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JAPANESE CULTURAL TRADE BARRIERS

A NEW GENERATION OF ISSUES IN INTERNATIONAL TRADE

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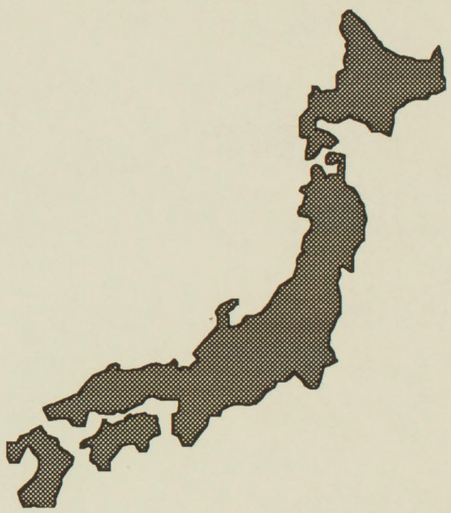

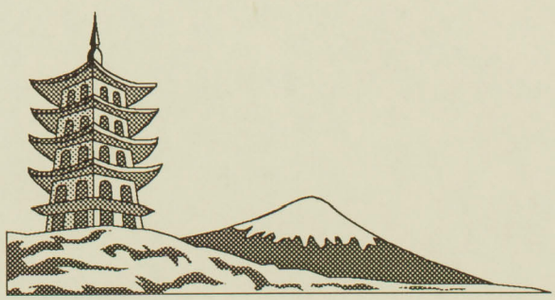

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Japanese Cultural Trade Barriers : A New Generation of Issues in International Trade

Martyn Taylor*

This paper explores the theme of cultural barriers to international trade. However, in order to simplify an extraordinarily complex subject, the writer assesses the situation for a single country : Japan. In particular, this paper details the nature of selected Japanese trade barriers, reveals their cultural basis and then appraises the international legal techniques that may be applied to overcome them. This paper also considers recent developments in this field of trade law and suggests that archetypes for resolving cultural trade barriers are now provided by the Structural Impediments Inititative and the proposed APEC Dispute Mediation Service. Finally, this paper briefly critiques a proposal mooted by the Japanese Ambassador to New Zealand in 1994; he suggested the establishment of a Japan - New Zealand "Dispute Management Committee".

I INTRODUCTION

Within the past five decades the global community has achieved considerable success in eliminating many of the more formal restrictions to international trade. Successive rounds of multilateral negotiations have progressively lowered the tariff and quota barriers that were proving so inhibitive to global commerce. Yet, as these formal restrictions to trade have incrementally diminished, additional, more subtle impediments to international trade have been exposed.[1] These newly emerging trade barriers are typically extremely complex in character and often appear intractable. In the most difficult situations they embody deeply entrenched cultural patterns. They are rapidly forming a new dimension of legal issues within international trade.[2]

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1 Because tariff increases are prohibited by the GATT, protectionism has now assumed the guise of "non-tariff" barriers. These non-tariff barriers were officially recognised during the Sixth (Kennedy) Round of GATT multilateral negotiations (1963-1967). But they were not then addressed due to the risk of compromising delicate tariff-reduction negotiations. In the Seventh (Tokyo) Round of multilateral negotiations (1973-1979), codes of conduct were created for non-tariff barriers, but substantive reduction agreements were left to subsequent rounds. In the latest Eighth (Uruguay) Round of multilateral negotiations (1986-1994), informal barriers were tackled, but only superficially. See EJ Ray "Changing Patterns of Protectionism: The Fall in Tariffs & Rise in Non-Tariff Barriers" (1987) 8 Nrthwst J Int'l L Bus 26, 30.

2 In their January 1995 Trade Policy Review of Japan, the GATT Secretariat commented: "*It is recognised that [Japanese] formal trade barriers on industrial products are now generally low. The attention of Japan's trading partners has thus turned to conditions covering Government procurement practices, regulations on standards and testing requirements,*

Professor RJ Smith of Cornell University commented in 1989 that "*the greater the extent to which complex cultural and historical factors colour a troubled international relationship, the less amenable it may be to satisfactory mutual adjustment*".[3] In the context of the contemporary relationship between the United States and Japan, this comment seems particularly astute. For it is here that the elusive nature of these troublesome trade barriers has been dramatically revealed.

Since the Japanese defeat in 1945, the relationship between the United States and Japan has remained relatively amicable. However, over the past decade it has become increasingly fraught with acrimony, mutual accusation and even fears of reciprocated retaliation. Japan and the United States constitute the world's two economic superpowers so their trading relationship ranks foremost in international commerce.[4] Annual trade between the United States and Japan aggregates an astounding NZ$100 billion worth of American products exported to Japan and NZ$200 billion of Japanese products exported to the United States.[5] Yet these simple statistics quickly reveal a convoluted quandary, for the relationship between the United States and Japan has been marred by an alarming blowout of the United States trade deficit.[6] Last year this deficit totalled a record NZ$108 billion. To the chagrin of the American public, it seems their wealth and prosperity is unequivocally transferring to the Japanese.[7]

With characteristic bellicosity, the United States administration sought a convenient scapegoat for their economic woes.[8] Japan seems to have been perceived as an easy victim.[9]

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customs procedures, administrative guidance, antimonopoly legislation, the distribution system, keiretsu and other business practices" See GATT *Trade Policy Review - Japan : Volume One* (GATT, Geneva, January 1993), 55.

3 See RJ Smith "Culture as an Explanation : Neither All Nor Nothing" (1989) 22 Cornell Int'l LJ 425, 434.

4 The economic relationship between Japan and the United States is both the most important and the most complex in international trade. The two nations together account for 40% of global output, and their wealthy populations make them the world's largest markets. Their firms compete aggressively for international leadership in numerous high-technology and industrial sectors. See CF Bergsten *Reconcilable Differences : United States - Japan Economic Conflict* (Institute International Economics, Washington DC, 1993), 1.

5 America's current account deficits have cumulated to about US$1 trillion over the past decade, with Japan's surpluses accounting for roughly two-thirds of this figure. See Bergsten, above n 4, 1.

6 Ironically this deficit was caused not so much by trade barriers, as a divergence of macroeconomic policy between the two nations. Each country's saving-investment balance, together with the real exchange rate, determines the aggregate trade surplus or deficit. It seems in the long-run, demographic changes in the two nations, which determine the relative proportions of high and low savers in the domestic economy, will eventually push the trade position towards a greater balance. But in the short run the balance will be affected most directly by *macro*economic policies. In application to trade barriers, the trade deficit is more a "red-herring" that serves as a political instrument for focusing and intensifying public opinion. Trade barriers represent a problem in their own right, regardless of the size of the trade imbalance. Yet Bergsten estimates that structural considerations may be curtailing US exports by up to US$11 billion annually. See Bergsten, above n 4, 56. See also TJ Pempel "The Trade Imbalance Isn't the Problem" (1989) 22 Cornell Int'l LJ 435, 436.

7 Essentially Japan is maintaining domestic output and employment at the expense of other countries, such as the United States, whose external deficits have risen as a counterpart to the Japanese surplus. Servicing this accumulated foreign debt requires additional transfers of American resources abroad. Continued depreciation of the dollar will thus adversely affect the American terms of trade and reduce American wealth and expenditure. See Bergsten, above n 4, 5.

8 Kazuo comments that much of the hostility reflects frustration with America's own performance and a resulting tendency to look for scapegoats abroad. See N Kazuo "Treating America's Japanophobia" (1989) 16:4 Japan Echo 58.

Yet the economic gulf and high level of cultural misunderstanding between the two nations has exacerbated matters.[10] While the United States economic system generally worships the consumer and the sacrosanct Western ideal of perfect competition; Japanese society has long embraced a culture where the producer is paramount.[11] In Japan, the juxtaposition of cultural, political and historical factors have permitted power to prevail within immense corporations. These have in turn strongly influenced the shape and development of the Japanese legal and economic system.[12]

Yet this is not to suggest that the United States is wholly to blame for the current crisis in American relations with Japan.[13] The American perception that Japan is engaging in "unfair" trading practices appears well-founded. Within Japan, government and business have embraced in a cosy and often exclusive relationship that has spawned a proliferation of pervasive and self-serving bureaucratic regulation.[14] Such intervention has adopted the character of both overt governmental legislation, and a more covert manner of governmental influence known as "administrative guidance". While the overt forms of Japanese discrimination have been largely eliminated by the GATT, many of the more covert techniques have remained. Such tacit discrimination against foreign products has so far eluded direct GATT scrutiny.

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9 Americans perceive that many Japanese, particularly the older generation, have deep feelings of gratitude, obligation and admiration towards America as a result of American political and economic guidance following World War II. This has meant Japan has attached far greater weight to its relations with the United States, than to its relations with other countries. See WA Wallis "Economics, Foreign Policy and United States-Japan Trade Disputes" (1989) 22 Cornell Int'l LJ 381, 382.

10 Moreover, the politics of the "Japan issue" tilts heavily away from the key macroeconomic issues towards the microeconomic concerns. This is partly because individual industry problems lend themselves easily to political anecdotes and outcomes that are far more comprehensible to the public. Sectoral complaints are also the direct source of constituents' appeals to governmental representatives and delivery on these demonstrates the ability of representatives to "do something". See MB Smith "Bilateralism's Role in Trade Liberalisation" (1990) 69 Economic Impact 22.

