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Japanese Prime Minister Noburu Takeshita recently proposed a bi-national dispute settlement mechanism for resolving trade disputes between the United States and Japan ("Takeshita proposal" or "proposal"). Japanese Foreign Minister Sosuke Uno first raised the proposal in a meeting with Secretary of State James Baker on February 2, 1989.

The Takeshita idea was not presented as a formal proposal, but appears to have been more of a trial balloon launched to test the United States' reaction. Although details are sketchy, the proposal reportedly called for a Cabinet-level mechanism to settle trade and economic disputes and to coordinate policy between the two countries. The proposal also included a provision for the formation of a working-level group comprised of sub-cabinet officials and industry representatives which would hear trade and economic complaints prior to the higher level group. The proposal suggested that these bilateral panels review a variety of issues, including trade disputes, market access problems, exchange rate policy, macroeconomic issues, development assistance, and technology transfer. The Takeshita proposal, though purportedly modeled after the dispute settlement mechanism in the United States-Canada Free Trade Agreement("FTA"), in fact differs significantly from it. The dispute panel would not have "supranational" authority, as do the FTA dispute settlement panels, nor would its decisions be binding.

Because the Takeshita proposal was informal, the United States did not make an "official" response. During their meeting, Secretary Baker informed Minister Uno that the United States would review the proposal, but that the United States believes adequate mechanisms already exist to handle trade disputes. Privately, United States Government officials state that the proposal received a negative reaction at the Office of the United States Trade Representative and the Department of Commerce. These offices reportedly viewed the plan as an attempt by the Japanese to circumvent United States trade laws.

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It is true that there are existing forums for discussing and resolving United States-Japan trade concerns; a new, elaborate dispute settlement panel could prove counterproductive. In certain circumstances, it could even hinder application of both United States and Japanese laws concerning trade issues. However, there is one circumstance in which the idea could prove quite useful. Certain market access disputes between the two countries have proven to be particularly intractable. A binational arbitration panel charged with determining the facts underlying the dispute and with reaching a decision regarding whether either side is being unfair, could be quite useful.

The United States should respond to the Takeshita suggestion for a new dispute settlement mechanism by proposing that an arbitration panel be established which would have jurisdiction and authority to decide certain market access disputes.

I. A Joint United States-Japan Arbitration Commission to Resolve Market Access Disputes

Many of the practices which create barriers to market access are already covered by bilateral and/or multilateral agreements. These practices include restrictive tariffs, quotas, investment barriers, subsidies, and discriminatory health and safety standards. However, many barriers to market access stem from less tangible practices ingrained in the business cultures of economies. There is currently no adequate method for resolving such market access problems between the United States and Japan. In some instances there seems to be an agreement by the two sides that steps need to be taken to increase United States sales in Japan, but individual United States companies seeking to sell in Japan simply make no progress. In these circumstances American companies often present specific complaints to the United States Government. The United States Government relays these complaints to the Japanese Government, which relays *its* companies' complaints about the United States companies' efforts. In short, there is no way for either government to resolve these kinds of issues. In these circumstances, it may be useful to have arbitrators look at the evidence on each side and make a determination as to whether or not there is unfair treatment of potential United States sellers.

A. The Standards and Law in Market Access Disputes

There is no clear *jurisprudence* regarding market access in international law. To some extent, then, these arbitration panels would be working in uncharted territory. However, in many other areas of trade relations between the United States and Japan, as well as between other trading nations, there are clear, agreed upon definitions of what constitutes an unfair trade practice. For example, there is broad international consensus concerning dumping and subsidization, reflected in the GATT codes

covering these practices.[1] Similarly, at least among developed nations, there are broad areas of agreement as to what constitutes violation of intellectual property rights.[2] In many instances market access problems are a symptom of deeper disjunctures between two countries or two economies. However, in certain circumstances, particularly where there is some acknowledgement on both sides that non-tariff barriers and structural differences between the two economies create market access difficulties, criteria might be established.

What should the standards be? Quite simply, they should not significantly differ from the standards used in government procurement or other competitive acquisition situations. For example, if a product meets specifications, if its price is competitive, and if the other incidents to the product, such as service contracts and warranty, are competitive, it should be expected that the product will be purchased. No basis for radically different market shares for a foreign product should exist either in Japan or in the United States. Government hiring provides another example. There, a careful demarcation of specifications and an independent review board determine whether candidates meet hiring qualifications.

Over time the arbitration panels could hopefully develop standards as to what constitutes true "market access," and true fairness between foreign sellers and domestic buyers of goods. Furthermore, these standards might eventually serve as points of departure for multilateral discussions of a "Market Access Code," similar to the other GATT codes.

