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## United States-Japan Free Trade Area: A Skeptical View\*\*

Trade disputes have, over the past 20 years, become a permanent fixture of the U.S.-Japan relationship. From the "textile wrangle" of the late 1960s to the FSX fighter aircraft controversy of the late 1980s, an ever-growing list of sectors, products, and services have demanded the attention of the two countries in the course of their politically cooperative yet economically competitive postwar relationship.<sup>1</sup>

The most visible of these issues have been prominently covered in the mass media: textiles, steel, automobiles, color television sets, machine tools, beef, oranges, rice, semiconductors, construction services, and the FSX. But a long list of other items, many not so glamorous or eye-catching, continue to disrupt the tranquility of the relationship. When the two governments convene their biennial meeting of the U.S.-Japan Trade Committee, 20 or 25 issues are routinely put on the agenda

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\*\* The views expressed herein are those of the author alone and do not represent in any way the views of the United States Government or any department or agency thereof.

1. Among the many English-language books and articles on U.S.-Japan trade conflicts, the following are especially informative: I. DESTLER, H. FUKUI & H. SATO, *THE TEXTILE WRANGLE: CONFLICT IN JAPANESE-AMERICAN RELATIONS, 1969-71* (1979); I. DESTLER & H. SATO, *COPING WITH U.S.-JAPANESE ECONOMIC CONFLICTS* (1982); I. DESTLER, H. SATO, P. CLAPP & H. FUKUI, *MANAGING AN ALLIANCE: THE POLITICS OF U.S.-JAPANESE RELATIONS* (1976); T. McCRAW, *AMERICA VERSUS JAPAN* (1986); C. PRESTOWITZ, *TRADING PLACES: HOW WE ALLOWED JAPAN TO TAKE THE LEAD* (1988); and Johnson, *How to Think About Economic Competition from Japan*, in *THE TRADE CRISIS: HOW WILL JAPAN RESPOND?* (K. Pyle ed. 1987). Although not specifically on U.S.-Japan trade, the following book sheds considerable light on the intractability of the bilateral trade problems: K. VAN WOLFEREN, *THE ENIGMA OF JAPANESE POWER: PEOPLE AND POLITICS IN A STATELESS NATION* (1989).

by the U.S. as problems that require immediate attention.<sup>2</sup>

### I. The U.S.-Japan Trade Problem

The "U.S.-Japan Trade Problem" comprises three dimensions. First, the *size* of the trade deficit is both an economic and political problem, although many economists would argue that it is the global deficit, not the bilateral deficit, that is an economic problem. Due in part to yen appreciation, U.S. exports to Japan in 1988 were up 35 percent over 1987, compared to a rise of only 6 percent in Japanese exports to the U.S. But the difference in the absolute levels of the trade flows meant that the imbalance only narrowed from \$59.8 to \$55.4 billion. This was 42 percent of the U.S. global deficit. The 7 percent decline in the U.S. bilateral deficit with Japan was far smaller than the 21 percent decline in the U.S. global deficit. The imbalance with the European Community dropped 47 percent and that with the Asian newly industrialized economies ("NIEs") decreased 16 percent. No matter how one measures it, the magnitude of the U.S. trade deficit with Japan is enormous.<sup>3</sup>

Second, the *composition* of the bilateral deficit is a matter of growing concern. U.S. manufactured products have demonstrated their competitiveness in all major markets around the world except in Japan. The ratio of imports to GNP in Japan, 6.6 percent, is lower than the 9.5 percent for the U.S. and 20.7 percent for Germany. The disparity between ratios of manufactured imports to GNP is even greater: 21.3 percent for Korea, 10.5 percent for Germany, 7.3 percent for the U.S., and only 2.4 percent for Japan. Of all lesser developed country ("LDC") exports of manufactured products in 1987, the U.S. took in 52.6 percent, the European Community ("EC") 26.1 percent, and Japan only 9.1 percent.<sup>4</sup> Japan exhibits a bias against importing manufactured products, even when they are clearly more competitive than domestic products.<sup>5</sup>

Third, the *anecdotal evidence* provided by American companies of market barriers in Japan is overwhelming. These include Japanese government laws, regulations, and administrative guidance; corporate policies, practices, and industrial structure; and attitudinal barriers

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2. For a discussion of the range of trade issues negotiated in bilateral fora, see Fukushima, *The U.S.-Japan Trade Conflict: A View From Washington*, 6 BULL. INT'L HOUSE OF JAPAN (Spring 1986) (Issue No. 2).