11 In their January 1995 study, the Institute for International Economics concluded that Japanese tariff and non-tariff barriers inflict an annual cost to Japanese consumers of US$100 billion. At the expense of consumers, Japanese producers pocket perhaps US$60 billion. The Japanese government collects only around US$2 billion in tariff revenue. The net cost to Japanese society as a whole amounts to around US$12 billion. See Y Sazanami *Measuring the Costs of Protection in Japan* (Institute International Economics, Washington DC, 1995), 2.

12 Access difficulties by American firms to the Japanese market, combined with the asymmetrical ease of access by Japanese firms to the American market, has spurred fears that Japanese firms may exercise predatory behaviour from behind the shelter of a domestic bastion market. See N Kazuo "The Fundamental Flaws in the American 'Containing Japan' Thesis" (1989) 16:4 Japan Echo 52, 55. See also S Johnson *The Japanese Through American Eyes* (Stanford University Press, Stanford, 1988), 30. See also T Tanaka "The Role of Law of Law in Japanese Society : Comparisons with the West" (1985) 19 UBC L Rev 2, 17.

13 During the past two decades there have been three peaks in trade tensions between the United States and Japan. The first peak was witnessed from 1968-1972, the "textile war". Here President Nixon pledged protection of the United States textile industry by controlling imports from Japan. He pressured Japan to reduce exports of textiles, but met fierce opposition from the Japanese. The second peak occurred from 1977-1979 and concerned steel and colour televisions. The third peak has continued from the early 1980s and has seen a striking broadening and perpetuation of trade frictions. See S Yachi "Beyond Trade Frictions : A New Horizon for US-Japan Economic Relations" (1989) 22 Cornell Int'l LJ 389, 391.

14 After World War II, the Japanese government lent assistance to private enterprises to precipitate a rapid economic recovery. The pre-existing cultural propensity towards close relations between government and business was strengthened considerably. This lead to the establishment of a mechanism whereby the business community's wishes were directly reflected within government policy. See O Nariai *History of the Modern Japanese Economy* (Foreign Press Centre, Tokyo, 1994), 32.

The Japanese business milieu has also received sustained American assault.[15] Japanese society has long extolled the virtue of long-term relationships and ranked the ambitions of the group above those of the individual. These Confucian ethics have evolved into a form of Japanese "relational contracting" that fuses the Western bargain theory of the contract with the twin Eastern ideals of harmony and long-term security. On a macro scale, such relational contracting has promulgated the large-scale practice of *dango* collusion within the construction industry, and the omnipotence of the corporate *keiretsu*.[16] The intensely communal, yet historical feudal structuring of Japanese society, has further catalysed the development of the complex business pyramids that shape Japanese business practices of today.[17]

Finally, American allegations highlight the Japanese distribution system, a system deeply rooted within Japanese history and culture. In its modern form, the Japanese distribution system comprises long and complex chains of intermediary wholesalers that link the producer with the Japanese consumer.[18] These chains have effectively maintained a unique social welfare system within Japanese society by absorbing unskilled labour, while cultivating the intricate packaging and high level of service associated with many Japanese products and retail outlets. Meanwhile, Government policy has sheltered the system from the inevitable tide of competition.[19] An example is provided by the Japanese Large Store law,

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15 Denial of access to the Japanese market (the world's second largest) may significantly hamper individual foreign industries. It reduces their ability to achieve economies of scale and slows their progress along the learning curve - both factors being critically important to success in most high technology sectors. See Bergsten, above n 4, 6.

16 Linked by corporate ties, long-term supply arrangements, and an ongoing chain of reciprocal business favours, members of a Japanese *keiretsu* feel compelled to buy from another *keiretsu* sibling - even when an outside product represents a more economically justifiable choice. There exists extensive microeconomic theory concerning anti-competitive barriers to entry. This postulates how various examples of industry structure (for example, advertising intensity or commitment of capital) can disadvantage entrant firms relative to incumbents. Overall the theory predicts that the existence of barriers to entry results in fewer entries and therefore allows incumbent firms to enjoy above average profitability. Entry is, therefore, important in microeconomic theory as a means of promoting competition and thereby improving the allocation of economic resources. Many of the microeconomic models relating to a firms entry into a particular industry have a direct application to an importer's entry into a domestic protected market. See R Clarke & T McGuiness (eds) *The Economics of the Firm* (Basil Blackwell, New York, 1987), 127. See also RH Frank *Microeconomics and Behaviour* (2ed, McGraw Hill, New York, 1994). 205. See also PA Geroski, RJ Gilbert & A Jacquemin *Barriers to Entry and Strategic Competition* (Harwood, Zurich, 1990), 3. See also PA Geroski *Market Dynamics and Barriers to Entry* (Basil Blackwell, Oxford, 1991), 17. See also J Tirole *The Theory of Industrial Organisation* (2ed, MIT Press, Massachusetts, 1989), 205. See N Terumasa "Japan's Place in the World" (1992) 14 Japan Echo 2, 5.

17 The United States is essentially a pluralist society in which policy-making tends to be dominated by specific interest groups. In contrast, Japan, as a modern trading state is ruled more by a bureaucratic and political élite. Power in Japan is concentrated essentially within an interlocking triumvirate of politicians, bureaucrats and business associations. Japanese policy for the past 30 years has therefore been dominated by this group's desire to preserve overall economic stability, remain internationally competitive, and enhance opportunities for economic growth. See J Adams "The Law of United States-Japan Trade Relations" (1990) 24:2 World Trade 37, 40. See also Y Matsuura "Law and Bureaucracy in Modern Japan" (1989) 41 Stanford LR 6, 29.

18 Tokyo ranks as one of the most expensive cities in the world (35% more expensive than London), mainly because high land prices act in conjunction with this complex "multiple mark-up" distribution system. See N Iwao "A Japan-US Free Trade Zone?" (1988) 15:4 Japan Echo 43, 47.

19 It seems the GATT Secretariat shares a similar view: "*Further trade liberalisation, while it will alter considerably the structure and levels of Japanese imports, should be pursued by the Japanese Government for its own benefit, inducing long-run economic competitiveness rather than seen as a fix for bilateral imbalances*". See GATT, above n 2, 11.

which maintained the parochial feeling of Japanese society by favouring existing smaller local stores and thwarting the development of large and efficient malls and hypermarkets.

Yet despite the perceived successes of the United States in reducing Japanese barriers to international trade, there have been high costs. The Japanese have become increasingly vexed by the constant American bullying and are now seeking to assert their presence within international society.[20] They have also become increasingly alarmed by the perceived Westernisation, indeed Americanisation, of their unique oriental culture. The recent turmoil within the Japanese political system, the soaring value of the Yen, and a severe domestic recession have further engendered something of a backlash against the United States.[21] The all-American way of life may be gradually losing its appeal to the Japanese psyche.

Where does this leave New Zealand? In the global arena of international trade, New Zealand, as a small but capable nation within the global community, must continue to extol the virtues of such initiatives as the Asia-Pacific Economic Co-operation ("APEC") and the World Trade Organisation ("WTO"). Japan's increasing assertiveness and the America's continued belligerency have progressively raised the temperature of each successive United States-Japan trade dispute.[22] This has also provoked resentment and a higher degree of cultural friction.[23] The resulting climate of uncertainty is undermining the stability of the world's financial, economic and trading networks.[24] The nations of the world can only pray that the United States and Japan will continue to solve their disputes amicably. The global implications of an all-out trade war are potentially cataclysmic.[25]

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20 Ironically, a traditional Japanese proverb states : *no aru taku wa tsume wo kakasu* or "*An able hawk hides its talons*". The Japanese perceive aggressive bargaining tactics within negotiations as fairly crude and childish. See BM Hawrysh & JL Zaichkowsky "Cultural Approaches to Negotiations : Understanding the Japanese" (1989)7 Int'l Mrkting Rev 28, 38.

21 In international trade the United States has a reputation for arrogant and bullying behaviour. Takeshi notes that the American perception of "fair trade" is highly judgemental and that this "American Unilateralism" in trade is universally resented. This resentment has tainted many aspects of American international relations. See S Takeshi "Coming Next : Japan-United States Legal Friction" (1988) 15:1 Japan Echo 38, 383.

22 Fukushima comments: "*as goods oriented friction is supplanted by institution oriented friction, problems in bilateral relations will become more structural and political in nature - hence frictions will escalate*". See GS Fukushima "United States-Japan Free Trade Area : A Sceptical View" (1989) 22 Cornell Int LJ 455, 459.

23 Bergsten comments: "*On the political front, many Americans - including a number of politicians, business people, and labour leaders - view Japan as a major threat to America's economic future. Many see Japan as an international 'free-rider' that fails to pay its way...but instead depends on others for defence of its strategic interests and for maintenance of the open international economic system that is so crucial to its [relatively closed] economy...Japan will continue to engender negative reactions in the United States as long as it retains its image of a closed and exclusionary society that fails to play an international role commensurate with its wealth and capability*". See Bergsten, above n 4, 4. See also "The Centre of Gravity Shifts East", *The Vancouver Sun*, Vancouver, 13 November 1993.

24 It is no secret that jitters on Wall Street, or in Tokyo, have profound implications throughout our modern global village. For example, the Washington Times stated: *"There is no doubt that the event that set off tremors in the financial markets was the quarrel between the United States and Japan"*. An aggravated relationship between Japan and the United States would have an adverse effect not only on the their own development, but on the entire world economy. See "Volatility Linked to Japan-United States Conflict", *The Washington Times*, Washington DC, 19 July 1994. See Fukushima, above n 22, 459. See also "Now That the Rising Sam is Eclipsing the Rising Sun", *Business Times*, New York, 21 July 1994.

