite a bit lengthier than Article XXIV itself, and would have been much longer but for the fact that it incorporates by reference certain tariff averaging procedures followed by the GATT Secretariat in the Uruguay Round negotiations. n48

Good faith differences of opinion regarding the application of general principles, and the resulting need to reduce the scope of permissible interpretation, are a more prevalent basis for the addition of specificity to the GATT. The national treatment principle is frequently invoked in dispute settlement proceedings. A GATT Member is expected to treat imported products on the same basis as domestically-produced products for the purposes of internal sale. For good reason, formally identical treatment of domestic and imported products is not required. A government may require that certain agricultural procedures are followed domestically to protect the health of humans or animals, and the same government may require the border inspection of imported like products to assure equivalent safety. The goal of the regulations is the same, *i.e.* [*198] protection of health at an equivalent level. The application of different rules to imported like products is not contrary to the national treatment principle unless the effect of the import regulations is to afford a competitive advantage to domestic production. n49 The desire to avoid the inherent uncertainties in determining whether import regulations are the equivalent of domestic regulations has caused governments to seek in the SPS Agreement to establish specific rules as to how import measures are adopted, to assure the transparency of rules, and to govern the way these rules are applied. n50

Articles VI and XVI of the GATT established rules regarding the application of antidumping and countervailing duty measures. By the time the Tokyo Round negotiations were initiated, it was apparent to many GATT Member governments that these rules allowed too much flexibility in the determination of dumping and subsidization, and so efforts were undertaken to add specificity, such as by clarifying the method by which material injury to domestic industries would be determined. n51 The adoption of these more specific rules in the Tokyo Round did not accomplish a great deal in terms of minimizing inter-governmental friction in the context of dumping and subsidization, so efforts to further clarify rules were pursued in the Uruguay Round. In the new Agreement on Application of GATT Article VI a higher level of detail is added, for example, regarding the rates of exchange to be used in comparing export price and normal value. n52 Likewise, the Agreement on Subsidies added a substantially higher level of detail regarding what types of subsidies may be countervailed against. n53

The WTO Agreements on SPS, Dumping and Subsidies, as well as the agreements pertaining to fields such as technical barriers to trade, valuation for customs purposes, rules of origin and import licensing procedures, establish specific rules with respect to the operation of "administered barriers to trade." The objective of the negotiators of these Agreements was to clarify the application of GATT general principles (such as the national treatment principle) in the relevant subject matter areas, and to limit the discretion of national and regional administrators in the implementation of rules. The goal of limiting discretion was not, however, pursued without objection or qualification.

A useful illustration of the tendency to qualification is in a provision regarding dispute settlement in the Agreement on Dumping. If a DSU panel finds that there is "more than one permissible interpretation" of the Agreement on Dumping, and a complained-against Member's administrative measures are in conformity with one permissible interpretation, then those measures will be considered consistent with the [*199] Agreement. n54 The implication of this provision is that WTO Members did not in fact agree on a single set of rules governing the application of antidumping measures, but instead achieved an agreement with multiple meanings that may be adjusted to suit individual Members. There is some considerable concern among GATT legal scholars about this provision. It seems to be inconsistent with general principles of treaty interpretation which assume that the meaning of terms can be definitively ascertained. A provision that permits individual WTO Members to adopt different interpretations of the same text suggests some of the difficulties that may be inherent in attempting to ascribe or predict economic effects regarding the WTO Agreements governing administered barriers to trade. Predicting the effects of the Agreements is hampered by uncertainties in the Agreements themselves.

The most significant movement toward the creation of specific or hard rules in the WTO/GATT system occurred in connection with the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement). In the TRIPS Agreement, WTO Members largely abandoned the historical practice of leaving to individual governments the choice of mechanisms by which to fulfill their GATT obligations, and specified both strict minimum substantive standards of intellectual property rights (IPRs) protection and the legal mechanisms for enforcing those standards that Member governments must maintain. n55 The TRIPS Agreement reflects a significant degree of skepticism among OECD governments that a soft law system in the area of IPRs protection would be adequate to protect their perceived interests. The hard law of the specific TRIPS substantive standards, and the potential for imposition of trade sanctions against transgressors, would be more suited to their purposes.

The often-cited length of the final WTO Agreement as some 25,000 pages is deceptive since this includes the tariff schedules of the Members. The basic texts, standing at roughly 500 pages, nevertheless represent a significantly more detailed set of rules for the governance of the multilateral trading system than the GATT 1947 and Tokyo Round Agreements. Taken as a whole, these texts evidence a trend toward the application of harder law in the WTO.

D. From Consensus to Quasi-Judicial Dispute Settlement

1. The General Practice

The WTO Agreement has transformed the GATT dispute settlement system from a consensus-based system to a quasi-judicial system. Both the old and new systems derive from Article XXIII of the GATT which generally provided for a system of consultation, to be followed by recommendations from the Members as appropriate, [*200] to authorization of the withdrawal of trade concessions as required. n56 The basic Article XXIII provisions evolved over time into a panel dispute settlement system which was codified in a 1979 Understanding on Dispute Settlement. In this system, the GATT Council received complaints from Members, and could agree by consensus to establish a panel of experts, generally consisting of three individuals, who were charged with drafting a report with respect to a dispute. The report might make recommendations concerning measures to be taken by a complained-against Member in order to conform its rules to the GATT. In order for the report of the panel to be binding on a complained-against Member, the GATT Council was required to adopt the report by a consensus of its Members, including the complained-against Member. Although this system of dispute settlement appears to have functioned effectively for much of recent GATT history, n57 there was a perception that the consensus-based system resulted in the failure to establish panels and avoidance of panel rulings, n58 and that the system was therefore insufficiently law-based.

The Dispute Settlement Understanding, n59 adopted in connection with the conclusion of the Uruguay Round, substantially alters the prior GATT dispute settlement practice. n60 The DSU applies to the settlement of disputes under all of the multilateral trade agreements (MTAs). Following a mandatory consultation period, a panel of experts will be appointed by the WTO Secretariat (or Director-General if necessary), unless the Dispute Settlement Body (DSB) votes by consensus against the establishment of a panel. n61 The report of the panel will be adopted by the DSB unless

there is a consensus vote against adoption, or unless a disputing party appeals the decision to the newly created Appellate Body. If an appeal is pursued, the ruling of the Appellate Body is adopted by the DSB, unless there is a consensus against adoption. Since there is little prospect that a consensus will exist against the adoption of a report, n62 for virtually all intents and purposes, the adoption of panel reports is now automatic.