3. Data compiled by the Office of the United States Trade Representative (USTR), Department of Commerce, and the International Monetary Fund.

4. GATT, INTERNATIONAL TRADE, 1987-88.

5. "The most recent study has been conducted by Robert Z. Lawrence of Brookings. . . . His conclusions are striking: Japanese imports of manufactured imports are ' . . . about 40 percent lower than one would expect of a typical industrial economy.' . . . Applying Lawrence's order of magnitude adjustment to Japan's estimated 1987 manufactures imports suggests that Japanese manufactures imports would have been roughly \$40 billion larger." ADVISORY COMMITTEE FOR TRADE POLICY AND NEGOTIATIONS ("ACTPN"), ANALYSIS OF THE U.S.-JAPAN TRADE PROBLEM 76-77 (1989) [hereinafter ACTPN Report]. For a discussion of the importance of the composition of trade, see S. COHEN & J. ZYSMAN, MANUFACTURING MATTERS: THE MYTH OF THE POST-INDUSTRIAL ECONOMY (1987).

including a buy-Japanese mentality. Whether or not these barriers were intentionally erected to exclude foreigners, the effect is the same: one American company after another has complained to the Administration and to Congress about the difficulty of exporting to or investing in Japan. Not all of these claims are legitimate, but enough meritorious cases exist to cast serious doubt on Japanese arguments that American companies are just “not trying hard enough.”<sup>6</sup>

## II. Background of the FTA Idea

It is in the context of these persistent and seemingly intractable trade problems that the idea of a U.S.-Japan Free Trade Area (“FTA”) has emerged. No one really knows precisely when the notion first surfaced, but by the mid-1980s U.S. Ambassador to Japan Mike Mansfield was heard to include in his speeches his “personal” idea that the two countries needed a framework along the lines of an FTA to better manage “the most important relationship in the world, bar none.”<sup>7</sup>

When newly installed Prime Minister Noboru Takeshita visited Washington in January, 1988, Senate Majority Leader Robert Byrd suggested to the Prime Minister that it might be worthwhile for the two sides to consider the feasibility of an FTA. On June 15, 1988, Senator Lloyd Bentsen, in his capacity as Chairman of the Senate Finance Committee, sent a letter to the U.S. International Trade Commission (“ITC”) requesting an investigation of “the pros and cons of entering into negotiations with Japan to explore the possibility of establishing a U.S.-Japan free trade area. . . .”<sup>8</sup>

The ITC Report—based on interviews with 122 individuals, 34 written submissions, and a public hearing—was an opinion study rather than an economic analysis of the costs and benefits of an FTA. The Institute for International Economics in Washington, D.C. convened a two-day conference entitled “More Free Trade Areas?” on October 31 and November 1, 1988. And the RAND Corporation, the Santa Monica, California-based think tank, has undertaken a major study of the U.S.-Japan FTA concept.

As is often the case with “new approaches” to the bilateral relationship, however, Japan has been notably more diligent than the U.S. in assessing the costs and benefits of establishing an FTA. Official or quasi-official studies were initiated under the auspices of the Ministry of

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6. See *The Role of Japanese Trade Barriers*, in ACTPN Report, *supra* note 5, at 53-82 (ch. 5). See also Kreinen, *How Closed is Japan's Market? Additional Evidence*, *THE WORLD ECONOMY*, Dec. 1988, at 529-42.

7. The most recent iteration of this famous phrase can be found in the last sentence of Mansfield, *The U.S. and Japan: Sharing Our Destinies*, 68 *FOR. AFF.* 1, 15 (1989).

8. This letter is reproduced on pages B-2 and B-3 of *Pros and Cons of Initiating Negotiations with Japan to Explore the Possibility of a U.S.-Japan Free Trade Area Agreement*, USITC Pub. 2120, Inv. No. 332- TA-255 (Sept. 1988) (U.S. International Trade Commission report to Senate Finance Committee) [hereinafter ITC Report].