25 Nukuzawa comments that the current trade relationship between the two economic super-powers [US/Japan] has analogies to the cold-war relationship between the two nuclear superpowers [US/USSR]. The relationship remains stable because each nation knows that if one were to start a (trade) war, it would be equally devastating to both. Nukuzawa termed this

PART ONE: CULTURAL TRADE BARRIERS

II JAPANESE CULTURAL BARRIERS TO TRADE

A The Decline in Tariffs and the Rise of Non-Tariff Barriers

In 1987 the World Bank reported that although Japan possessed the developed world's most heavily protected market, the most significant Japanese trade barriers did not exist in the form of traditional tariffs and quotas.[26] Indeed, as Japanese politicians frequently highlight, Japan maintains one of the world's lowest levels of tariffs and quotas and the Japanese remain exemplary in their adherence to GATT bindings.[27] However, it seems that Japanese protectionism has followed a pattern that is now increasingly evident throughout the entire international community.[28] As formal tariffs and quotas have gradually declined, so "non-tariff" barriers have emerged as the primary impediment to international trade.[29] Professor JH Jackson metaphorically explains: "*the receding waters of tariffs and other forms of overt protection inevitably uncover the rocks and shoals of non-tariff barriers*".[30]

Unlike tariffs and quotas, non-tariff trade barriers are not established solely by law. Instead they embody the interplay of legal, political, and cultural factors underlying an

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the international trade version of nuclear deterrence : Trade Mutually Assured Destruction (T-MAD). See K Nukazawa "Japan and the United States : Wrangling Towards Reciprocity" (1988) 64 Harvard Bus Rev 42, 50.

26 In 1955, with the support of the US, Japan became a contracting party to the GATT and began a gradual period of import liberalisation. Most quotas in the manufacturing sector had been eliminated by the beginning of the GATT Kennedy Round in 1964. By the mid-1980s, tariff levels in Japan were comparable (if not somewhat lower than) those maintained by the United States and the European Community, and quotas had been largely eliminated. See Bergsten, above n 4, 71.

27 While Japanese tariff rates are relatively high for agricultural commodities (13.9%), they are very low for other categories. The 1991-1992 average (unweighted) tariff on all products was only 6.9% (and 5.2% for manufactures). Again, 97% of all industrial tariff lines are bound, yet the rate for agriculture is an abject 59%. See Bergsten, above n 2, 68.

28 Dunkel labels this trend the 'new protectionism': "*We must not disguise what is happening. At the same time as governments profess their attachment to the open trading system, they are undermining it by resorting to indirect discrimination...their involvement in such deals disqualifies them from challenging the similar behaviour of others. This is the new protectionism - measures in a grey area between legality and open breach of GATT rules.*" Preusse labels the trend 'neo-protectionism' and defines it in terms of a "*bundle of new, subtle forms of non-tariff intervention in trade, which have as common traits: recourse to selective measures; selectivity; bilateralness; and invisibility....this represents a new cancer in the trading system*". See J Dunkel "The New Protectionism - Who Pays?" (1982) 23 EFTA Bulletin 1, 10. See also HG Preusse "Voluntary Export Restraints - An Effective Means Against a Spread of Neo-Protectionism?" (1993) 27:1 World Trade 5, 5.

29 Ray attempts to define such informal non-tariff barriers in the following terms: "*A non-tariff barrier is defined as any measure (public or private). other than a customs tariff, that causes internationally trade goods and services, or resources devoted to the production of these goods and services, to be allocated in such a way as to reduce the potential real world income. Potential real world income is that level attainable if resources and outputs are allocated in an 'economically efficient manner'*". See Ray, above n 1, 28.

30 Gröetzinger advocates the complementary view; non-tariff barriers have not only been exposed, but they have also increased: "*National groups, formerly protected from foreign competition by high tariffs, now feel obliged to pressure their respective legislatures into adopting new non-tariff protective barriers*". See JH Jackson *The World Trading System Law and Policy of International Economic Relations* (MIT, Boston, 1989). See also J Gröetzinger "The New GATT Code and International Harmonisation of Products Standards" (1975) 8 Cornell Int'l LJ 168, 170.

international trading relationship.[31] They remain difficult to define, elusive to identify, and problematic to police.[32] We should not be surprised that while GATT resolutely condemns such trade impediments, they have been frequently regarded as "intractable" by the international community and conveniently overlooked.[33] One peculiar form of non-tariff barrier is the "cultural trade barrier".

B The Conceptual Status of Cultural Trade Barriers : Identifying the Issues

Rachel Field, an Australian solicitor, notes in a recent article that cultural explanations for economic issues are often quickly dismissed.[34] She comments that this is often unfortunate; because while it is clear that culture is not the sole basis on which to understand particular trade phenomena, it cannot be denied that cultural elements have always played an important role in understanding the nature of international trading relationships.[35] Indeed, many of the remaining structural impediments to free trade appear deeply entrenched within the history and culture of the respective nations.

While the existence of underlying cultural influences is clearly recognisable, such influences are almost impossible to isolate. This makes the definition and recognition of cultural trade barriers extraordinarily complex.[36] Numerous commentators have struggled to articulate the underlying phenomenon. Japanese trade restrictions have been described as a "*broad mix of deeply rooted structures, business practices, and cultural attitudes*";[37] "*a web of government programmes, and oligopolistic practices....a subterranean maze of non-tariff*

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31 In the Japanese context, examples of non-tariff measures include: import quotas; government procurement limited to domestically produced goods; price support programmes coupled with restrictions on domestic sales; and various restrictions stemming from the Japanese system of industrial organisation. See Sazanami, above n 11, 19.

32 Ray identifies three primary factors explaining the shift to non-tariff barriers: (i) industrialised nations now have highly developed taxation systems and no longer require tariff-related income; (ii) non-tariff barriers are subtle and more difficult to quantify, hence GATT Rounds have tended to ignore them; and (iii) they can be used to protect special interest groups. Pomfret elaborates: "*Policy-makers may favour non-tariff barriers because they grant more discretionary power than do tariffs (the level of which is bound by international agreement) and because their opaqueness may forestall opposition from groups negatively affected by trade restrictions*". See R Pomfret *International Trade : An Introduction to Theory and Policy* (Basil Blackwell, New York, 1991), 121. See also Ray, above n 1, 32.

33 Unfortunately this has now allowed considerable scope for governmental avoidance of GATT obligations. See W Ruigrok "Paradigm Crisis in International Trade Theory" (1991) 25:1 World Trade 77, 81.

34 See R Field "Japanese Cultural Trade Barriers and the Search for an Appropriate Dispute Settlement Forum : An Australian Perspective" (1993) 21 Aust Bus LR 173, 179.

35 Smith reasons that cultural factors may loom large in some contexts, but play a minor role in others. They cannot serve as the entire explanation for any given development, but they are certain to be of some moment in every case. Smith also comments that legal, political and economic elements are typically heavily infused with cultural meanings; as culture provides the environment within which all legal, political and economic decisions are made. See Smith, above n 3, 426.

36 The current very broad conception of "non-tariff barriers" creates extremely complex issues. Shutt comments, for example, there remains the logical possibility that parts of a country's social infrastructure might constitute a "non-tariff barrier": "*The logical extension of this argument might lead us to the conclusion that all forms of public service - even down to the police and armed forces - are actually or potentially a form of subsidy to the private sector and thus preclude any genuinely undistorted competition*". See H Schutt *The Myth of Free Trade Patterns of Protectionism Since 1945* (Oxford, London, 1985).

37 See S Cohen *Uneasy Partnership : Competition & Conflict in US- Japan Trade Relations* (MIT, Boston, 1985), 165.

barriers";[38] a "*cult of uniqueness*" that produces "*significant non-tariff barriers to foreign trade and investment*";[39] and a "*network of personal ties between Japanese businesses*".[40] Professor PW Punke of George Washington University notes that these have "*only hinted at the cultural element of non-tariff barriers*" with "*none giving more than a flavour of the core problem*".[41]

Punke's own strategy for identifying cultural trade barriers employs the following definition:

> A cultural trade barrier is best defined as an impediment to the free flow of internationally trade goods and services that stems, *to a significant degree*, from entrenched cultural patterns, rather than solely from economic or political motivations. [emphasis added]

However, there clearly remain severe difficulties with this approach. How does one differentiate between "*entrenched cultural patterns*" and "*solely economic or political motivations*"? Often these appear inextricably intertwined.[42] Politicians and businesses may exploit culture to justify trade restrictions - exaggerating and manipulating cultural traits for their own advantage. Conversely, cultural patterns may themselves evolve via economic and political influences.[43]

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38 See Pempel, above n 6, 436.

39 See E Frost *For Richer, For Poorer : The New United States - Japan Relationship* (Pergemon, New York, 1987), 79.

40 See R Baldwin *Non-tariff Distortions in International Trade* (Oxford, London, 1970), 5.

41 See MW Punke "Structural Impediments to United States-Japan Trade : The Collision of Culture and Law" (1990) 23 Cornell Int'l LJ 55, 59.

42 For example, Thatcher explains the underlying socio-cultural dynamics of the United States-Japan leather dispute: "*Although in comparison with other trade issues leather did not seem like an issue worth expending significant amounts of political capital upon, Japan resisted demands for change in the face of a GATT determination of illegality because of important characteristics of its society*". Thatcher comments that for centuries, outcast elements of Japanese society, the *burakumin*, have worked in such undesirable occupations as tanning and grave digging. Because of extreme discrimination against these people, which continues even today, they tend to be very poor with little chance to rise in society. The Japanese Government have therefore implemented affirmative action policies to protect existing *burakumin* employment and promote their social improvement. A direct conflict existed between the international demands of American businesses for access to the Japanese market and the Japanese Government's domestic policy of protecting an historically deprived minority group. See KB Thatcher "United States Trade Act 1974, Section 301 : Unfair Trade Practices by the Japanese" (1987) 81 Northwestern Uni LR 492, 522.