B. Arbitration Procedures

An arbitration system to resolve market access disputes should be tried on a pilot project basis for the next two years. Such an arbitration panel would not work in all instances. Clearly, governments would not submit a matter as complex and emotionally charged as the current debate regarding the development of the FSX fighter plane to independent arbitrators, nor should they. However, such a mechanism could resolve many more mundane market access disputes. For example, many of the day-to-day problems stemming from the semiconductor agreement,[3] or concerning sales of brake pads to auto companies, diagnostic machines to hospitals, or pigment to paint producers would be amenable to this sort of solution.

Details of the arbitration procedure would not be difficult to work out. The United States and Japan could establish an arbitration commis-

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1. *See* Agreement on the Implementation of Article VI of The General Agreement on Tariffs and Trade (Geneva 1979); and Agreement on Interpretation and Application of Articles VI, XVI, and XXVII of the General Agreement on Tariffs and Trade (Geneva 1979).

2. *See Intellectual Property Talks Moving Ahead*, 5 INT'L TRADE REP. (B.N.A.) No. 48, at 1589 (Dec. 2, 1988).

3. Office of the U.S. Trade Representative, Arrangement between the Government of Japan and the Government of the United States of America concerning Trade in Semiconductors (Washington, D.C., Sept. 2, 1986).

sion. Each nation would choose a roster of, for example, ten to twenty non-governmental individuals who could serve as arbitrators. In the event of a market access dispute, the two sides could elect to submit the dispute to arbitration for resolution. The parties to the case should be the private potential seller and potential buyer, not the governments. The arbitrators would have a relatively short time, say six months, to review evidence, hear arguments, and reach a decision. The decisions would be binding on the parties, and if the arbitration panel found market access discrimination, the party in violation, in what admittedly would be a rather novel remedy, would be *required* to increase its purchases from the aggrieved party.

C. The United States Experience With the Semi-Conductor Agreement—An Illustration of the Need for an Arbitration Panel

The United States-Japan Agreement on trade in semiconductors rather starkly presents the difference between concepts of unfair trade in the dumping area and in the area of market access. The provisions of the agreement designed to eliminate dumping contained clear directives and clear standards. As a result, Japanese producers have stopped dumping semiconductors in the United States. Regardless of the controversy this may have occasioned, there is no question that this part of the agreement has met its envisioned goals.

The market access portion of the agreement, however, has not worked well. In part, this is because there is simply no clear *jurisprudence* or standard as to what constitutes "market access" and no clear method of enforcement. This is a problem not only with respect to semiconductors, but in many areas of United States-Japan trade, and in the trading relationships between other countries, as well.

As previously noted, the idea for this system of resolution derives, in part, from the problems in the market access provisions of the semiconductor agreement. In that instance, many American semiconductor companies approached the U.S. Government complaining of market access problems in the Japanese market. They argued that their products were comparable in quality, competitive in price, and should therefore be purchased by certain buyers, but that they were the victims of "discrimination." Japanese companies responded to the Japanese Government that the U.S. sellers' products were simply not competitive for one reason or another. There was simply no way for the governments to resolve these issues. A review of the contentions by independent fact finders might have helped to uncover the underlying causes, and to reach a resolution to this dispute.

D. Possible Objections to an Arbitration Panel

Admittedly, this type of arbitration panel would be a move toward

increased government involvement, or, at least, outside involvement[4] in the market process. This does not seem a particularly large price to pay for a solution to a series of intractable market access disputes.

A further objection that might arise to this system is that it is impossible to force a buyer to purchase from a supplier with whom he does not wish to deal. To some extent this is true, but there are ample precedents for this kind of system. For example, (i) under government procurement law, if the government fails to accept the most competitive bid, a court or appeal board can require the government to accept such a bid; (ii) in certain limited circumstances under labor law, if management declines to act in good faith, it can be required to enter into a contract with a labor union; (iii) under antitrust law, if a party wrongfully terminates a dealer, a court can order the reinstatement of that dealer, or require the payment of damages (under the described market access arbitration procedure, presumably the arbitrators could, under some circumstances, require the payment of damages); (iv) under housing and employment discrimination law, discriminating parties can be required to rent to certain tenants or hire certain employees in the event discrimination is shown.[5] These remedies, available in other areas of law, could be applied to the market access problem.

If the United States and Japan adopted this system, they perhaps could set an affirmative example that over time could be adopted by the GATT as a whole, rather than leading the developed nations in the number and acrimony of trade disputes.

II. Further Steps to Improve the Overall U.S.-Japan Trade Relationship

This Article does not suggest that this arbitration panel would work to solve all market access trade disputes. Many cases exist where this kind of private, mandatory dispute settlement will not be appropriate, either because the reasons for a particular market access problem are too complex, or because an issue is simply too large and politically charged.

Moreover, both parties must pursue different paths in resolving the overall trade problem. These include first, the use of market share targets in some U.S.-Japan negotiations. There are areas where such targets could be useful to both sides. Nevertheless, the United States and Japan should use this method sparingly. It has significant costs in terms of the long-term trade relationship between the two countries.