Foreign Affairs ("MOFA"), the Ministry of International Trade and Industry ("MITI"), the Ministry of Finance ("MOF"), and the Economic Planning Agency ("EPA").<sup>9</sup> There were unconfirmed reports that the Ministry of Agriculture, Forestry, and Fisheries ("MAFF") was investigating the implications of an FTA for bilateral agricultural trade, and a number of Japanese private research institutes were known to be at work analyzing one aspect or another of the FTA idea.

These reports, conferences, and the media accounts that have accompanied them have, among some quarters, generated considerable interest and expectation in the FTA as a promising approach to resolve the seemingly intractable trade conflicts that have afflicted the bilateral relationship over the past two decades. Yet the concept of a U.S.-Japan FTA is mired in confusion. Advocates are often using the term "FTA" to mean entirely different things.

This confusion is fraught with danger, since conceptual clarity, precision, and specificity are essential for both countries if an FTA—however defined—is to be considered as a serious option for the U.S.-Japan relationship in the 1990s.<sup>10</sup> A mismatch between the means (implementing steps) and the objectives (ultimate goals) with respect to an FTA could have severely counterproductive effects for the bilateral relationship, especially if both sides enter into such discussions without first establishing a clear understanding within each country (and between the two) of the specific scope, nature, and intended results of an FTA.

### III. Motivations for an FTA

One way to sort through the confusion surrounding the FTA idea is to ask what motivates its adherents. Two motivations immediately stand out: political and economic.

#### A. Political Rationale

The political motivation is based on the conviction that the political and military security dimensions are the bedrock of the bilateral relationship. Adherents of this view are troubled by the potential spillover of the trade conflicts into what they see as a smooth and harmonious political and military security relationship. Japan being a military ally, this view holds, we should try our best to minimize conflicts in trade or economic matters because these epiphenomenal irritants could eventually sour the overall alliance. Thus, Ambassador Mansfield, in his submis-

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9. For a Japanese perspective on FTAs, see Shirakawa, *Nichi-Bei Jiyu Boeki Ken Koso no Haikei* [Background of the Japan-U.S. Free Trade Area Concept], KEIZAI SEMINAA, No. 407, Dec. 1988, pp. 26-31. Shirakawa is Director of the Second International Economic Affairs Division in the Economic Planning Agency. See also Nakatani, *Nichi-Bei Jiyu Boeki Kyotei o Kento Suru Imi*: [Assessing a U.S.-Japan Free Trade Agreement], SHUKAN TOYO KEIZAI, July 23, 1988, at 96-99.

10. For the pitfalls of miscommunication in bilateral negotiations, see Fukushima, *The Nature of U.S.-Japan Government Negotiations in THE U.S.-JAPAN BILATERAL SESSION: A NEW ERA IN LEGAL AND ECONOMIC RELATIONS* (forthcoming).

sion dated July 7, 1988 to the ITC study discussed above, writes as follows:

The basis for my suggestion that we at least study the shape of a free trade agreement is the belief that the U.S. should switch from approaches which politicize trade issues, exacerbate friction, raise emotional stakes, erode public support here [i.e., in Japan] for American objectives and risk undermining both countries' commitment to the alliance. We have no alternatives at present to our piecemeal approach which would last—but should not—into the next century.<sup>11</sup>

In a recent article in *Foreign Affairs*, he sums up this view in the following words:

[O]ur relationship has been overshadowed in the media and in our bilateral dialogue by a seemingly endless series of disputes over market access and unfair trade practices. At times these frictions have spilled over and threatened to damage other areas of our economic partnership as well as our political, security and diplomatic cooperation. . . . I have also suggested that the United States should look at some variations of a free trade agreement to see if there are not ways of applying this approach to trade negotiations with Japan.<sup>12</sup>

This view is welcomed by many Japanese as well. Former MITI Vice-Minister for International Affairs Makoto Kuroda, for instance, had the following to say in October 1988 at the Institute for International Economics conference cited above:

An aggravated relationship between Japan and the U.S., which are two of the largest economic powers, would have an adverse effect not only on the development of themselves, but also on the world economy as a whole. Therefore, Japan and the U.S. have a special and great responsibility to formulate a new relationship in which we can facilitate smoother trade relations and contribute to world economic development. From the standpoint of finding a new relationship, an expanded concept of the FTA could be one avenue worth exploring.<sup>13</sup>