43 For example, modern Japanese law expresses Japanese cultural patterns - and reflects historical economic and political influences. The first Japanese judicial text was Prince Shotoku's *Code of the Seventeen Articles* written in 604. Its first principal, "*harmony must be honoured*", remains fundamental to modern day Japanese society. The Japanese did not inherit the Roman Law traditions of Western societies, but instead were deeply influenced by the precepts of the Confucian doctrine. To some extent the Confucian concept of the moral rule was substituted for the Rule of Law, with the whole concept of the Japanese State, of Japanese Law, and of social relations lastingly marked by it. In obtaining social dues owed by another, legal proceedings were traditionally regarded as a crude, vile and degrading method. The traditional way to resolve disagreement utilised a third party conciliator, such as a respected elder. This conciliation avoided the humiliation of the defeated party and allowed harmony to be restored and maintained. These social rules of behaviour were known as "*giri*". For example, in the Western world an employer-employee relationship was governed by strict legal rights and obligations created by contract. Within Japan this relationship was governed by unwritten social rules whereby an employer offered protection and in return the employee offered loyalty. In the Japan's modern day legal system, these notions governing social life often underlie much Japanese caselaw. The Japanese Judiciary integrate this historically-derived social reality into Japanese law together with the strong influences of international jurisprudence. See JH Moitry "Competition Law in Japan" (1988) 11:2 World Competition 5, 7. See also Hawrysh & Zaichkowsky, above n 20, 42. See also Y Noda "The Rules of Giri" in Y Noda *Introduction to Japanese Law* (Tokyo University Press, Tokyo, 1982).

Punke attempts to gloss such inherent difficulties within his definition. He reasons that the essence of culture is "permanence" and suggests that cultural factors have an independent significance that contributes to the complexity of the relevant trade restriction and gives it an essential feeling of resilience and "immutability":[44]

> Underscoring the permanence of culture, one author has contrasted culture with mere attitudes, arguing "*culture implies a certain permanence, inherence and immutability that does not apply to other attitudes*". Culture differs from economic and political motivations in the same respect - it is far more permanent and resistant to change.[45]

Field accepts Punke's approach but proceeds further.[46] She suggests that cultural trade barriers may be broadly divided into two groups - "attitudinal" barriers and "institutional" barriers. Attitudinal barriers involve the psychological manifestation of culture to create a trade impediment based largely on perception; such as a negative view of foreign products by local consumers or officials. Clearly such attitudinal traits are not unique to Japan. Most of the world's peoples exhibit some form of psychological resistance to foreign products and display an inherent preference for local produce. In New Zealand, for example, such resistance is exemplified by our "Buy Kiwi-Made" campaigns - which have even received direct government funding.

Attitudinal barriers may themselves be roughly sub-divided into two groups. They seem to occur in the form of either consumer preferences, such as a reluctance to buy foreign products. Or the perceptions of officials, such as the rejection of imports because they do not meet domestic technical criteria. The latter attitudinal barrier clearly overlaps with a wider category of trade restrictions known as "technical barriers to trade".

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44 Hawrysh and Zaichkowsky note that given the complexities of culture, most studies have used "country" as a surrogate for "culture". Yet they argue "culture" is not something granted only to citizens of a country, it is something learned from exposure to an environment. Similar environments provide similar influences and hence shape similar behaviour. Hence, in their view, culture influences behaviour by shaping habits, skills and styles from which people construct "*strategies of action*" or persistent ways of ordering behaviour through time. For example, Japanese and Americans have different negotiating strategies. The Japanese consider a personal and trusting relationship to be an essential prerequisite to business and place a greater emphasis on status (according more respect to buyers than sellers). Japanese decision-making also tends to be made by group consensus ("*ringi*"). See Punke, above n 41, 59. See also Hawrysh, above n 20, 28. See also JL Graham "The Japanese Negotiation Style : Characteristics of a Distinct Approach" [1993] 4 Negotiation J 123, 123.

45 *Attitudes* are a settled way of thinking. For example: "*Japan cannot afford the luxury of importing expensive foreign products*", or "*Japanese products are of superior quality to foreign products*". They may reflect cultural beliefs and values, but they are readily amenable to change.

Beliefs are the acceptance of something as fact. For example, religious beliefs such as Confucianism and Buddhism inform Japanese that the highest good is the good of society and that the worst blemish is egotism and selfishness. Similarly, *Shinto* (a native Japanese religion) emphasises harmony throughout all aspects of life, including social and business relationships. Beliefs and values are often strongly rooted in custom and tradition, they are "*far more resistant to change*".

Values are moral ideals, principles and standards. For example since World War II the Japanese have embraced the twin ideals of peace and affluence. Article 9 of the Japanese Constitution 1947 states "*The Japanese people forever renounce war....and the use of force as a means of settling international disputes*". Beliefs and values tend to be entrenched and more "permanent". See P West "Cross-Cultural Literacy and the Pacific Rim" [1989] 2 Business Horizons 3, 7.

46 See Field, above n 34, 174.

The second broad category of cultural trade barrier mooted by Field was the "institutional" trade barrier. These barriers occur where trade discrimination is caused by an organisational pattern within an economy and this pattern has a predominately cultural basis.[47] Institutional barriers are often extraordinarily complex, with the most intractable examples occurring where the pattern causing the discrimination is central to the unique cultural identity of the society itself. Hence the dismantling of the trade barrier would require a deconstruction of deeply entrenched national values and beliefs. This predicament is manifested by Japan's corporate *keiretsu* and retail distribution system.

A direct attack on a deeply entrenched institutional barrier would clearly prove counter-productive as it could easily be misinterpreted as an assault on the culture of the entire nation.[48] The associated issues of social identity and national pride are highly emotive.[49] Ideally such barriers should therefore be approached with extreme sensitivity. Any international pressure should be selective and incremental.[50] The current United States' strategy towards Japan unfortunately appears extremely brutal and *ad hoc*.

In order to assess the sensitivity and effectiveness of current international legal techniques for addressing cultural trade barriers, it is first necessary to detail the essential character of the cultural trade barriers themselves. Japan provides an ideal case study. Japan is clearly not unique in exhibiting cultural barriers to trade. Cultural barriers seem to arise whenever there are large cultural differences between nations, however, Japan currently manifests the most studied examples.

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47 These are not to be confused with "structural trade barriers" (which concern any organisational pattern within a society constituting a barrier to trade). The term "structural barrier" is derived from microeconomic theory. See Field, above n 34, 174. See Geroski, above n 16, 28.

48 By illustration, an editorial in the *Nikkei* (a leading Tokyo newspaper) stated: "*It must be clearly understood that what the United States was seeking in relation to the bilateral talks when it demanded that Japan change the structure of its distribution system was nothing less than a demand that the country also change its culture*". See *Nikkei Shinbun*, Tokyo, 11 January 1992, editorial.

49 Yachi comments that economic policies and institutions are amenable to legislative change, albeit at considerable cost and pain. But, when Japanese are told that their "distribution system" (in its socio-economic totality) is a barrier, the issue becomes intractable. Difficulties in consumer behaviour are another example. When Japanese consumers are told that they "*Don't buy foreign goods*", again the matter is so ill-defined that it becomes intractable. Hence, while one party becomes progressively more assertive in their allegations of discrimination, the other party becomes increasingly defensive. See Yachi, above n 13, 396.

50 Yachi proposes three techniques for overcoming intractables (such as cultural trade barriers):
First, they must be defined narrowly. The issues should be narrowed to concern specific laws, policies and institutions, rather than criticising vague entireties (e.g. targeting the Japanese Large Store Law instead of criticising the entire Japanese distribution system).
Second, a longer time-frame is required; intractables are not "unchangeables", they merely take substantially longer to alter (i.e. a sufficiently slow enough pace to allow changes in socio-cultural behaviour).
Thirdly, cultural magnanimity is essential; cultural barriers surface largely because nations have very different cultural, historical, and traditional backgrounds. Interpreting another's behaviour using one's own cultural perceptions will inevitably lead to misperceptions (i.e. judgemental behaviour is a recipe for cultural conflict).
See Yachi, above n 13, 397. See also JH Park "Trading Blocs and United States-Japan Relations" (1992) 15:3 World Competition 50, 55.

III ATTITUDINAL BARRIERS TO TRADE

A Japanese Consumer Preferences : From Barbie Dolls to Mercedes Benz Cars

Over the past four decades there have been numerous allegations made by American firms that Japanese consumers unfairly discriminate against American products.[51] Claims of a universal "Buy Japanese" mentality within Japan have been received with considerable sympathy from the United States Congress. This has in turn perpetuated an elaborate myth, premised largely on cultural misunderstanding, that has remained to this day.

At first sight there appears to be substantial anecdotal evidence of discrimination by Japanese consumers against foreign products.[52] Yet on closer analysis, the facts reveal that the issue is not that simple. Much of the alleged discrimination has a more innocuous explanation - such as product unsuitability, inferior product quality, or consumer unfamiliarity. American companies have frequently blamed a Japanese nationalistic attitude for their failures, rather than questioning how well their products were tailored to the differing demands and requirements of the Japanese market in the first place.[53]

Many recent articles have been extremely critical of the manner in which American companies have blamed this "*pervasive buy-Japanese attitude*" rather than accepting responsibility for their own ineptitude.[54] Dr VR Alden, a leading figure in the United States-Japan trade debate, has noted that when many of the anecdotes are investigated systematically, the allegations of discrimination are not substantiated.[55] Frequently the product has been revealed as fundamentally unsuitable for the Japanese market.[56] For example, Alden explains that Mattel's "Barbie Doll" had appalling sales figures within Japan - then her curly blonde hair was changed to straight black, and her sales rocketed. Similarly with Johnson & Son Inc, who encountered severe difficulties selling their "Lemon Pledge" furniture polish - then they

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51 These have even included allegations of xenophobia and overt racism. See Moitry, above n 43, 12.