[*201] The automatic adoption of panel reports is coupled with other important features of the new DSU. The DSU provides that Members are expected to resolve disputes involving interpretation and application of WTO rules, or "impediment[s] to the attainment of any objective of the covered agreements," under the rules and procedures of the DSU. n63 Moreover, a Member is not to impose trade sanctions on another Member for an alleged violation of WTO rules without the authorization of the DSB. n64 The DSU thus generally prohibits the unilateral imposition of trade sanctions regarding matters within the scope of the WTO regulatory system. n65

Another important innovation of the DSU is the prescription of more rigorous timetables for the settlement of disputes. In addition to rules limiting the time within which panels and the Appellate Body must issue their reports, n66 the DSU provides guidelines as to the time frame in which Members are expected to implement recommendations and rulings of the DSB. n67

The dispute settlement procedure of the GATT 1947 involved a political negotiation directed at achieving a consensus among the disputing Members. Although this procedure may have been largely successful in resolving disputes, it lacked the legal character of a judicial procedure. A judicial procedure requires that the decision-making function be performed by a neutral decision-maker, *i.e.* one without a direct interest in the outcome of the dispute. The assumption underlying the judicial procedure is that the law applicable to the parties will govern the outcome of the dispute, and not the self-interest of the parties. Under the GATT 1947 system, the interests of the Members and the willingness of the Members to make concessions regarding those interests were central to the outcome of a dispute.

The WTO DSU removes WTO Members from the center of the decision-making function by making the establishment of panels and the adoption of panel reports automatic. The panels and Appellate Body assume the role of primary decision-makers. Since panels are appointed on a case-by-case basis, the panelists act in the capacity of arbitrators rather than judges. Members of the Appellate Body serve for extended terms and have the independent character of appellate judges. On the whole, it seems fitting to refer to the new DSU procedure as "quasi-judicial." The underlying assumption of the new WTO system is that the law is the master of the Members. The [*202] outcome of a dispute settlement procedure should not, at least nominally, be based on a political negotiation.

E. What is Within the Scope of WTO Dispute Settlement?

Both Japan and the United States are Members of the WTO. As such, they have agreed to settle certain disputes by recourse to the DSU. There is nothing in the WTO Agreement or DSU that prevents Members of the WTO from agreeing between themselves to settle a specific dispute or class of disputes through alternative dispute settlement mechanisms. n68 However, it is important to consider the scope of the class of disputes that Japan and the United States have already agreed to settle by recourse to the DSU. The critical text in this regard is Article 23 DSU, which states:

Article 23 Strengthening of the Multilateral System

1. When Members seek the redress of *a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements*, they shall have recourse to, and abide by, the rules and procedures of this Understanding.

2. In such cases, Members shall: (a) not make a determination to the effect that a violation has occurred, that benefits have been nullified or impaired or that the attainment of any objective of the covered agreements has been impeded, except through recourse to dispute settlement in accordance with the rules and procedures of this Understanding, and shall make any such determination consistent with the findings contained in the panel or Appellate Body report adopted by the DSB or an arbitration award rendered under this Understanding. . . n69

[*203] Article 23 of the DSU must be read in conjunction with Article XXIII of the GATT 1994, Article XXIII of the GATS, and Article 64 of the TRIPS Agreement. Article 23 DSU and Article XXIII GATT 1994, in conjunction, contemplate several different kinds of disputes. n70 Specifically:

1. Disputes involving a violation of the terms of the GATT 1994 ("violation complaints");
2. Disputes not involving a violation of the GATT 1994, but involving conduct by a Member that nullifies or impairs the benefits of another Member under the agreement, or that interferes with the attainment of an objective of the agreement ("non-violation complaints"), and;
3. Disputes involving "any other situation" ("situation complaints"). n71

Article 23 of GATS (with Article 23 DSU) contemplates violation and non-violation complaints, but does not refer to situation complaints. n72 Article 64 of the TRIPS Agreement (with Article 23 DSU) contemplates only violation complaints for the first five years after its entry into force, with the issue of non-violation complaints and situation complaints to be considered by the Ministerial Conference during that period. If no consensus is reached by the Ministerial Conference by the end of the five-year period, then non-violation complaints and situation complaints might be brought under the TRIPS Agreement. n73

Article 23 DSU adds a mandatory character to the dispute settlement provisions of the GATT/WTO. Article XXIII GATT 1947 was permissive in its terms. Article 23 DSU, on the other hand, says that *if* a complaint is covered by the terms of the DSU, [*204] then a Member with a complaint *must* resolve the dispute under the DSU (unless the disputing Members agree among themselves to do otherwise).

Subjecting non-violation complaints to mandatory dispute settlement under the DSU creates substantial uncertainty for Japan and the United States regarding the scope of their obligations to settle bilateral trade disputes by recourse to the DSU. A wide range of governmental activities may be construed to "nullify or impair" benefits that other Members expected to obtain by adherence to the WTO Agreement. As Petersmann has noted, there were few complaints brought under Article XXIII of GATT 1947 that involved an allegation of nullification or impairment without also alleging a violation of the terms of the GATT. n74 The situations of GATS and TRIPS are novel.

A broad interpretation of Article 23 DSU and related dispute settlement provisions would increase the latitude for Japan and the United States to make claims against each other for which they might demand a satisfactory adjustment. n75 This might increase the frequency of disputes brought to the WTO for resolution. This might also limit recourse of Japan and the United States to so-called "unilateral measures."

A broad interpretation of Article 23 DSU might also create the appearance that the WTO is concerned with regulating matters that neither the Japanese nor U.S. governments consider within its scope. For example, can high levels of domestic sales taxes impede import penetration and thus deprive an exporting country of expected benefits under the GATT 1994? Does domestic competition policy potentially nullify or impair benefits under the GATT 1994?

For Japan and the United States, interpretation of Article 23 DSU is a double-edged sword. On the one hand, a broad interpretation may preclude application of unilateral measures by forcing disputes into the WTO. On the other hand, a broad interpretation may open up the potential range of complaints to a point where political difficulties are created.

A narrow interpretation of Article 23 has the opposite effect. On the one hand, it may leave open the possibility of unilateral measures. On the other hand, it may limit the range of claims that can be brought.

For the time being, the issue of the proper scope of Article 23 is indeterminate. By its express language, the scope of Article 23 appears broad. However, it is not so clear that the Members of the WTO have intended a broad application of that provision.

1. WTO Arbitration

It should be noted that in addition to the WTO DSU procedure that involves a formal complaint by a Member and decision by the DSB, there is available to WTO Members the alternative of *ad hoc* arbitration under WTO auspices pursuant to mutual [*205] agreement by the parties to a dispute. n76 The parties to an *ad hoc* arbitration proceeding are subject to DSU rules regarding surveillance of implementation and suspension of concessions. n77

F. What May Be Outside the Scope of WTO Dispute Settlement?

It is an accepted fact that the WTO rule system is incomplete. To some extent, the WTO Members attempt to compensate for this incompleteness through the mechanism of the non-violation complaint. The incompleteness of the system is self-referenced in many, if not most, important WTO legal instruments. For example, the Agreement on Rules of Origin sets out a work program for harmonization of rules of origin, but it does not establish such rules. n78 The GATS Agreement establishes market access commitments only for those sectors positively listed by Members in their Schedule of Commitments, and even in that respect the commitments are subject to listed exceptions. n79 The Agreement on Trade-Related Investment Measures (TRIMS Agreement) sets forth certain basic principles regarding discriminatory measures affecting imports and exports, but it does not purport to establish general conditions of investment. n80 Neither the GATS nor TRIMS Agreement requires the granting of a right of establishment (or right of commercial presence) on a national treatment basis. n81

Only at the Singapore Ministerial Conference in December 1996 did WTO Members agree to establish a working group to examine the relationship between trade and competition rules. n82 Many of the bilateral disputes between Japan and the United States involve U.S. allegations that the Japanese market is not sufficiently competitive, and that despite revisions in Japan's competition laws and its commitment to application of those laws, U.S. enterprises are deprived of adequate access to the Japanese market. The U.S. might in some contexts succeed in pursuing these allegations through GATT-based arguments concerning deprivation of national treatment and non-violation nullification and impairment. It is nonetheless clear that there is not a complete WTO rule system in place for addressing competition issues.