Here again, the goal of an FTA is seen not to remedy materially the trade imbalance between the two countries or to undertake changes in policies or practices to bring about concrete economic outcomes. Rather, it is to "facilitate smoother trade relations," i.e., reduce the level of trade conflict. Kuroda was more explicit in his desire to contain the politicization of trade in an article he wrote for the *Japan Economic Journal*:

[A]s goods-oriented friction is supplanted by institution-oriented friction, problems in bilateral relations will become more structural and political in nature. . . . Such frictions should not be allowed to escalate needlessly. Rather than repeating the past approach of simply "coping with friction,"

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11. Reproduced in ITC Report, *supra* note 8, at A-2 to A-4.

12. Mansfield, *supra* note 7, at 3-4, 8.

13. M. Kuroda, My View on the Strengthening of Japan-U.S. Cooperation and the Concept of a Japan-U.S. Free Trade Agreement, 1 (Oct. 31, 1988) (unpublished manuscript).

we should take a more forward-looking approach which seeks common goals through joint efforts.<sup>14</sup>

Kuroda's former boss at MITI, former Vice-Minister Shinji Fukukawa, expressed a similar view in a conference in Japan in November 1988:

As economic powers with enormous responsibilities in managing the world economy, Japan and the U.S. need to consider a new structure for their mutual relationship, one that will help them *handle conflicts effectively* so that they can continue to contribute to development of the world economy. . . . From this perspective, a Japan-U.S. free trade concept deserves examination as a means of enhancing relations between our two nations.<sup>15</sup>

## B. Economic Effectiveness

In contrast to this view—i.e., that the primary function of an FTA should be the political one of reducing bilateral trade frictions—is the notion that an FTA would be more economically effective than the current process-oriented, piecemeal approach. Adherents of this view are dissatisfied by what they see as the endless rounds of trade negotiations between the two governments. These negotiations more often than not eventually lead to agreements, but these agreements—often establishing more transparency in procurement procedures—do not necessarily produce the intended results: increased sales to the Japanese market of U.S. products and services.

It is this frustration with the lack of concrete results that has led the Advisory Committee for Trade Policy and Negotiation ("ACTPN"), a private-sector advisory group to the President, to issue a recommendation in February 1989 that "given the different structures of the two [U.S. and Japanese] economies, trade policy solutions lie somewhere between free trade and managed trade. . . . A results-oriented trade strategy would provide concrete evidence that U.S.-Japan negotiations are succeeding. . . ."<sup>16</sup> Although the ACTPN report explicitly rejects the FTA idea as ineffective, the same dissatisfaction with the process-oriented, piecemeal approach can be seen behind certain initiatives from Capitol Hill supporting a U.S.-Japan FTA.

Citing calls for such an FTA by Ambassador Mansfield and the introduction of legislation in support of an FTA by Congressmen Gibbons and Crane, Senator Max Baucus of Montana had the following to say in October 1988:

Given the magnitude and complexity of the bilateral problems, a sweeping economic accord is needed—one much more extensive than the Canada FTA. . . . We should negotiate a bilateral accord that establishes a

14. Kuroda, Japan-U.S. Relations Need Fresh Framework, *Japan Economic Journal*, Dec. 31, 1988 & Jan. 7, 1989, at 11.

15. S. Fukukawa, *Asian-Pacific Cooperation and the Japan-U.S. Free Trade Concept*, 12 (Nov. 14, 1988) (paper presented at the Fifth U.S.-Japan Council Meeting) (unpublished manuscript) (emphasis added). Note the focus on "handling conflicts."

16. ACTPN Report, *supra* note 5, at vii.

process for trade and economic coordination between the U.S. and Japan. The accord should have three major elements: (1) a macroeconomic coordination agreement, (2) a trade agreement, and (3) a burden sharing agreement.<sup>17</sup>

Although Baucus has been careful to point out that “[g]iven the pervasiveness of Japanese trade barriers, a true FTA is probably not in the U.S.’ best interests,” few observers have noted the differences between his idea of a “bilateral accord” and the more general notion of an FTA.<sup>18</sup>

Thus, as seen at least in the mass media and in the public perception, a bilateral FTA is being advocated by a wide range of responsible parties—from American ambassadors to former senior Japanese Government officials to prominent members of Congress. Only by pinpointing what each advocate sees as the ultimate objective or motivation of an FTA can we come to understand what kind of an FTA is really being considered. Take the Baucus proposal, for example. Although macroeconomic coordination might be acceptable to both sides if it did not go much beyond the current G-7 framework, forcing Japan to implement “trade-flow targets” and significantly increase “direct payments” to the U.S. to “ease the unequal security burden”<sup>19</sup> may well exacerbate, not reduce, conflict between the two countries—precisely what those motivated by political considerations hope an FTA would avoid.