52 See Punke, above n 41, 62.

53 The writer talked with Professor George Fields (International Business Consultant and Professor of Marketing at Pennsylvania University) who commented that the essence of the difficulty seemed to concern "brand engineering". The American firms had not identified the different stimuli that are required to trigger consumers to buy a product in different nations. Fields noted that anywhere in the world the physical needs of consumers are fundamentally the same. However, the differences in culture will require products to be adapted to fit the differing emotional and sensory characteristics (and perceptions) that will encourage consumers buy the product. Fields considered that this was the essence of the perceived "attitudinal" cultural barrier to trade.

54 This ineptitude seems more a misunderstanding of the different marketing approach required, the different requirements of Japanese consumers, and the different strategies for doing business within Japan. The Japanese market is one of the world's most competitive and is extremely "high paced". Fashion products, for example, typically last only half the life-span that they would last in most Western nations. Firms are therefore required to expend considerable amounts of energy and money in understanding the consumer, keeping ahead of competitors (research, design and development), and retaining their existing market share. See PR Maurer *Competing in Japan* (Japan Times, Tokyo, 1990), 19.

55 See VR Alden "Who Says You Can't Crack Japanese Markets?" (1987) 65 Harvard Bus Rev 52, 53.

56 See Alden, above n 55, 56.

realised the polish smelled like latrine disinfectant widely used in Japan in the 1940s and with a change of odour the sales soared.

It also appears that many of the more frequently quoted "Japanese attitude" anecdotes have been sensationalised by the media, and deliberately exaggerated by foreign businesses and American politicians. Alden cynically suggests:[57]

> The most prosperous companies often keep quiet about their success and join the chorus of allegations. After all, they don't want to spread the word about the lucrative market too widely for fear of attracting competition.

Other commentators also highlight the successes of many American companies within Japan.[58] Coca-Cola commands a 60% market share of the Japanese domestic market and Schick razors have achieved a virtual monopoly with their 73% share. American fast-food store franchises, such as MacDonalds, Kentucky Fried Chicken and Seven-Eleven, are also found on almost every main road in Japan.[59] Alden's simple advice is that "*no one in Japan is going to hand you a market share on a platter - in Japan you must earn it*".[60]

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57 See Alden, above n 55, 55.

58 See Maurer, above n 54, 72. See also Alden, above n 55, 57. See also Punke, above n 41, 60.

59 Henry suggests that one key reason for the failure of most foreign firms is their inability to fathom the complex social networks that support business life within Japan. By the process of *shōgai katsudō* (external relations), a successful Japanese firm maintains an external focus that allows it to gather critical information by leveraging external contacts. The significance of this process is so critical in Japan that a firm will typically devise separate corporate strategies to win in two separate markets: the "product/service" market and the "intelligence" (information) market. The intelligence market is divided into six clear segments: Ministries and agencies; trade and business associations; mass media and trade journals; university and research centres; the Liberal Democratic Party ("LDP"); and business partners. Given the close proximity, and tight inter-relationship, of the segments within this market in Tokyo, the Japanese often refer to the market as the "Tokyo Loop". Henry explains that "*Co-operation in daily reciprocal information exchanges among all parties creates a tightly interrelated network based upon close personal relationships. Communication between the parties acts as the foundation for corporate and institutional interaction. Since interaction is daily, informal, personal and often indirect, public relations and law firms are of limited assistance in gaining long-term insider status within the loop*". Henry notes that a large Japanese firm will typically devote an entire department (*shōgai-bu*) to this information gathering process. In relation to Government Ministries, Henry comments "*Maintaining and nurturing relationships requires the company to have at least one person visiting the Ministry daily*". Such visits are very informal with value placed on the number of visits (frequency is an indication of sincerity). In relation to the Liberal Democratic Party, Henry notes that the most influential parliamentarians head their own private "economic support groups" (conduits for political funds). Firms are expected to sponsor parliamentarians in return for access to their powerful personal contacts and intelligence network. Henry suggests that one of the key reasons for the failure of foreign firms in the Japanese market is that they have failed to recognise the critical importance of this system. Henry comments that while the Tokyo Loop is accessible to the foreign firm, very few foreign firms have entered it. He considers this "*surprising....when one considers that most of these companies enjoy in their home countries a high level of sophistication in dealing with government, media, and academic circles*". Ms Kuni Sato of Cosmos Public Relations Ltd also told the writer how she had organised a "Diet Doorknock" last year to lobby influential LDP politicians about the concerns of foreign businesses within Japan. Sato commented that the politicians were extremely open and genuinely interested. They jumped at the opportunity to gain a new insight into the foreign complaints. Surprisingly they had not been approached directly in that manner before. This tends to confirm Henry's suggestions. See EK Henry "Shogai Katsudo (External Relations) and the Foreign Firm" (Sophia University, Tokyo, 1992).

60 Makino notes that an intimate knowledge of the traditional buyer-dominated relationship is the key to successful marketing by foreign firms in Japan. This includes a knowledge of the different characteristics of the Japanese market, including the continuity of the contractual relationship (written and unwritten), tailored industrial marketing and manufacturing systems, product management, quality control and quality improvement. Makino notes that "*a relationship that is distinctly long-*

While there was statistical evidence a few decades ago that suggested the Japanese had an aversion to foreign products, times have now definitely changed. Recent statistics demonstrate that at least 66% of Japanese consumers do not discriminate in any way between imported products and domestic equivalents.[61] Indeed, the average Japanese consumer is no less discerning or sensible then any other consumer anywhere else in the world. Foreign products are even coveted as status symbols within Japan - such as German BMW cars, or French "Louis Viton" handbags.[62] The Japanese, as with all consumers, choose to buy a product by assessing its design, function, price, quality and suitability.[63]

In summary, while there seems little doubt that the Japanese have long placed a premium on supporting locally made products, these attitudes have clearly faded over the past few decades. The alleged "Buy Japanese" attitude of today seems more a misconception by foreign firms about the desirability of their products. Much of the Japanese "consumer resistance" derives from a fundamental lack of understanding by foreign firms of the differing needs of Japanese consumers. The Japanese live within a society that customarily provides an outstanding level of service to the customer - they thus have a high social expectation of quality.[64] Yet once foreign products have established themselves as quality products - they will be bought just the same as any other.

B Bureaucratic Perceptions : Technical Barriers to Trade

While purported "Buy Japanese" consumer preferences appear more fictional than factual, Japanese bureaucratic perceptions remain an unfortunate reality. This is best illustrated by the ostensible "cult of uniqueness" that allegedly permeates modern Japanese

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term oriented and collaborative is vital for success in Japan". See above Alden, n 55, 57. See S Makino *A Foreign Supplier in Japan* (Sophia University, Tokyo, 1991), 27.

61 While 2.3% favoured imports and 26.4% preferred domestic products. The researchers therefore concluded that the competitive power of the foreign product determines its success more than its foreign origin. See ME Peters "Free Trade as the Solution to Bilateral Trade Relationships : Japan" (1990) 28 Columbia J Transntn'l L 499, 519.

62 The BMW story provides a classic example of niche marketing, product differentiation and persistence. While Japanese car producers are mass-production oriented, BMW took a different route, targeting Japanese consumers "*who search for something more than average*". To sell cars in a market with ten domestic makers was often ridiculed as: "*Trying to sell snow to the Eskimos*". Traditionally foreign cars had been priced out of reach of the Japanese consumer, this had led to a negative perception of foreign cars. From 1981, BMW mounted intensive marketing activities to erase in the minds of the Japanese consumer the border that clearly separated domestic cars from imports. BMW used a two-pronged strategy: exclusive dealership and corporate identity. Exclusivity became a hallmark, with a direct servicing link established between customer and manufacturer - unique in Japan. Recognition of imported cars spread among the younger generation who saw the merit of buying them at the same price as a domestic car. Young Japanese thus set themselves apart from the rest of car owners by owing an imported car that strongly appealed to their individual taste. German BMW cars quickly acquired citizenship in Japan and lost their prior image of "foreign-made car", having replaced it with one of "individual taste". See C Kinias "Foreign Product Strategy in Japan : The Case of BMW" (Sophia University, Tokyo, 1993).

63 See Peters, above n 61, 519. See also Maurer, above n 54, 86.

64 Maurer comments that consumers must ideally be "*wrapped in a cocoon of information and service*" to maintain their loyalty. Management must remain alert to customer requirements at all times. In Japan, the "*customer is king*". See Maurer, above n 54, 102.

society. While there has been much sensationalisation of this trait, the allegations and anecdotes have been supported by quantifiable research - and have a clear cultural basis.

The Japanese "cult of uniqueness" reflects an assertion by some Japanese people that they are unique from the populace of other nations and cultures.[65] This sense of uniqueness is exaggerated by a heightened consciousness within Japanese society as to who is Japanese and who is not. Discrimination against foreigners within Japan dates back to at least AD815 and long spans of isolation from the rest of the world have further reinforced this segregational habit and insulated Japan from Western ideas and influences.[66] Japanese society remained essentially homogeneous. The resulting insider-outsider mentality perpetuated an underlying nationalism that seemed to take endless fascination with the purported unique characteristics of the Japanese people.[67] This was further exaggerated by the intense nationalistic propaganda expounded by the Japanese military until 1945. Today the attitude persists more with the older generation.