None of the foregoing points are intended as a criticism of the WTO. They are facts. Only by an unreasonably extensive usage of the non-violation concept could all [*206] bilateral trade disputes between Japan and the United States fall within the jurisdiction of the WTO DSU and DSB. This would place an enormous strain on the WTO because panels and Appellate Bodies would be called upon to apply legal and equitable principles without the basic agreement of disputing parties as to the governing rules of the system. It would not be to the advantage of either Japan or the United States to place this burden on the WTO system.

G. Trends in U.S.-Japan WTO Dispute Settlement

1. GATT 1947

The United States and Japan rarely used the GATT 1947 dispute settlement mechanism to resolve bilateral disputes. n83 The exceptions involved U.S. complaints concerning Japanese restrictions on imports of silk, n84 leather, n85 tobacco products, n86 and agricultural products. n87 Each of these disputes involved a complaint by the United States. Three involved alleged GATT-inconsistent quotas (leather, silk and agricultural products) and the other involved alleged GATT-inconsistent discrimination against imported products (tobacco). The tobacco and silk cases were resolved through bilateral settlement. n88

Japan's restraint in invoking Article XXIII of the GATT 1947 against the United States was likely due to a number of factors. Japanese society in general is non-litigious. The use of the GATT dispute settlement system may have conflicted with Japanese traditions, and therefore it was avoided. In addition, Japan is likely to have been sensitive to its security dependence on the United States during the Cold War period (which more or less coincided with the term of the GATT 1947), and it may have been hesitant to upset a military protector.

On the United States side as well, there was hesitation to use the GATT 1947 dispute settlement mechanism in relation to Japan. This is despite a myriad of U.S. government complaints regarding restrictions on market access. U.S. hesitation also was due to a number of factors. First, the United States may have perceived that its [*207] complaints were not expressly covered by GATT law, and therefore considered that recourse to GATT dispute settlement would be fruitless. n89 Second, the goal of U.S. actions may have been preferential market access improvements for American suppliers, which would not have been achieved through GATT dispute settlement. n90 Similarly, U.S. market access restrictions on Japanese exporters negotiated bilaterally (grey-area mechanisms) could not have been achieved consistently with GATT rules, so that initiating GATT complaints to achieve such results would have been pointless. n91 Third, the United States may have perceived that its political leverage *vis-a-vis* Japan was substantially greater than its legal leverage *vis-a-vis* Japan, and so it may have preferred to resolve disputes through political-diplomatic means rather than legal means.

2. WTO

It is clear that Japan's attitude concerning use of the GATT/WTO dispute settlement system is changing. The Japanese government complained vociferously when the USTR initiated a Section 301 proceeding in relation to automobiles and parts and announced the imposition of trade sanctions prior to requesting consultations in the new WTO. n92 Japan eventually initiated WTO consultations in the automobiles and parts dispute, a dispute ultimately settled through a bilateral Japan-United States agreement. n93 The Japanese government has signaled its intention to avoid the resolution of trade disputes with the United States through grey-area agreements that include commitments binding on the Japanese government or private enterprises. n94 The United States government was unable to persuade the Japanese government to resolve bilaterally its complaint regarding market access for photographic film and paper, and has initiated WTO dispute settlement in this matter. n95 The implications of this important case are discussed below. In 1996 the Japanese government refused to extend the semiconductor arrangement to include the kind of numerical targets included previously. n96 By way of counter-example, the Japanese government has recently agreed to improve market access for foreign insurance companies under U.S. pressure outside the WTO dispute settlement forum. n97

[*208] The United States joined with the European Community and Canada in initiating a complaint against Japan regarding discriminatory taxation of alcoholic beverages. n98 Japan's internal taxation system was found to discriminate against imported alcoholic beverages (a GATT art. III:2 violation).

Japan's Industrial Structure Council 1996 Report on the WTO Consistency of Trade Policies by Major Trading Partners states:

Japan must convey to all WTO members that it will rely on the WTO dispute settlement procedures to correct foreign measures that serve as trade barriers, or that are inconsistent with the multilateral trading system. It is true that there are certain limits in the WTO dispute settlement procedures. However, contributing to further improvements, as well as making use of the strengthened dispute settlement procedures is a major obligation of those who benefit from the multilateral trading system. Japan should be an active user of the procedures when necessary. n99

The Industrial Structure Council (ISC) is particularly concerned with limiting U.S. use of Section 301 procedures in conflict with WTO obligations. The ISC states:

Should Japan be subject to unilateral measures, we believe the Japanese government should seek redress in WTO dispute settlement procedures, and it should take advantage of all opportunities to demonstrate the case against trade policies that attempt to pressure trade partners by hinting at the possibility of unilateral sanctions. n100

a. The Photographic Film and Paper Case

The U.S. complaint against Japan in the photographic film and paper case is largely based on the theory that the Japanese government cooperated with industry in creating market access barriers that were intended to prevent foreign companies from penetrating the domestic Japanese market after the Japanese government had agreed to market-opening measures in the Kennedy and Tokyo Rounds of GATT negotiations. n101 The U.S. government believes that it has assembled a detailed set of facts that prove its case, and that its fact-specific approach is distinguishable from prior unsuccessful efforts by the European Community to use a non-violation approach to challenge Japanese trade practices based largely on reference to trade statistics. n102 At least some officials in [*209] the U.S. Trade Representative's Office have come to the view that WTO dispute settlement, and the use of the non-violation complaint, may be the most effective mechanism for challenging Japanese trade practices. These same officials are reluctant to consider alternative mechanisms for dispute settlement between the United States and Japan, particularly those such as APEC dispute settlement mechanisms that do not involve binding decisions. n103

Both the United States and Japan appear to recognize the high stakes involved in the photographic film and paper dispute. If the U.S. is able to win on its theory of nonviolation nullification and impairment, this is almost certain to lead

to additional similar complaints. If the panel and Appellate Body reject the U.S. approach, the U.S. government may face considerable resistance from Japan in its pursuit of future challenge actions, whether bilateral or multilateral.

The Japanese government and industry appear to be getting precisely what they wanted in the channeling of Japan-U.S. trade disputes into the WTO. It may be that Japanese officials did not foresee the potential use of the non-violation complaint as a looming threat. It may be that Japanese officials are confident that the WTO will not accept a U.S. non-violation approach to trade disputes. It may also be that MITI officials, seeking to promote a more liberal regulatory structure within Japan, but finding themselves hampered by a resistant political leadership, understood that the net result of forcing disputes into the WTO might be to increase pressure on the Japanese regulatory system. Forced use of the WTO may have been seen as a positive mechanism for domestic-internal change.