#### IV. Limitations of an FTA

Whether one’s motivations are political or economic, the question remains: Is a U.S.-Japan FTA a good idea? One needs to answer this question with caution, since it contains several analytic elements: (1) Definition, i.e., what is meant by an “FTA”? (2) Perspective, i.e., a “good idea” from whose standpoint—the U.S.? Japan? the “relationship”? (3) A “good idea” in what sense—reducing the trade imbalance? eliminating Japanese trade barriers? preserving an open market in the U.S.?

My tentative and preliminary answer is as follows: If one views the FTA as the kind of bilateral accord reached recently between the U.S. and Canada, an FTA would confer more advantages to Japan than to the U.S. Thus, such an arrangement would not satisfactorily address the “U.S.-Japan Trade Problem” as understood by most Americans. This is not to deny that such an arrangement might have the effect of quelling the politicization of trade conflicts over the short term. But once the economic effects of an FTA become evident, Americans are not likely to

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17. M. Baucus, Statement at Institute for International Economics Conference on Bilateral Trade Agreements, 6 (Oct. 31, 1988) (unpublished manuscript).

18. For a detailed explanation of Senator Baucus’s proposal, see Baucus, *A New Trade Strategy: The Case for Bilateral Agreements*, 22 CORNELL INT’L L.J. 1 (1989); see also Baucus, *Pacific Overture*, THE INT’L ECONOMY, Nov.-Dec. 1988, at 70.

19. Baucus, *Pacific Overture*, *supra* note 18, at 70-71.

be pleased. There are at least five reasons for skepticism regarding a U.S.-Japan FTA.

#### A. Inability to Address Core Problems

An FTA, as traditionally conceived, is aimed at the elimination of such visible barriers as tariffs, quotas, and government subsidies. Yet these are not the real barriers to gaining access to the Japanese market.

Due in large part to bilateral and multilateral negotiations over the past 20 years, Japan's official, visible barriers are among the lowest in the world. Average tariffs are 2.5 percent, compared to 2.8 percent for the EC, 3.4 percent for the U.S., and 4.0 percent for Canada. Import quotas number 23, more than any advanced industrialized country except France, but 22 of these are in agricultural products and likely to be reduced in the near term.<sup>20</sup> A series of "market opening measures" over the past decade, culminating in the "Action Program" of July 1985, have simplified import procedures and eased certain standards and certification requirements.<sup>21</sup>

Changes in laws and regulations, however, do not necessarily equal liberalization in fact. Tetsundo Iwakuni, a Japanese senior vice president of Merrill Lynch Capital Markets and a businessman well versed in Japanese financial markets, argues that there is:

a misconception among Americans and other foreigners who wish to do business in Japan and who wish to be treated fairly by the Japanese government and Japanese companies. The misconception is that changes in the laws will lead to a change in traditional Japanese relationships and Japanese society. . . . In the present ordeal, we learned a valuable lesson: the Japanese will willingly agree to the concept of free, fair, and open markets but will do whatever they can to place small obstacles in our path in the hope, perhaps, that we will tire and give up.<sup>22</sup>

In addition to these official government impediments are a second level of barriers best characterized as corporate, institutional, or organizational. These include the symbiotic relationship between government and business (including "administrative guidance"), the tight-knit relationships between affiliated companies in *keiretsu* groups, and the multi-layered and exclusive distribution system. These structural features of the Japanese economy make it difficult for any newcomer to enter the market, but especially for the foreign newcomer with few domestic allies, little goodwill, and limited contacts to rely on for assistance.<sup>23</sup>

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20. Data on tariffs and quotas are from JAPAN EXTERNAL TRADE ORGANIZATION ("JETRO"), *HANDY FACTS ON U.S.-JAPAN ECONOMIC RELATIONS* 8 (1988).