However, this cult of uniqueness has been frequently manipulated and exploited by Japanese business interests and officials for protectionistic purposes. There have been many well-documented instances of a tangible bureaucratic resistance to foreign goods. Some of the more absurd examples are outlined by Deputy Assistant United States Trade Representative ES Fukushima.[68] These include a quota placed on American beef, where Japanese officials resolutely asserted that American rice was "unfit for Japanese consumption" because the Japanese reputedly had an extra 10 metres of intestines. A restriction was placed on American construction companies who supposedly would be unfamiliar with the unique composition of Japanese soil. It was also claimed that American timber was unsuitable for Japanese housing - which must survive frequent earthquakes and a higher fire risk. At one

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65 There are clearly problems with generalising here, especially where evidence is partly anecdotal. But a significant number of academic articles, supported by statistical evidence, justify this statement. See Fukushima, above n 22, 463.

66 Moitry comments that the consensus against foreigners derived from the "*siege mentality*" perpetuated during the *sakoku* (closed centuries) during the Japanese Tokugawa shogunate. The opening of Japan was imposed by foreign powers and following the signing of the "Unequal Treaties" of 1858. See T Yano "Gaijin : One Word Locks the Door to Japanese Society" (1980) 9 Japan Times Weekly 22, 24. See also Moitry, above n 43, 11.

67 Professor E Frost remarks that books and theories suggesting Japanese are somehow unique, superior or different to other races "*found an instant audience*" within Japan: "*New theories about the supposed uniqueness of the Japanese brain, or nose, or tolerance of alcohol, or some other characteristic find an instant audience. Higher scores for Japanese children on comparative international IQ tests tend to be interpreted in racial rather than motivational or socio-economic terms, Some older Japanese are even said to believe such things as body temperature and the length of pregnancy are different for Japanese*". See Frost, above n 39, 60. See also Punke, above n 41, 60.

68 There are many more examples. In one recorded case, a plan to import gasoline was abandoned when government officials successfully pressured the prospective importer's Japanese bank to withdraw financing. In another case, small fibreglass boats were kept out of the Japanese market by subjecting them to inappropriate testing procedures (designed for concrete boats) - such as dropping them. Particularly intriguing was the long-standing Japanese customs practice (now discontinued) of slicing open Dutch tulip bulbs to check for insects, Dr J Bhagwati cynically comments that: "*once the bulbs were severed, even Japanese ingenuity could not put them back together again*". See Bergsten, above n 4, 72. See also Punke, above n 41, 60.

stage a Japanese official even asserted that as Japanese snow was different to European snow, European skis were unacceptable to Japanese skiers.[69]

It is clear that many governmental regulations have been deliberately tailored to exclude foreign goods.[70] The most dramatic example is provided by the "American baseball-bat case". Professor PR Pempel explains that when American aluminium baseball-bats began to secure a large share of the Japanese market, the Japanese baseball-bat manufacturers exerted intense pressure on their Government and....[71]

> The size, shape and, by at least one account, the sound, of American imports, were declared inappropriate for Japanese batters, and the American product was shut out in favour of presumably lower quality, but more culturally acceptable Japanese equivalents.

These anecdotes all suggest an extreme application of technical barriers to trade - supported by a token cultural and pseudo-scientific justification. As is the case in any country, officials and regulators are swayed by the protectionistic interests of big business.[72] These absurd Japanese product standards are therefore less motivated by culture; they are more a reflection of Japan's extremely cosy relationship between business and bureaucrat.[73]

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69 However, best-selling Japanese writer Nakazawa Kazuo is fiercely critical of these anecdotes : "*Many of the best-sellers about Japan written by Westerners shun broadly based economic and social evidence in favour of anecdotes designed to appeal to the instincts of the reader. One such anecdote features a ski equipment dispute, when a single narrow-minded Japanese claimed that snow here is different to snow in Europe and that the ski equipment must therefore be built to different standards. Overnight this incident was transformed into a symbol of the closed mentality of the Japanese and was widely reported around the world.....A well-chosen anecdote can capture peoples attention and thereby provide an effective opening for the presentation of economic theory. But the anecdote about the Japanese who opposed decontrolling beef imports on the grounds that the digestive tracts of Japanese are supposedly different from those of Westerners has no place except perhaps as a bit of light conversation over cocktails*". See Kazuo, above n 12, 54.

70 Jackson comments that "*much of the controversy and, indeed, anger about Japan's apparent unwillingness to import, centres on practices such as [gerrymandering the technical standards for imports]*". See JH Jackson "Statement on Trade Policy Before the United States Senate Committee on Judiciary, 18 June 1992" (1992) 4:5 World Trade 111, 119.

71 See Pempel, above n 6, 439. See also JJ Schott "The Law of the United States - Japan Trade Relationship" (1990) 24:2 World Trade 37, 39. See also "European Union Raps Japan for Keeping Trade Barriers", *Jiji Press Ticker Service*, Tokyo, 19 May 1994. See also "Golden Opportunity : Washington Sees a Chance to Redraft Its Japanese Policy" *Far Eastern Economic Review*, 21 July 1994,

72 Product liability law, until recently, was extremely weak in Japan. This was accentuated by the very high burden of proof placed on plaintiffs and an extremely slow, costly and inaccessible court system. Japanese were forced to rely heavily for product safety on an extensive system of bureaucratic standards, testing, and certification. In practice this system is readily susceptible to political capture by producer interests and can produce significant non-tariff barriers to imports. Numerous cases exist in which Japanese standards were written or changed to exclude imported products - often after imports had begun to significantly penetrate the market. However, in December 1993 the Japanese Social Policy Committee recommended the adoption of legislation that would create strict liability where a product was defective amd the plaintiff could prove the defect and causation. The legislation was passed into law on 22 June 1994, with enforcement commencing on 1 July 1995, and largely followed the Committees recommendations [Law No. 85 of 1994]. The new Product Liability Statute removes the theoretical need to prove fault but does not provide new mechanisms for consumers to bring actions. However, it appears to signify a symbolic shift of power from the producer to the consumer within Japanese society. See Bergsten, above n 4, 73. See Z Kitagawa (ed) *Doing Business in Japan* (Matthew Bender, New York, 1994), Vol 6, 20.

73 Punke notes that foreigners generally do not belong to the associations assigned the task of developing specific product and safety standards. Not surprisingly, safety regulations often seem disproportionately burdensome to foreign companies. Such standards, testing and certification barriers are often encountered in concentrated or cartelised industries. See Bergsten, above n 4, 74. See also Punke, above n 41, 63.

IV INSTITUTIONAL BARRIERS TO TRADE

"Institutional" cultural trade barriers refer to discriminatory organisational patterns within a society that exhibit an undeniable cultural basis. In the Japanese context these institutional barriers take three primary forms: administrative guidance; the corporate *keiretsu*; and the Japanese retail distribution system.[74]

A Administrative Regulation and the Business-Bureaucrat Symbiosis

A salient feature of the Japanese regulatory system is the close symbiosis between business and government.[75] Powerful Japanese business interests may dramatically influence the shape and development of governmental regulation, yet in return will submissively abide with bureaucratic requests. This relationship permits trade discrimination to occur in two principal forms. First, domestic firms and organisations may successfully lobby the government for overt regulation that is discriminatory against foreign producers. Second, discrimination may occur via the tacit effects of a more covert form of Japanese governmental influence known as "administrative guidance".

1 Indirectly Discriminatory Governmental Regulation : The Complex Shaken System

Where governmental regulations directly discriminate against foreign products they are challengeable under the GATT. Most such overt discrimination has now been eliminated from the Japanese regulatory system.[76] This paper is therefore concerned with governmental

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74 Bergsten comments that: "*Neither we nor other analysts have been able to quantify the 'contribution' to the total calculated implied non-tariff barrier effect of specific structural features of the Japanese economy, such as the government's industrial policy, corporate keiretsu relationships and absence of aggressive anti-trust policy, the distribution system, land use policy, or the product liability system. Formal border protection is light, but there is a trove of evidence suggesting that the government intervenes to limit imports of manufactures and sanctions limitations by the private sector*". A seemingly contradictory view is outlined by the GATT Secretariat which comments : "*The extent to which practices such as keiretsu and the distribution system inhibit imports is difficult to ascertain. Available evidence suggests that the restrictive impact of these arrangements may be less important than is often claimed*". See Bergsten, above n 4, 32. See also GATT, above n 2, 11.

75 In January 1993, the GATT Trade Policy Review of Japan, conducted by the independent GATT Secretariat, stated : "*The Government continues to consult closely on trade issues with the private sector through a large number of advisory bodies. Interactions between the advisory bodies and the Government remain relatively informal and are not generally subject to public scrutiny, thereby strengthening the discretionary powers available to the Government.*" For example, there are numerous interest-articulation and aggregation groupings for the benefit of commercial and industrial interests. These operate very actively on a national scale in the form of federations, the four largest being the Federation of Economic Organisations ("*Keidanren*"); the Japan Chamber of Commerce and Industry; the Japan Federation of Employers' Associations; and the Japan Committee for Economic Development. Each of these associations has the ability to sway voter support in elections and they use this ability, plus their economic muscle, to influence politicians. They also put their own representatives onto various types of government commissions, and their views on important social and political questions are frequently reported to the media. See GATT, above n 2, 4. See also W Akio *Government and Politics in Modern Japan* (Tokyo University, Tokyo, 1994), 13.