Whatever the case, the photographic film and paper case may be causing some hesitation in Japan as to whether the national interest lies in trying to force dispute settlement into the WTO. This might account for some renewed interest in bilateral approaches to dispute settlement or to the use of alternative fora to the WTO. At the same time, if the United States succeeds in the photographic film and paper case, Japan may find the United States less willing to consider and pursue alternative approaches.

IV. APEC, NAFTA AND THE FCN TREATY

Existing mechanisms for the settlement of disputes between the United States and Japan are not limited to the WTO DSU.

[*210] A. Japan-United States FCN Treaty

Article XXIV of the Japan-United States FCN Treaty n104 provides that disputes involving interpretation or application of the treaty will be settled by recourse to the International Court of Justice (ICJ), unless the parties agree otherwise. No application to the ICJ in respect of interpretation or application of this treaty has been made by either party.

The FCN Treaty establishes important principles governing economic relations between the United States and Japan, including the rights of establishment and national treatment regarding commercial enterprises. n105 Japanese enterprises doing business in the United States have invoked the FCN Treaty, for example, in private litigation regarding employment practices. n106 Kodak has referred to the FCN Treaty in the context of its Section 301 petition against Japan regarding market access in the film and photographic supply sector. n107

While the FCN Treaty establishes important legal principles, it is doubtful that the ICJ is a viable alternative to the WTO DSU for the settlement of bilateral international economic disputes between the United States and Japan. The focus of ICJ jurisprudence is in the field of public international law. While it might be possible to use the ICJ chamber procedures as a limited forum for trade dispute resolution, the relative lack of international economic law experience at the ICJ argues against this alternative. Moreover, as rules regarding services and investment are gradually covered by the GATS and prospective OECD investment agreement, the FCN Treaty will diminish in importance as a source of rights as between the parties.

Though the FCN Treaty remains important as a source of legal rights and obligations as between Japan and the United States, in light of developments elsewhere in the international trade rule system it seems doubtful that renegotiation of this agreement is the best mechanism for improving trade relations and resolving disputes between the two countries.

B. OECD

The prospective OECD investment agreement may contain a provision for the settlement of disputes. This author has not yet seen a draft of the OECD investment agreement, but this may provide an important alternative forum for the settlement of bilateral trade and investment related disputes between Japan and the United States.

[*211] C. NAFTA

The government of Japan does not have access to the NAFTA Article XX dispute settlement procedure. However, private investors of Japan who establish a commercial presence in Mexico or Canada may have recourse to third party arbitration. Such recourse would be available in the context of a dispute involving an investment by a Japanese-owned enterprise of Canada or Mexico in the United States. n108

The NAFTA is a significantly more complete rule system than the WTO. n109 NAFTA's rules concerning investment are extensive. NAFTA's services coverage uses a "negative listing" approach as opposed to GATS's "positive listing" approach, and the sectoral coverage of NAFTA's services rules is far more extensive than the GATS's coverage. NAFTA does not, however, have a well developed set of rules concerning the application of competition laws.

It is useful to ask whether Japan's adherence to the NAFTA, or the negotiation of a new bilateral free trade agreement between Japan and the United States, might solve the incomplete rule system problem. There may be merit to this approach, though the advent of APEC to some extent argues against it.

The idea of a Japan-United States FTA is not novel. In 1988 the U.S. International Trade Commission (ITC) prepared a report for the U.S. Senate Finance Committee on precisely the question of whether a Japan-United States FTA would be in the national interest. n110 Though negotiation of the Canada-United States FTA (CUSFTA) had been completed by 1988, NAFTA negotiations had not begun. The NAFTA is largely modeled on the CUSFTA, so that ITC investigators had a fair picture of what a relatively comprehensive FTA might involve.

The ITC found expert opinion mixed regarding the proposal. As a general reaction, the proposal was largely regarded as worthwhile, but significant reservations and cautions were expressed. On the positive side, such an agreement might improve economic relations between Japan and the United States by recognizing the importance of the relationship and providing a less confrontational forum for resolving trade issues. On the negative side, there was skepticism that a FTA could address what most U.S. experts viewed as the core of the problem between the two countries: namely informal and structural market access barriers in Japan. It seemed generally agreed that for the agreement to be successful, it would need to include rules that address competition/structural issues. It was also generally agreed that such an agreement would need to be consistent with GATT rules.

[*212] Because the NAFTA embodies a more complete rule system than the WTO, it might serve as the basis for improving trade relations between the two countries. In the area of dispute settlement, NAFTA employs a panel mechanism that generally makes use of arbitrators who are nationals of the disputing countries. This might present advantages over the WTO approach of generally using third country arbitrators. Third country arbitrators may be perceived as being removed from the context of specific trade disputes.

Echoing the FTC report, a Japan-United States FTA that did not address the issue of informal and structural barriers might not be in the interests of either country. It might be perceived in the United States as an ineffectual "give-away" to Japan, and it might create a political backlash affecting Japan-United States relations.

On the whole, the idea of Japanese adherence to the NAFTA is one that deserves serious reflection. However, in light of the advent of APEC, it is questionable whether such an arrangement could be pursued bilaterally (or quadrilaterally) without upsetting the balance of political and economic relations between Japan, the United States, and the rest of their APEC trading partners.

D. APEC

In the Osaka Action Agenda to Implement the Bogor Declaration n111 the member governments of APEC agreed, *inter alia*, to "examine the possible future evolution of procedures for the resolution of disputes as the APEC liberalization and facilitation process develops." n112 In addition, APEC Member governments have agreed to promote dispute settlement facilities both for disputes between private entities and governments, and between private parties. n113 In pursuit of these objectives, the APEC Experts' Group on Voluntary Consultative Dispute Mediation, which is established as a subgroup of the APEC Committee on Trade and Investment (CTI), met and issued a progress report in preparation for the Manila Summit in November 1996. n114

In its report, the APEC Experts' Group stressed the desire of the Member governments that any APEC dispute settlement mechanism be supportive of the WTO DSU, operate without prejudice to rights and obligations of Members under the WTO agreement and other international agreements, be complementary to WTO dispute settlement, and be voluntary. The Experts noted that already within the CTI there is the institution of the "Trade Policy Dialogue" which is intended to encourage the nonadversarial settlement of disputes. The only specific proposal that was discussed in the report was the possibility of government-to-government dispute mediation with the [*213] "establishment and maintenance by the APEC Secretariat of a roster of qualified mediators." n115 The Experts' Group requested that Member governments submit specific suggestions on such proposals in advance of the subsequent Experts' Group meeting.

In the Manila Action Plan for APEC (MAPA) Member governments agreed to "discuss options for a dispute mediation service including in particular the use of the 'Trade Policy Dialogue' of the Committee on Trade and Investment." n116

The dynamism of APEC is not to be underestimated, nor is its growing importance in the regulation of Asian-Pacific trade and investment. For the time being, it is not clear that APEC will provide an important alternative dispute settlement mechanism for Japan and the United States in their bilateral relations. The reason for this is that APEC has yet to develop a comprehensive rule system. It relies on the good faith undertakings of its Members to liberalize their economies. It encourages consultation and the non-adversarial settlement of trade disputes. These efforts are laudable and important in the context of a region that has lacked a formal integration structure. However, the economic and political relations of Japan and the United States are highly evolved, and there is no lack of communication between officials of the two governments. Political demands in the United States are for the solution of market access problems through detailed and enforceable agreements. It is not clear that APEC will provide a forum for this kind of solution. If Japan were to rely on the non-adversarial perspective of APEC as a means of resisting U.S. pressures for market access, U.S. business interests might come to perceive the APEC process as adversarial to them. The viability of APEC as an institution could be threatened.