Second, the United States should intensify its trade efforts with respect to Japan and elsewhere. The trade negotiating sections of the U.S. Government are continually understaffed and less experienced than

4. "Outside involvement" assuming that the arbitration panel, to some extent, acted independently of the governments.

5. *See generally* 42 U.S.C. § 2000a-5(g); E.E.O.C. v. Safeway Stores, Inc. 634 F.2d 1273, 1284 (10th Cir., 1980) (proper remedy in "failure to hire" case is instatement in next available position); H.J. Heinz v. N.L.R.B., 311 U.S. 514 (1941); Procter & Gamble Mfg. Co., 248 N.L.R.B. 953 (1980) (failure to execute a prior agreement).

their counterparts. Once again, the semiconductor agreement provides a good example. The United States Government assigned a staff of over fifteen full time members to the successfully implemented dumping side of the agreement. Conversely, the U.S. Government did not assign a single full time person to monitor compliance with the market access portion of the agreement.[6] In its discussions concerning market access, the United States Government did not possess the detailed information necessary to make its case, nor did it retain a staff with the ability to negotiate painstakingly for weeks in solving problems that arose. For this reason, in part, the market access portion of the Agreement continues to falter. The United States must increase its trade negotiating capability by increasing its resources and expertise in this area.

Third, there was probably not a single participant at the Cornell Symposium who did not believe that macroeconomic efforts by the United States would accomplish more with respect to trade problems than any other single initiative. Specifically, a major reduction in the United States budget deficit would have a profound impact on United States trade and competitiveness by lowering interest rates and the cost of capital for United States manufacturers and by increasing the rate of savings in the United States. Similarly, responsible budget policy could, over time, lead to a further reduction in taxes, which would generally stimulate economic activity in the United States.

Fourth, the United States must make more readily available to its exporters export financing equivalent to that used by competitors in other countries. United States manufacturers should not lose sales because foreign manufacturers can provide better financing terms to a buyer. Manufacturers consistently convey to the U.S. Government that this is the reason for many lost sales. Export financing vehicles, provided either by the government or through private institutions, need to be dramatically improved in the United States.

Finally, United States business must generally intensify its export efforts. I recently was in Japan delivering several speeches to the Japan Fair Trade Center, a Japanese organization that studies trade problems. The active participants at the organization were generally mid-level managers from major Japanese corporations. At the conclusion of one of my speeches, a young woman asked a question. First, she stated that she would ask her question in English because it was quite complicated and she doubted that it could be translated accurately (it would be rare for a United States mid-level manager to ask a question to a Japanese speaker in Japanese). She then told me that she and others had formed

6. This dichotomy in staffing resulted from the fact that the dumping side of the agreement was enforced in Import Administration in the Department of Commerce, while the market access portion of the agreement was largely the responsibility of the United States Trade Representative's Office. Import Administration in the Department of Commerce, for a variety of historical reasons, is a large organization of close to 300 people which has the resources to quickly put new people on important new projects. Historically, the United Trade Representative's Office has not had this kind of resources at its disposal.

a "study group" to analyze the "anticircumvention" provisions of the 1988 United States Trade Act. These anticircumvention provisions are an extremely complicated part of the Trade Act, which concern how country of origin and definition of product will be established under the United States antidumping and countervailing duty laws. She posed a number of hypothetical situations and asked how these hypotheticals would be handled under the new law.

Frankly, I was amazed, not so much by her questions but at what her questions implied. The fact that there is a group of mid-level Japanese managers devoted to a study of United States anticircumvention legislation in the 1988 Trade Act is truly astounding. There are probably not ten trade lawyers in the United States who are fully familiar with this section, and certainly no mid-level managers. It is even clearer that there are very few mid-level managers in the United States who are familiar with Japanese customs and trade law, or who have a study group devoted to learning about it. Because I was one of the drafters of the United States anticircumvention legislation, I can say with certainty that the issues the woman raised had not been considered in the course of preparing the statute. The point is that the Japanese approach exporting with an unbelievable intensity of effort. This is an admirable quality, and certainly is a large part of the Japanese success in exporting. United States companies must duplicate this type of intensity of effort if they are to be successful. However, United States business cannot be expected to succeed alone. Their success will depend, to some extent, on the U.S. Government's leadership and trade negotiating strength. This intensification of efforts will be a necessary part of any successful United States exporting drive.

Conclusion

Along with a variety of other steps, the United States and Japan should consider the formation of arbitration panels to solve certain market access disputes. Disputes which may be amenable to such a solution are those in which the two sides basically agree that there are market access problems caused by structural or cultural differences between the two countries, and that neutral fact-finding can serve a purpose. Concepts and standards established through this arbitration process might be useful more generally in resolving market access problems between the two countries, and perhaps in multilateral contexts.