76 The GATT Secretariat names 33 overtly protectionistic laws in Japan. Most of these relate to agricultural products and are perpetuated by the politically powerful *Nokyo* agricultural co-operative. See above GATT, n 2, 231.

regulation that is indirectly discriminatory. Such regulations fall into a GATT "grey-area" and have stubbornly persisted within the Japanese economy. The *shaken* automobile regulations provide a controversial example.[77]

The Japanese *shaken* automobile regulations sprang into the international limelight during the 1995 Japan-United States auto-trade dispute.[78] These regulations are administered by the Japanese Ministry of Transport, one of the more notoriously heavy-handed regulators of the Japanese bureaucracy.[79] The *shaken* regulations form a pervasive and elaborate web of rules and procedures that are intended to promote vehicle safety and protect the Japanese consumer.[80] However, while these regulations *prima facie* apply equally to both Japanese and foreign cars, allegations of discrimination have arisen because all *shaken* repairs must be conducted at Government-certified garages. And most of these certified garages are currently monopolised by domestic Japanese auto companies - hence practically all of the car parts they stock are Japanese. Foreign car parts are mostly found at Japan's independent, but non-certified, garages.[81]

This tight repair-inspection linkage indirectly discriminates against foreign automobile suppliers.[82] It illustrates how Japanese companies have influenced their regulators into enacting laws that are not directly discriminatory, but are calculated to have a discriminatory effect when interacting with other features within the market environment.[83] The extent to which such overt governmental regulation can be said to be "culturally" derived

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77 Pronounced "shar-ken".

78 The auto trade dispute involved a stand-off between the United States and Japan on 28 June 1995. The United States was demanding that Japan implement a voluntary import expansion to boost the presence of American cars and car parts within the Japanese domestic market. The United States threatened to impose NZ$10 billion worth of tariffs against 13 models of Japanese luxury cars. These tariffs would have priced the cars completely out of the American market. See "What the United States-Japan Auto Debate is About", *The Dominion*, Wellington, 17 May 1995. See also "American Trade Sanctions Could Hit Japanese Autos This Weekend", *Asian Wall Street Journal*, Hong Kong, 17 May 1995. See also "Japanese Luxury Car-Makers Face Dilemma Due to United States Tariff", *Asian Wall Street Journal*, Hong Kong, 18 May 1995. See also "Japan Cites Urgency : Sanctions Saga Moves to WTO", *Asian Wall Street Journal*, Hong Kong, 30 May 1995. See also "Negotiators Work Hard to Beat Deadline", *CNN News*, New York, 28 June 1995.

79 See "Japan Transport Chief Stops Traffic At Auto Trade Talks" *Asian Wall Street Journal*, 30 May 1995, 1.

80 See "Push to Open Car-Components Sector May Create Few Jobs at Home", *Asian Wall Street Journal*, Hong Kong, 25 May 1995. See also "Car Battle Seen as Key Case for WTO", *The Dominion*, Wellington, 17 May 1995.

81 Japan argues that changing the system would undermine Japan's tough auto safety standards. Earlier this year, following three years of intense American pressure, the Japanese Ministry of Transport pledged to relax the *shaken* licensing requirements for new garages. This avoided a WTO Panel scrutiny of the issue. See "Both United States and Japan Play Politics With Trade Talks" *Asian Wall Street Journal*, Hong Kong, 18 May 1995.

82 Ironically the loudest complaining American company, Ford, is now achieving dramatic success in penetrating the Japanese market. Its 1994 Japanese sales reached 11,250 cars, an increase of 121% on 1993. This figure is all the more remarkable when considering that Ford offers just two right-hand-drive models in Japan - the Ford Mondeo and the Ford Probe. See "Japan is Said to be Mulling Auto Subsidies" *Asian Wall Street Journal*, 16 June 1995, 1.

83 Another example is provided by the Pharmaceutical Industry. The Pharmaceutical Affairs Law is not directly aimed at limiting imports of cosmetics and pharmaceuticals, but it has this restrictive effect. Under the Law, the importation and manufacture of all pharmaceuticals must be licensed. Only firms resident within Japan are permitted to hold import licenses, and all drugs must be approved by the Japanese Pharmacopoeia. As a result the non-tariff barrier for cosmetics and toilet preparations was estimated by the Institute for International Economics at 660% - the highest rate among the 50 product groups they studied. See Sazanami, above n 11, 27.

remains unclear. Arguably its pervasiveness within the Japanese economy results from the close historical symbiosis between Japanese government and industry.[84]

2 *Administrative Guidance and Selective Enforcement : A Covert Form of Regulation*

In contrast, the more covert form of governmental regulation known as administrative guidance ("*gyõsei shidõ*") appears deeply rooted within Japanese culture. Administrative guidance occurs when a Japanese bureaucrat requests a party to "voluntarily" act in a specific way to further some governmental ambition.[85] It is conducted via directions ("*shiji*"), requests ("*yobo*"), warnings ("*keikoku*"), suggestions ("*kankoku*"), encouragements ("*kansho*"), and notices ("*tsuutatsu*"). Its fundamental characteristic is that it remains unenforceable at law, the executive branch of government is simply expressing a general expectation that an action should be undertaken or conducted in a certain manner.[86]

While this can also be highly discriminatory in its effect, administrative guidance remains less amenable to judicial review because of its high legal obscurity. Professor W Lockwood comments:[87]

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84 A disadvantage of the close ties between Japanese Government and industry is the considerable degree of corruption. Until recently, parties with deeply vested interests monopolised the most influential positions within Japanese society and formed a closely knit alliance to block reform. But many forces acted to topple the old regime:
(i) Ongoing sex, bribery and corruption scandals amongst elected officials provoked universal elector outrage;
(ii) The collapse of Japan's economic bubble revealed the inefficiencies of the over-regulated Japanese economy;
(iii) The US was pressuring Japan to deregulate and used severe measures such as Super 301 to enforce this "hard-line";
(iv) There was an increasing threat from East Asia - China's expanding economic power, and the Korean instability.
Under the weight of proof of corruption, and the refusal of Prime Minister Kiichi Miyazawa to implement electoral changes, dissidents split from the Liberal Democratic Party ("LDP") in June 1993. This broke the LDP's 39-year stranglehold on political power. Japan went through four governments in the space of a year. On 29 June 1994, the previous coalition Government under Prime Minister Toshiki Kaifu collapsed and a new coalition under Prime Minister Tomiichi Murayama voted itself to power. The Murayama Government was a bizarre and highly unstable coalition between former bitter political enemies - the LDP and the Social Democratic Party. It seems they united solely in an attempt to slow the pace of reform. The critical final piece of legislation to implement sweeping reforms to Japan's electoral system was indefinitely delayed. Clearly this was running against the wishes of the Japanese voting public. Only 35% of Japanese voters had confidence in the Murayama Government. This compared with popularity levels of 80% for the previous Governments of Prime Minister's Hosokawa and Hata. See "Recent US-Japan Trade Efforts Undercut by Japan's Political Turmoil", *Management Briefing*, New York, 6 July 1994. See "Expediency Triumphs Over Ideology in Coalition Politics" *Far Eastern Economic Review*, Singapore, 14 July 1994, 22. See "Conservatives and Socialists Sacrifice Principle for Power" *Asiaweek*, Hong Kong, 13 July 1994, 19.

85 The GATT Secretariat defines administrative guidance in the following terms : "*The term "administrative guidance" covers informal regulation by the Government which seeks to persuade private enterprise to co-operate in achieving a particular policy objective. While this exists to some extent in all countries, it is alleged that its role and influence in Japan has been especially strong*". Compliance is voluntary insofar as an agency cannot employ the judicial system of an administrative enforcement organ to compel a regulated party to obey the directive. See GATT, above n 2, 88.

86 The GATT Secretariat comments : "*Administrative guidance works through persuasion and, being informal and not legally enforceable, cannot generally be challenged by private parties*". The GATT Secretariat notes that a number of reported case illustrate how the practice has been used. In the *Lions Oil* case, for example, informal reports suggest that MITI requested financial institutions to stop supplying finance to Lions after the company, despite admonition from MITI, "reported" its intention to import gasoline commercially. See GATT, above n 2, 88.

87 Quoted in MK Young "Judicial Review of Administrative Guidance : Governmentally Encouraged Consensual Dispute Resolution in Japan" (1984) 84 Columbia LR 923, 925.

> The hand of the Japanese government is everywhere in evidence, despite its limited statutory powers. The ministries engage in an extraordinary amount of consultation, advice, persuasion and threat. The industrial bureaus of the Ministry for Trade and Industry proliferate sectorial targets and planes; they confer, they tinker, they exhort. This is the "economic by admonition" to a degree inconceivable in Washington or London.

It seems administrative guidance has expanded the scope of regulatory activity beyond its legal limits to pervade almost every aspect of Japanese business life.[88]

Administrative guidance is constitutionally validated by a set of expansive discretions accorded to the key Government Ministries by the Japanese Diet.[89] The constituting laws of these Ministries confer them with capacious quasi-legislative, executive and quasi-judicial powers. Japanese officials may allude to these nebulous powers when interpreting, applying, or enforcing the law. It seems that historically the discretions were framed so diffusely as to be effectively unreviewable by the judicial system.[90] However, over the past couple of decades the Japanese judiciary have made substantial inroads into this administrative mire and have developed a radical legal doctrine empowering them to challenge such regulatory techniques.[91]

Historically, administrative guidance was most frequently employed by the Japanese Ministry of Finance ("MOF"), the Ministry for Trade and Industry ("MITI"), and the Bank of Japan.[92] MITI was largely responsible for guiding Japanese industry out of its World War II

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88 Yamanouchi charges that administrative guidance permits agencies to regulate not only beyond the limits of the law, but also on occasion, in direct violation of the law. Such contravention is possible because any judicial enquiry into the propriety of the regulatory objective will be limited. See K Yamanouchi "Administrative Guidance and the Rule of Law" (1974) 7:22 Law in Japan 35, 37.