V. THE "CHINA PROBLEM"

There is a large and growing imbalance in trade relations between the United States and the Peoples' Republic of China (China). In the perception of the general public, this trade imbalance has relieved pressure on Japan-United States trade relations. Yet it seems apparent from MITI reports and discussions with Japanese business executives that a substantial part of Chinese exports to the United States are undertaken by Chinese enterprises owned by Japanese national enterprises. At the moment, political pressures in the United States are mounting to "do something" about the China problem. The approach taken by the USTR to date has involved using WTO membership as a "carrot" to encourage Chinese market access reforms, and using Section 301 measures, particularly with respect to protection of intellectual property rights, as a means of addressing Chinese rule and enforcement weaknesses.

Because of the capital-ownership relationship between Japanese and Chinese trade, the imbalance that the United States is suffering with both countries may well be tied together in the approach eventually adopted by the United States to deal with the dual trade imbalance. It may at the moment seem that Japanese-United States trade [*214] relations have entered an extended period of quiescence based on a reduction in their merchandise trade imbalance. It might be a mistake to assume that this quiescence will be long lasting. n117

VI. INCOMPLETE RULE SYSTEMS, SYSTEM INCOMPATIBILITIES AND SUBOPTIMAL SOLUTIONS

At the outset of this paper this author observed that many of the problems affecting Japan-United States trade and investment relations, and dispute settlement, arise from the incompleteness of the WTO and other rules systems and from good faith differences between the parties concerning desirable macroeconomic policies. This author observed that the intergovernmental solution to these problems has trended in the past decades to market access agreements (grey-area and otherwise) that are anticompetitive in nature.

The statement of the problem in these concise terms may also help formulate solutions to the dispute settlement and avoidance problem.

First, if a major part of the problem arises from the incompleteness of the rule system governing relations between the two countries, the answer may be found in completing the rule system. The first problem here is achieving agreement between the two parties on a desirable set of rules. The second problem is to achieve rules in a way that relations between the two parties with other countries and regions in the multilateral trading system are not adversely affected.

The problem of incompatibilities in macroeconomic preferences certainly will impact solution of the first problem. In other words, macroeconomic differences make it more difficult for the parties to agree on a set of rules. However, a major task that Japan and the United States might set for themselves is to identify those areas of macroeconomic policy in which there are real differences, and then to consider whether any of these areas must be considered off limits to negotiation. For areas that are offlimits to negotiation, the governments may need to consider offsetting adjustment measures.

Choosing the appropriate forum for the negotiation of more complete rule systems is important. In some cases, bilateral rule systems will be appropriate, in some cases mini-lateral rule systems (such as NAFTA, APEC and OECD

agreements) will be appropriate, and in some cases multilateral rule systems (such as WTO rules) will be appropriate. No single forum will be ideal in all cases because of the well-known limitations of each forum.

The problem of suboptimal solutions is most important. Market allocation agreements should be avoided if the open character of the international trading system is to be preserved. The objective of this entire dispute resolution exercise should be to promote a system in which market allocation solutions are minimized. In adopting the WTO Agreement on Safeguards, Member governments expressed their opposition to [*215] "grey-area" solutions to trade problems. n18 Events since the coming into force of the WTO Agreement highlight the stubbornness of the grey-area problem.

The problem of suboptimal solutions is clearly tied into the problem of incomplete rule systems and system incompatibilities. The abandonment of grey-area and market access agreements is dependent on a more complete set of rules that will allow parties to enforce rights to trade and invest openly. A set of open market rules confronts the problem of system incompatibilities. Coming to grips with incompatibilities is therefore a necessary step to the avoidance of suboptimal solutions.

Legal Topics:

For related research and practice materials, see the following legal topics:

International Trade Law
Dispute Resolution
Arbitration
International Trade Law
Federal Legislation
International Trade Law
Trade Act

FOOTNOTES:

n1 See, e.g., Hadi Soesastro, *Implications of the Post Cold War Politico-Security Environment for the Pacific Economy*, and references cited therein, in *PACIFIC DYNAMISM AND THE INTERNATIONAL ECONOMIC SYSTEM* 365 (C. Fred Bergsten & Marcus Noland eds., 1993).

n2 See, e.g., FRANCIS FUKUYAMA, *TRUST: THE SOCIAL VIRTUES AND THE CREATION OF PROSPERITY* 161-207 (1995). Fukuyama observes,

but even if *nenko* is not the optimal system for the future, it has clearly worked well for Japan in the past, reconciling job security-with economic efficiency in a manner that has eluded many Western economies. The fact that it has worked so well until now -- indeed, that it has worked at all -- is testimony to the power of reciprocal obligation in Japanese social life.

Id. at 193.

n3 The trend in the U.S. economy toward unrestrained market-based decision-making over the past two decades reflects the ascendancy of quasi-libertarian political perspectives. The intellectual father of the libertarian movement is Friedrich Von Hayek. See, e.g., FRIEDRICH A. VON HAYEK, *THE ROAD TO SERFDOM* (1945). Von Hayek's philosophical followers, such as Milton Friedman, dominate the so-called Chicago School of Economics that has strongly influenced both U.S. and international economic decision-making.

n4 This has resulted, for example, in a very high rate of incarceration among members of disadvantaged minority groups. An excellent critique of the prevailing American socio-economic philosophy is in JOHN KENNETH GALBRAITH, *THE CULTURE OF CONTENTMENT* (1992).

n5 See, e.g., *Inflow of Chinese Goods Slows Down U.S. Trade Deficit Improvements*, *LA TIMES*, Oct. 19, 1996, at D1 (noting that for the second consecutive month China had leading merchandise trade surplus with U.S.-\$ 4.71 billion in the month of August, compared to Japan's \$ 3.8 billion surplus); *Japan's U.S. Trade Surplus Plunged 56% Last Month*, *NY TIMES*, May 21, 1996, at D7 (noting that Japanese brand-name products are increasingly made abroad, e.g. in China).

n6 *See, e.g.*, trends in Japanese foreign direct investment (FDI) as reported in 1996 MITI White Paper, showing annual FDI into China at \$ 161 million in 1990, \$ 1,853 million in 1994, and \$ 1,364 million in the first half of 1995. 1996 MITI White Paper at 1996 Investment, Table 12 (visited Mar. 2, 1999) <<http://www.jetro.go.jp/WHITEPAPER/INVEST96/t12.html>>.

n7 *See, e.g.*, FREDERICK M. ABBOTT, LAW AND POLICY OF REGIONAL INTEGRATION: THE NAFTA AND WESTERN HEMISPHERIC INTEGRATION IN THE WORLD TRADE ORGANIZATION SYSTEM 139 (1995).