21. GOVERNMENT-RULING PARTIES JOINT HEADQUARTERS FOR THE PROMOTION OF EXTERNAL ECONOMIC MEASURES, *THE OUTLINE OF THE ACTION PROGRAM FOR IMPROVED MARKET ACCESS* (1985).

22. T. Iwakuni, *Laws May Change But Japanese Society Does Not* (text of speech) (unpublished manuscript).

23. For a discussion of *keiretsu*, see VAN WOLFEREN, *supra* note 1. See also Yamamura & Vandenberg, *Japan's Rapid-Growth Policy on Trial: The Television Case* in *LAW AND*

A third level of barriers is attitudinal. This is manifested in several ways. One is the notion that Japan, being a small, weak island nation devoid of natural resources, must import vast quantities of raw materials, add value in Japan, and export equally vast shipments of manufactured products in order to survive. A corollary of this is that Japan cannot afford the luxury of importing expensive foreign industrial products such as American supercomputers.<sup>24</sup>

A second aspect of this attitudinal barrier is that Japanese products are superior to foreign products across the board, hence explaining low import penetration by Japan's trading partners. When it is pointed out that American products often outcompete Japanese products in third-country markets, the response is that the Japanese market requires "extra effort."

A third aspect is the idea that Japan is "unique": Japanese intestines are longer than Western intestines, so Japanese are unable to consume beef (then why maintain quotas?); Japanese snow is different from foreign snow, so Japanese ski standards must be changed, to the detriment of American and European ski manufacturers; and Japanese soil is different from foreign soil, so American construction companies cannot hope to win bids on Japanese public works projects.<sup>25</sup> Some Japanese actually believe these arguments about uniqueness, whereas others merely use them as arguments to justify their protectionist policies and practices.

These attitudinal barriers should not be confused with what is sometimes termed "cultural conflict" (*bunka masatsu*) between the U.S. and Japan. First, culture implies a certain permanence, inherence, and immutability that does not apply to attitudes. Just as Japanese products 20 years ago did not generally enjoy a reputation for high quality in this country and just as American products 10 years ago were not routinely derided in Japan for low quality, unreliability, and poor workmanship, attitudes can change much more quickly than culture. Second, similarity in cultures is no guarantee against trade conflicts, as attested to by the recurring frictions between the U.S. and the EC. Third, as a tactical matter, excoriating another country's culture is hardly apt to win sympathy in that country's government or public and may even inflame the sensitivity to racial victimization for which Japan is not unknown.<sup>26</sup>

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TRADE ISSUES OF THE JAPANESE ECONOMY: AMERICAN AND JAPANESE PERSPECTIVES (G. Saxonhouse & K. Yamamura eds. 1986).

24. Despite holding over 80 percent of the world market for supercomputers, U.S. manufacturers have been virtually excluded from the public sector supercomputer market in Japan. See Sun, *A Global Supercomputer Race for High Stakes*, 243 SCIENCE 1004-06 (1989).

25. The beef and soil examples are based on personal experience in bilateral negotiations. The ski case, which came to me second-hand from Donald Abelson, a USTR standards expert, is documented in *The Unique Japanese*, FORTUNE, Nov. 24, 1986, at 8.

26. These feelings are abetted by such articles as that by Boaz, *Yellow Peril Reinfests America*, Wall St. J., Apr. 7, 1989.

All of this is to say that barriers in Japan are complex, multilayered, and—although perhaps once inspired, created, or orchestrated by the government—now less under the government's direct control. Thus an FTA is unlikely to address the core barriers that bar access to the Japanese market.

### B. Mutuality

An FTA implies mutuality. That is, both parties bring something to the table. In this case, such items as tariffs, quotas, subsidies, and other trade-distorting government policies and practices would presumably be put on the table by both sides. But since Japan has few remaining official, visible barriers, it is likely to give up less than is the U.S., where the importance of visible barriers is far greater than in Japan.

Take, for example, the voluntary export restraints, voluntary restraint agreements, and orderly marketing arrangements currently in place between the U.S. and Japan. Dismantling these may lead to a greater increase in Japanese exports to the U.S. of automobiles, steel, textiles, machine tools, etc. than is compensated for by additional U.S. exports to Japan resulting from a reduction of Japanese tariffs and quotas. This could lead to a widening, not lessening, of the bilateral trade imbalance.