n8 *See, e.g.*, U.N. CHARTER art. 1, para 2 & art. 2, para. 7.

n9 *See, e.g.*, Nuclear Tests Case (Austl. v. Fr.), 1974 I.C.J. 253 (Dec. 20)(separate opinion of Judge Petren); *Filartega v. Pena-Irala*, 630 F.2d 876 (2nd Cir. 1980); *Kadic v. Karadzic*, 70 F.3d 232 (2nd Cir. 1995).

n10 *See, e.g.*, Vienna Convention on the Law of Treaties, art. 26 in T.O. Elias, THE MODERN LAW OF TREATIES 236 (1974) ("Every treaty in force is binding upon the parties to it and must be performed by them in good faith."); and Fisheries Case (U.K. v. Norway), 1951 I.C.J. 116 (as amended 1956) regarding binding force of custom.

n11 *See* General Agreement on Tariffs and Trade: FINAL ACT EMBODYING THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS, Apr. 15, 1994, LEGAL INSTRUMENTS-RESULTS OF THE URUGUAY ROUND VOL. 1 (1994), reprinted in 33 *I.L.M.* 1125 (1994) [hereinafter GATT: Final Act].

n12 *See* United States-Japan Treaty of Friendship, Commerce and Navigation, Apr. 2, 1965, U.S.-Japan, 4 *U.S.T.* 2063, T.I.A.S. No. 2863 (entered into force Oct. 30, 1953) [hereinafter FCN Treaty]. *See also* discussion *infra* notes 104-05.

n13 *See* discussion *infra* Part IV.B.

n14 *See* discussion *infra* Part IV.D.

n15 Regarding the Structural Impediments Initiative (SII), *see* MITSUO MATSUSHITA, INTERNATIONAL TRADE AND COMPETITION LAW IN JAPAN 200-02 (1993). For a useful catalogue of bilateral arrangements, *see* *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.

n16 *See* *Consumers Union v. Kissinger*, 506 F.2d 136 (D.C. Cir. 1974).

n17 *See, e.g.*, Japan Trade in Semi-Conductors: Report of the Panel, GATT Doc. L/6309 (Mar. 24, 1988).

n18 *See, e.g.*, LAURA D'ANDREA TYSON, *WHO'S BASHING WHOM?* 76-82 (1990).

n19 *See* Japan-U.S. Automotive Agreement and Supporting Documents, Aug. 23 1995, 34 *I.L.M.* 1482. *See also*, U.S., *Japan Strike Deal on Auto Trade Addressing Parts, Dealerships, Repairs*, 1995 DER 125, June 29, 1995 (LEXIS/NEXIS); *EU/Japan/US: Europe Gives Cautious Welcome to US-Japan Car Deal Copyright*, EUROPEAN INTELLIGENCE, July 8, 1995(LEXIS/NEXIS); *Australian minister urge [sic] Japan Not To Fa-*

vor *US Auto Parts Makers*, AGENCE FRANCE PRESSE, July 11, 1995 (LEXIS/NEXIS); *Japan, U.S. Report on Auto Accord, Say Dispute Is Now Removed from WTO*, 12 Int'l Trade Rep. (BNA), July 12, 1995, at 1176.

n20 See, e.g., *Japan to Liberalize Insurance Rates in Personal Injury Area in Line with Pact*, 14 Int'l Trade Rep. (BNA), Jan. 8, 1997, at 50 [hereinafter *Japan to Liberalize Insurance Rates*].

n21 GATT: Uruguay Round, *supra* note 11, art. 11 (providing that ". . . a Member shall not seek, take or maintain any voluntary export restraints, orderly marketing arrangements or any other similar measures on the export or import side").

n22 *Id.* art. 11(3).

n23 See generally, Robert E. Hudec, *Thinking About the New Section 301: Beyond Good and Evil*, in AGGRESSIVE UNILATERALISM 113 (Jagdish Bhagwati and Hugh T. Patrick eds. 1990).

n24 See Frederick M. Abbott, *Protecting First World Assets in the Third World: Intellectual Property Negotiations in the GATT Multilateral Framework*, 22 VAND. J. TRANSNAT'L L. 689, 707-09 (1989).

n25 See, e.g., Japanese Ministry of International Trade and Industry, JETRO, WHITE PAPER ON INTERNATIONAL TRADE: JAPAN 1992 at 89-98 (1992).

n26 See, e.g., Industrial Structure Council, Japan, *1996 Report on the WTO Consistency of Trade Policies by U.S. Trading Partners* (1996).

n27 See also C. FRED BERGSTEN AND MARCUS NOLAND, RECONCILABLE DIFFERENCES: UNITED STATES-JAPAN ECONOMIC CONFLICT (1993); LESTER THUROW, HEAD TO HEAD: THE COMING ECONOMIC BATTLE AMONG JAPAN, EUROPE AND AMERICA (1992).

n28 For analysis of the potential impact of the NAFTA, see Abbot, *supra* note 7, ch. 8.

n29 See, e.g., Manila Action Plan for APEC and related documents, *infra* Part IV.D.

n30 The EU common commercial policy and its impact on the United States is discussed in Abbot, *supra* note 7, ch. 7.

n31 See Marcos Castrioto de Azambuja, *Institutions for International Economic Integration*, AM. SOC. INT'L L. NEWSLETTER (forthcoming 1996)(describing the Mercosur).

n32 These objectives may present themselves as complementary opposites. In other words, each potential objective may reveal a counterobjective that may also have certain attractions.

n33 See, e.g., THUROW, *supra* note 27, at 245-58.

n34 See generally Hudec, *supra* note 23 and TYSON, *supra* note 18.

n35 See discussion of automobile arrangement, *infra* Part III.G.2.

n36 These views were conveyed to the author in interviews with government officials in Japan in 1993. See Abbot, *supra* note 7, ch. 8.

n37 This theme was first developed by this author in Frederick M. Abbott, *The Intersection of Law and Trade in the WTO System: Economics and the Transition to a Hard Law System*, in UNDERSTANDING TECHNICAL BARRIERS TO AGRICULTURAL TRADE 33 (David Orden and Donna Roberts eds. 1997).

n38 See, e.g., Ulrich Beyerlin, *The Concept of Sustainable Development*, in ENFORCING ENVIRONMENTAL STANDARDS: ECONOMIC MECHANISMS AS VIABLE MEANS?, at 95 (Rudiger Wolfrum ed. 1996). Beyerlin does not expressly adopt the "soft law" terminology, referring instead to the concept of sustainable development as "an overall political aim which all actors in the field of international environmental protection and development have to respect."

n39 In its seminal decision denying the GATT a self-executing character, the European Court of Justice emphasized the character of the GATT as a forum for reciprocal bargaining, as opposed to a fixed set of rules. Case 21-24/72, *International Fruit Company N.V. v. Produktschap voor Groenten en Fruit No. 3*, 1972 E.C.R. 1219.

n40 OLIVIER LONG, LAW AND ITS LIMITATIONS IN THE GATT MULTILATERAL TRADING SYSTEM (1985).

n41 Rules evolved, for example, to allow special and differential treatment for developing countries.

n42 Consensus framework agreements, for example, were developed to conclude part of the Tokyo Round negotiations.

n43 The movement of the GATT/WTO from a soft to a hard law system might be understood to manifest itself in a number of ways. The creation of the single integrated system, for example, might be understood to evidence the trend by eliminating the optional character of many sets of rules. Rules are now applicable to a greater number of parties. However, the mere extension of norms to a wider group of parties does not necessarily signal an enhancement in the expectation that norms will be complied with.

n44 Rule refinement does not always result in a significant reduction of the level of discretion allowed to national governments, as evidenced to some extent by the Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXTS (1994) [hereinafter SPS Agreement]. In the concluding stage of the Uruguay Round, this agreement was modified to facilitate deviations from internationally-agreed norms.

n45 See General Agreement on Tariffs and Trade 1994 [hereinafter GATT], art. I, in WORLD TRADE ORGANIZATION, THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXTS (1995).

n46 See *id.* art. III.

n47 See also, e.g., the tension between the MFN principle and the exception for less developed countries and the prohibition of export subsidies and the expectation for exports of primary products. The problem of interpreting exceptions in relation to rules has led to some of the most intense and long lasting GATT disputes.

n48 See Understanding on the Interpretation of Art. XXIV of the GATT (regarding Art. XXIV) and new General Agreement on Trade in Services (GATS) Article V, LEGAL INSTRUMENTS-RESULTS OF THE URUGUAY ROUND, vol. 31, 33 *I.L.M.* 51 (1994)(governing regional services agreements); see also Abbot, *supra* note 7, at 35-54.

n49 For an explanation of the National Treatment principle, see, e.g., Japan-Taxes on Alcoholic Beverages, WT/DS8/R, WT/DS10/R, WT/DS11/R, 1996 GATTPD LEXIS 2, July 11, 1996 (unpublished Panel Report).

n50 See SPS Agreement, *supra* note 44, Annex C.

n51 See Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, art. 3 [hereinafter Antidumping Agreement].

n52 See *id.* art. 2.4.1.

n53 See Agreement on Subsidies and Countervailing Measures, Annex I, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex IA, LEGAL INSTRUMENTS-RESULTS OF THE URUGUAY ROUND vol. 27; 33 *I.L.M.* 1125, arts. 3-8 (1994).

n54 See Antidumping Agreement, *supra* note 51, art. 17.6(ii); see also Steven P. Croley and John H. Jackson, *WTO Dispute Panel Deference to National Government Decisions: The Misplaced Analogy to the U.S. Chevron Standard-of-Review Doctrine*, in INTERNATIONAL TRADE LAW AND THE GATT/WTO DISPUTE SETTLEMENT SYSTEM 193 (E.-U. Petersmann ed. 1997).

n55 Agreement on Trade-Related Aspects of Intellectual Property Rights. See *First Report of the Committee on International Trade Law of the International Law Association*, Buenos Aires 1994 (E.-U. Petersmann and F.M. Abbott, Rapporteurs).

n56 See generally ROBERT HUDEC, ENFORCING INTERNATIONAL TRADE LAW (1993), and PIERRE PESCATORE ET AL., HANDBOOK OF GATT DISPUTE SETTLEMENT (1991 and updates).

n57 See generally, *id.*

n58 In fact, the adoption of a number of important panel reports rendered during the Uruguay Round negotiations, including the two Tuna panel reports, the Cafe Standards and Banana reports, were blocked. However, the reports may in part have been blocked on the grounds that the subject matter would be addressed as part of the bargaining at the completion of the Round, so that in a sense the claimed ineffectiveness of the panel procedure was a selffulfilling prophecy.

n59 See Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, art. 22, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS-THE LEGAL TEXTS 404 (1994), 33 *I.L.M.* 1226 (1994)[hereinafter DSU].

n60 See Ernst-Ulrich Petersmann, *The Dispute Settlement System of the World Trade Organization and the Evolution of the GATT Dispute Settlement System Since 1948*, 31 *COMMON MKT. L. REV.* 1157 (1994).

n61 The DSB is the General Council of the WTO sitting under a different name.

n62 A prevailing party could choose not to pursue its remedies. However, since that party is entitled to withdraw its complaint at any time, there is no foreseeable reason why it would permit the report to be brought before the DSB, only to vote against it. Also, the report of a panel or the Appellate Body might be considered so offensive by WTO Members, that the DSB would decide to condemn it by a negative consensus vote, thus precluding even the appearance of potential future effect on future dispute settlement decisions.

n63 DSU, *supra* note 59, art. 23:1, at 1241.

n64 *See id.* art. 23:2(c).

n65 The adoption of rules prohibiting the unilateral imposition of trade sanctions was directed towards the United States and its Section 301 legislation, which sets up the U.S. Trade Representative's Office as prosecutor, judge, and enforcement agency with respect to the traderelated practices of foreign governments.

n66 *See* DSU, *supra* note 59, arts. 12:8-9 & 17:5, at 1233 & 1236. The basic time limit for issuance of a panel report is six months from the date a panel is composed and terms of reference are agreed upon, subject to a three month extension. The Appellate Body must issue a report within 60 days of notice of appeal or 90 days if extended.

n67 As a general guideline, the time period should not exceed 15 months from adoption by the DSB of the panel or Appellate Body Report. *See id.* art. 21:3(c), at 1238.

n68 Under Article 3:6 of the DSU Members are obligated to notify the DSB and the relevant Councils and Committees of "mutually agreed solutions to matters formally raised under the consultation and dispute settlement provisions of the covered agreements." Under the express terms of the DSU, matters not formally raised by the parties do not require notification. *Id.* art. 3:6, at 1227.

n69 Article 23 continues:

(b) follow the procedures set forth in Article 21 to determine the reasonable period of time for the Member concerned to implement the recommendations and rulings; and (c) follow the procedures set forth in Article 22 to determine the level of suspension of concessions or other obligations and obtain DSB authorization in accordance with those procedures before suspending concessions or other obligations under the covered agreements in response to the failure of the Member concerned to implement the recommendations and rulings within that reasonable period of time.

Article 2:2 of the DSU is also relevant to the scope of the Member's obligations, providing:

2. The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements *Id.* at 1226-227.

n70 *See generally* Petersmann, *supra* note 60.

n71 See DSU, *supra* note 59, art. 26, at 1242 (regarding different procedures applicable to non-violation and situation complaints).

n72 Note that under GATS non-violation complaints are limited to those involving benefits from "specific commitments" under Part III of the Agreement. This is a significant limitation on non-violation complaints. See General Agreement on Trade in Services, art XXXIII:3, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization Annex 1B, 33 *I.L.M.* 1167 (1994) [hereinafter GATS].

n73 See TRIPS Agreement, art. 64:2 & 3.

n74 See Petersmann, *supra* note 60, at 1172 (noting that only 15 of more than 200 complaints brought under Article XXIII were non-violation nullification or impairment complaints, and only 4 of the more than 200 complaints referred to "other situations.").

n75 Under art. 26:1 a Member bringing a non-violation complaint is not entitled to removal of an offending measure, but only a satisfactory adjustment. See DSU, *supra* note 59, art. 26:1, at 1242.