In addition, many Americans may well be puzzled as to why, in the event of an FTA, there should be any mutuality at all. Given the \$55 billion trade imbalance and the widely accepted truth—even in Japan—that the U.S. market is the most open in the world, the Congress, the business community, and the general public are all likely to question, if not actively oppose, the notion that the U.S. should open its doors even wider to Japan. Certain Japanese observers have also expressed difficulty in understanding why the U.S. would want to make it easier for Japan to export to the U.S. while gaining so little in return in terms of substantial access to the Japanese market.

### C. Dispute Settlement Mechanism

One of the most attractive elements of an FTA, from the Japanese perspective, is the establishment of a dispute settlement mechanism. If based on the provisions for antidumping and countervailing duty matters in the U.S.-Canada FTA, binational panels comprising five members would be chosen from a roster of Japanese and Americans. Each side chooses two panelists, subject to preemptory challenges. The fifth panelist is selected by agreement between the parties, by the first four panelists, or by lot, as may be necessary. A panel must render its final decision within 315 days.<sup>27</sup>

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27. See Chapter Nineteen of the U.S.-Canada Free Trade Agreement, entitled "Bilateral Panel Dispute Settlement in Antidumping and Countervailing Duty Cases." For commentary, see D. McRae & D. Steger, *Understanding the Free Trade Agreement: Proceedings of a Conference Held at the University of Ottawa, Faculty of Law (Common Law)*, Jan. 22, 1988.

Many Japanese view a binational dispute settlement mechanism as the *sine qua non* of an FTA. For, to an unprecedented degree, it would give the Japanese Government the opportunity to participate directly in dispute settlement on trade matters between the U.S. and Japan.<sup>28</sup> No longer would Japan have to be subjected to what it views as “unilateral” and “discriminatory” judgments by the U.S. Government in trade disputes under such provisions of U.S. trade law as Sections 201, 301, and 337, or antidumping and countervailing duties.<sup>29</sup>

Even if such matters are not placed entirely within the jurisdiction of the binational panels, many in Japan would welcome the opportunity to at least moderate the ability of the U.S. to act unilaterally. Many Americans, on the other hand, would question the wisdom of opening up even more the already transparent process of implementing U.S. trade laws. After all, it was in part congressional concern that the Administration was not adequately enforcing the trade laws on behalf of U.S. commercial interests that led to the enactment of the Trade Act of 1988.<sup>30</sup>

#### D. Impact on Multilateralism

Even if an FTA were somehow fashioned to be attractive to both the U.S. and Japan, its effects on the multilateral system need to be considered. These involve both short-term and long-term effects. In the short term, concentrating resources on a bilateral FTA is certain to detract from the ongoing efforts to conclude the Uruguay Round of multilateral trade negotiations by the target date of 1990. In the long-term, a U.S.-Japan FTA, in the wake of the U.S.-Canada FTA and EC 1992, could have the effect of moving the world economic system toward regional trading blocs.

Gardner Patterson, the former Director-General of the GATT, summed up these concerns as follows:

For a believer in the virtues—and the feasibility if pursued vigorously by the United States—of an updated, broadened and strengthened GATT-type non-discriminatory multilateral trading system, the implications of a spread of U.S.-fostered FTAs are down right ominous. The major consequences seem likely to be: (a) an uncertain effect on the amount and composition of world trade but clearly inferior in both respects to comparable multilateral reductions in trade barriers; (b) a sub-

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28. As early as fall, 1988, Japanese newspapers reported that the Japanese Government was planning to propose to the new U.S. Administration a bilateral dispute settlement mechanism similar to that established under the U.S.-Canada FTA. See *Nichi-Bei Boeki ni Funso Shori Kikan* [Dispute settlement mechanism for U.S.-Japan Trade], *Nihon Keizai Shimbun*, Oct. 5, 1988, at 1.

29. A typical Japanese criticism of the U.S. Government's use of trade law actions against Japan can be found in *U.S.-Japan Friction: Interview with Former MITI Vice Minister Makoto Kuroda*, *SHOKUN*, Oct. 1988. See also Kuroda, *Japan Is Getting a Bum Rap on Trade*, *THE INT'L ECONOMY*, Jan.-Feb. 1988, at 48-55.

30. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (1988).

stantial diminution in the accomplishments of the Uruguay Round; (c) a great increase in trade-related political frictions around the world; (d) a weakening of the present fragile international mechanisms for "managing" the trading system; and (e) other nations concluding that the United States has abandoned its crucial role as supporter of a multilateral system leading them to emulate the United States and strike such bilateral deals as they can.<sup>31</sup>

#### E. Impact on Other Trading Partners

Patterson's final point—the impact on other nations of yet another FTA involving the U.S.—is an immediate problem. Many have advocated concluding an FTA with some other nations or regions before entering into FTA talks with Japan. Among those most often mentioned are Mexico, Taiwan, Korea, ASEAN, and even the European Community.<sup>32</sup>

In part, the concern about a U.S.-Japan FTA centers on the magnitude of the undertaking—with reference to both process and results. With regard to process, few believe that an FTA with Japan will be easier to conclude than that with Canada, which took 16 months of intensive and grueling negotiations—this despite the historical, institutional, cultural, and linguistic similarities and geographical proximity of the two countries. With regard to results, engaging the world's two largest economies—comprising nearly 40 percent of the world's GNP—in an FTA is certain to have massive repercussions for the two countries' trading partners. The impact on the LDCs in particular is not likely to be positive.<sup>33</sup>

#### V. Conclusion

This discussion has indicated two major motivations for, and five limitations to, negotiating an FTA between the U.S. and Japan. The two factors—motivations and limitations—are, of course, closely related. For the motivations will define what type of FTA is favored, and this in turn will determine the nature and extent of the limitations.

To simplify, those advocating an FTA based on a political rationale—containing and managing trade conflicts so they do not harm the political and military security relationship—appear to favor what might be termed a "minimalist" FTA. This would focus primarily on the reduction of formal, visible barriers, with perhaps some attention paid,

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31. G. Patterson, *More Free Trade Areas: Implications for GATT and the World Trading System* 21-22 (Nov. 1, 1988) (presented at the Institute for International Economics) (unpublished manuscript). See also Aho, *More Bilateral Trade Agreements Would Be a Blunder: What the New President Should Do*, 22 CORNELL INT'L L.J. 26 (1989).

32. "I think we should battle through the tough negotiations with [the] European Community first. That, after the experience with Canada, should educate and prepare us for a negotiation with Japan." R. Gephardt, *More Free Trade Areas?* 7 (Oct. 31, 1988) (presented at the Institute for International Economics) (unpublished manuscript).

33. W. Fritsch, *The New Minilateralism and Developing Countries* (Nov. 1, 1988) (presented at the Institute for International Economics) (unpublished manuscript).

as Makoto Kuroda suggests, to “establishing *rules* in new fields, such as services, investment, and intellectual property rights.”<sup>34</sup>

Those advocating an FTA based on economic effectiveness—restoring the trade balance, selling substantially more American goods and services to the Japanese market—appear to favor what might be termed a “maximalist” FTA. This would involve a results-oriented approach including the establishment of “trade-flow targets”<sup>35</sup> and “market share targets . . . in critical sectors”<sup>36</sup> as well as burden-sharing schemes.

Clearly, the two approaches are at odds. Each emanates from a different understanding of the problems confronting the U.S.-Japan relationship. And each may reflect different philosophies of how international trade, markets, and economies function. Yet the public discussion to date on this issue of a bilateral FTA has tended to lump all FTA ideas together, contributing to an already confusing discourse on how best to improve the troubled U.S.-Japan economic relationship.<sup>37</sup> My discussion here does not address that larger question. But if it has clarified the motivations for and limitations to a U.S.-Japan FTA, it will have served its purpose.

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34. Kuroda, *supra* note 14 (emphasis added). Note here the traditional process-oriented, rule-based approach that requires no commitment to results.

35. Baucus, *Pacific Overture*, *supra* note 18, at 70.

36. *Id.* at 71.

37. For a penetrating analysis of how ideological blinders obscure the search for realistic solutions to the trade problems, see Johnson, *The Japanese Political Economy: A Crisis in Theory*, 2 ETHICS AND INTERNATIONAL AFFAIRS (1988).