n76 *Id.* art. 25.

n77 See *id.* art. 25:4.

n78 See *e.g.*, Agreement on Rules of Origin, Annex 1A, Agreement Establishing the World Trade Organization, Apr. 15, 1994, reprinted in H.R. Doc. No. 316, 103d Cong., 2d Sess. 1515 (1994) [hereinafter Rules of Origin Agreement].

n79 See GATS, *supra* note 72, arts. XVI & XVII, at 1235.

n80 See Agreement on Trade-Related Investment Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXTS, arts. I & II (1994) [hereinafter TRIMs].

n81 The GATS allows for commercial presence commitments, but does not mandate them, except in the context of financial services commitments.

n82 See WTO, Singapore Ministerial Declaration, Dec. 13, 1996, art. 21, reprinted in 36 *I.L.M.* 218 (1997).

n83 See JAPAN INDUSTRIAL STRUCTURE COUNCIL 1996 REPORT ON THE WTO CONSISTENCY OF TRADE POLICIES BY MAJOR TRADING PARTNERS (1996), at 44-45 [hereinafter ISC Report].

n84 See Japanese Measures on Imports of Thrown Silk Yarn, L/4637-25S/107, 1978 GATTPD LEXIS 1, Report of the Panel adopted on May 17, 1978.

n85 See Panel on Japanese Measures on Imports of Leather, GATT Doc. L/5623 (May 15 & 16, 1984), reprinted in B.I.S.D., 31S/94, 112-13. There were several U.S. complaints against Japan regarding leather products (1979, 1980 and 1981).

n86 See GATT Dispute Settlement Panel Report: Japanese Restraints on Imports of Manufactured Tobacco from the United States, June 11, 1981, *available in* 1993 BDIEL AD LEXIS 39.

n87 See Japan-Restrictions on Imports of Certain Agricultural Products: Report of the Panel, March 22, 1988, GATT B.I.S.D. (35th Supp.) at 163 (1989).

n88 Perhaps the most notable GATT 1947 complaint involving Japan and the United States was initiated by the European Community in regards to Japan-U.S. agreement on market access in semi-conductors. See Japan Trade in Semi-Conductors, May 4, 1988, L/6309 35 B.I.S.D. 116, 162.

n89 For example, complaints regarding access to telecommunications services markets.

n90 For example, complaints regarding access to the super-computer and semiconductor markets, though in each case the resulting understanding was referred to as multilateral.

n91 For example, restrictions on imports of Japanese automobiles and steel.

n92 See ISC Report, *supra* note 83, at 240.

n93 See Automotive Agreement and Supporting Documents, Aug. 23, 1995, U.S.-Japan, *reprinted in* 34 *I.L.M.* 1482.

n94 See, *e.g.*, *id.* at 1524 (Joint Announcement by Ryutaro Hashimoto and Michael Kantor regarding the Japanese Auto Companies Plans).

n95 See, *e.g.*, ISC Report, *supra* note 83, at 257-66.

n96 See Joint Statement by the Government of the United States and the Government of Japan Concerning Semiconductors, Aug. 2, 1996, 13 *Int'l Trade Rep. (BNA)* 1287 (Aug. 7, 1996).

n97 See Japan to Liberalize Insurance Rates *supra*, note 20. Note also that the United States recently announced its intention to impose sanctions on Japan resulting from alleged failure to provide nondiscriminatory access to shipping port terminals. See, *e.g.*, Albright Raises Trade Issues in Frank Discussions in Japan, 14 *Int'l Trade Rep. (BNA)* 331 (Feb. 26, 1997).

n98 See Japan-Taxes on Alcoholic Beverages, WT/DS8/R, WT/DS10/R, WT/DS11/R, 1996 GATTPD LEXIS 2, July 11, 1996 (unpublished Panel Report).

n99 ISC Report, *supra* note 83, at 44.

n100 *Id.* at 258.

n101 See Japan--Measures Affecting Consumer Photographic Film and Paper, First Submission of the United States of America, 1997 GATTPD LEXIS 1, Feb. 20, 1997.

n102 These views were expressed to the author in interviews with officials at the Office of the USTR in February 1997. The author assumes that USTR officials were referring to Japan-- Trade in Semi-Conductors: Report of the Panel, 1988 GATTPD LEXIS2, paras. 69-71, 131, May 4, 1988.

n103 The author notes that similar views concerning APEC dispute settlement have been expressed in discussions with Canadian government officials, though these are not official positions of the Canadian government. One such official noted that since APEC lacks binding legal rules, the concept of binding dispute settlement decisions is problematic.

n104 See FCN Treaty, *supra* note 12.

n105 See *e.g.*, *id.* art. VII.

n106 See Frederick M. Abbott, *Regional Integration Mechanisms in the Law of the United States: Starting Over*, 1 IND. J. GLOBAL LEG. STUDIES 155 (1993) n.34.

n107 See, *e.g.*, Executive Summary of Fujifilm's Comments Regarding Legal Issues, In the Matter of Investigation Pursuant to Section 302 Concerning Barriers to Access to the Japanese Market for Consumer Photographic Film and Paper, Docket No. 310-99, Aug. 11, 1995, at 10-12 (response to Kodak's allegations regarding violation of FCN Treaty and OECD Code on Capital Movements).

n108 See Abbot, *supra* note 7, at 102. The national origin of the owner of a commercial enterprises is generally not a factor in determining whether an enterprise is a national of a NAFTA party. Thus, a Japanese-owned company in Canada would have the rights of a Canadian national investor in a dispute concerning an investment in the United States, and would have the right of recourse to third party arbitration.

n109 See *generally, id.*

n110 *Pros and Cons of Initiating Negotiations with Japan to Explore the Possibility of a U.S.-Japan Free Trade Area Agreement, Report to the Senate Committee on Finance on Investigation No. TA-332-255 Under Section 332 of the Tariff Act of 1930, 1988 ITC LEXIS 78 (Sept. 1988).*

n111 See APEC Economic Leaders' Declaration for Action, Nov. 19, 1995 and The Osaka Action Agenda: Implementation of the Bogor Declaration (posted 1995)
<<http://infomofa.ntt.co.jp/infomofa/apecinfor/www/agenda/agenda.htm>> at Part I, C12.

n112 *Id.* at C12, Collective Actions, a.iii.

n113 See *id.* at Collective Actions, b.

n114 See, *e.g.*, Manila Action Plan Highlights, <<http://apecsun.apecsec.org.sg/mapa/voll/mapahigh.html>> [hereinafter MAPA Highlights] and APEC Committee on Trade and Investment, 1996 Annual Report to Ministers, download from <<http://apecsun.apecsec.org.sg/apecnet.html>>.

n115 APEC Experts' Group on Voluntary Consultative Dispute Mediation, *Dispute Mediation Progress Report on Collective Actions*, Nov. 1996.

n116 MAPA Highlights, *supra* note 99, at Dispute Mediation, Box 12, Undertakings on Dispute Mediation.

n117 The recent increase in the value of the dollar relative to the yen should also result in a significant increase in Japanese exports to the United States, potentially leading to trade friction.

n118 See GATT: Uruguay Round, *supra* note 21, art. 11.