89 For example, the Ministry of International Trade and Industry ("MITI") is established by the *Tsuhō Sangyō Setchi Hō*, Law No 275 of 1952, art 3. The statue provides that the MITI shall be an "*administrative organ with the responsibility of effectuating in a unified manner the national administration of the following:...including the adjustment and promotion of commerce and the administration of foreign exchange relate to commence, and the promotion of international co-operation in the trading economy*".

90 Judicial review of administrative guidance is particularly challenging due to the theoretically voluntary nature of compliance. See Young, above n 87, 953.

91 Historically, administrative guidance was non-justiciable. Then, in 1971 and 1972, two cases challenged this blanket rejection. In *Shioda* v *Ministry of International Trade & Industry* 22 Gyoosei Jiken Saibun Reishuu 1758 (Tokyo District Court, 1971), a bankrupt company sued MITI alleging the Ministry was solely responsible for its bankruptcy. The Court declared an administrative notice invalid, but held the associated warning was a mere request and thus non-justiciable. Similarly, in *Sawarabi Kabushiki Kaisha* v *City of Kyoto* 691 Hanrei Jihoo 57 (Kyoto District Court, 1972), planning restrictions promulgated by administrative guidance were held to be "exercise of public authority" and thus entitled the plaintiff to an award of damages. These case became the thin end of the wedge. A large body of caselaw has now evolved establishing broad legal principles within which administrative guidance must comply. Yet this developing doctrine is restrictive. The Japanese judiciary remain highly reluctant to intervene. See also *Nakatani Honten Goomei Kaisha* v *Tokyo* 955 Hanrei Jihoo (Tokyo Court of Appeal, 1979). See Young, above n 87, 940

92 The Ministries most frequently involved in trade policy formulation, and their main concerns are the: Ministry for Trade and Industry ("MITI") (general trade policy); Ministry for Agriculture, Forestry and Fisheries (agricultural policy); Ministry of Finance ("MOF") (government revenue); Ministry for Foreign Affairs (co-ordination; international negotiations); Economic Planning Agency (long-run economic planning); and the Fair Trade Commission (enforcement of competition laws). Historical tradition in Japan allowed the Executive, in particular the MITI and MOF, to become the supreme regulators. See Moitry, above n 43, 16.

devastation and used its powers of administrative guidance to control Japanese markets and fend off foreign competition.[93] It is MITI's current use of administrative guidance that forms the most significant barrier to international trade.[94] Yet it now seems that the role of administrative guidance within the Japanese economy may be slowly fading.[95]

Why is administrative guidance so effective in Japan? Despite its intrinsic legal unenforceability, compliance with such guidance appears to be a Japanese norm. Commentators have highlighted three principal explanations: consultation, coercion, and culture. First, administrative guidance is usually implemented only after intensive informal consultation with affected Japanese businesses.[96] It frequently summarises the results of extensive negotiations and often constitutes the official expression of a negotiated course of action.[97] This element of *fait accompli* clearly mitigates potential insurgence.[98]

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93 The Ministry for International Trade and Industry was able to implement a number of laws as early as the fifties in order to increase exports, rationalise production, and more spectacularly to limit the exports of cars into the United States in 1981 and electronic goods in 1987. On the basis of an agreement between the United States and Japan in 1981, an overall quota of 1.68 million units was granted to Japanese producers and then allocated by MITI. See Moitry, above n 43, 8.

94 Under American occupation, the domestic legal structure for current trade policy in Japan was established. Two pieces of legislation were passed under the provisions of the 1947 Constitution : the Foreign Exchange and Foreign Trade Control Law; and the Foreign Investment Law. These two legislative acts allowed the United States Government in Occupation considerable power to protect Japanese industry to achieve post-war economic stability. Japan's subsequent independence in 1952 did not result in any major reformulation of trade legislation. The basic economic policy of Japan remained guided by protectionism. Key provisions of the two laws provided considerable administrative latitude to the development of trade policy and its implementation. The Cabinet was authorised to elaborate and expand the provisions of trade legislation as Japan's trade policy required and Ministerial ordinances further supplemented matters. In 1979 the Japanese passed the detailed Foreign Exchange and Foreign Trade Control Law 1979. This established a broad framework for regulation and delegated further authority to MOF and MITI. Much of the enforcement of the law was envisaged as occurring via administrative guidance. The GATT Secretariat notes, for example, that export cartels have often been formed under the Japanese Export and Import Transaction Law following administrative guidance from MITI. Adams notes that:"*Protectionism was essentially accomplished by presumptively restricting all foreign exchange and foreign trade transactions*". See GATT, above n 2, 39. See Adams, above n 17, 47.

95 The bureaucracy will steadily lose its ability to guide the economy as a result of globalisation and the inexorable increase in the economy's complexity and market orientation. Moitry comments that the Ministry for International Trade and Industry's powers have considerably diminished but remain important in respect of customs duties and restructuring, Conversely, in competition law, the Ministry finally seems to have lost its battle against the Competition Committee, although there are still a few clashes. See Bergsten, above n 4, 9. See also Moitry, above n 43, 16.

96 Young notes that consultation can take a variety of forms depending on the nature of the problem and the agency's desired objective. All ministries utilise formal and informal consultative and advisory committees that comprise of industry representatives, academics, bureaucrats and representatives of other organisations, such as research institutions, the media and, on rare occasions, labour or consumer groups [note discussion above n 59]. When bureaucrats consult with the industry representatives, they sometimes focus on general business associations such as the powerful *Keidanren,* and the *Keizai Doyukai* (two powerful associations of prominent Japanese business leaders). At other times they may consult with specific trade associations, composed of representatives of all the companies within a particular industry. See Young, above n 87, 939. See also K Uchihashi "Behind the Scenes at MITI" (1983) 10:4 Japan Echo 35, 37.

97 Young notes that administrative guidance without consultation may meet with disobedience and, in rare cases, litigation. Japanese society favours group consensus; consultation is thus seen as a vital part of commercial etiquette. Agencies avoid potential disobedience by delegating much of the formulation and implementation of the guidance to the regulated parties themselves. This means the regulated parties may minimise the distortions of particular regulatory burdens (and may also "tilt the scales" against competitors). See Young, above n 87, 940.

98 Young comments : "*Administrative organs in Japan often seek to enshrine bargaining and negotiation between parties as the principal device for allocating regulatory burdens*". This pattern of forced bargaining and negotiation has an identifiable cultural basis in Japan. A study of the history of conciliation in Japanese law by Henderson highlighted Japan's historical tendency towards such "backward coercion" by administrators. Henderson identified the historical basis as an interest in protecting dominant classes from the otherwise valid claims of lower classes. See Young, above n 87, 941.

The second factor encouraging obedience is the employment of subtle, non-legal forms of coercion by Japanese administrators. At the most extreme, these coercive techniques may include the publishing of names of businesses (resulting in negative publicity and loss of face), or costly and damaging legal investigations via selective enforcement of antitrust or tax legislation.[99] But the most overwhelming coercive technique operates tacitly by a form of peer pressure. Bureaucrats play a key strategic role within the Japanese business environment and businesses will not wish to jeopardise their critically important relationship with the relevant Ministry by deliberately flouting bureaucratic requests.

The third element contributing to the success of administrative guidance is cultural. Administrative guidance is steeped in culture, with Japanese bureaucrats performing the traditional role of the ancient feudal underlords ("*daimyo*").[100] A Japanese official's requests are accorded a degree of reverence and respect that is unfamiliar to modern Western societies.[101] In his 1976 article, MS Johnson commented:[102]

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99 Fingleton notes that selective enforcement gives Japanese officialdom great leverage. The concept of selective enforcement is historically derived, with the ruling *daimyo* of feudal Japan inventing the concept as a tool of power. Selective enforcement is also the hidden dynamic behind most of Japan's political scandals, including the "Recruit" scandal of the late 1980s in which prominent Japanese politicians and bureaucrats were accused of insider trading and receiving company shares at below-market prices. See E Fingleton "Japan's Invisible Leviathan : The Ministry of Finance" (1995) 74:2 Foreign Affairs 69, 78

100 Essentially, up to and during Japan's Meiji period, the powerful ruling *samurai* and *daimyo* classes of Japan were transformed into a new class of administrators - the bureaucrats. They retained their elite status and their strong sense of duty and obligation to their traditional feudal masters (this role now assumed by cabinet ministers and military leaders). Prior to the Meiji period (also known as the "Meiji restoration"), Japan was feudally stratified - with a roughly pyramidal Confucian system of power based on the production of rice. The military *samurai* class (who owned the land) were at the top, the farmers (who produced the rice) were in the middle, and the merchants (who delivered the rice) at the bottom, of the feudal socio-economic pyramid. But with the dramatic increase in trade, the now economically powerful merchants began to challenge their socio-economic position - leading to a fundamental restructuring of Japanese society. Yet modern Japan retains echoes of this feudal culture. The top university graduates head for careers as administrators in the public service; the next-best graduates are employed by large Japanese corporations (generally, the bigger the company one is employed by, the higher one's own social status); and the graduates of "lesser" universities are employed by small and medium enterprises. See Nariai, n 14, 36.

101 Johnson notes that one chief characteristic of justice in the *Tokugawa* period (1603-1868), was the tendency of the under-lords ("*daimyo*") to: "*Consider all the circumstances of individual cases, to confide the relaxation of principles to judicial discretion, to balance the advantages and disadvantages of a given course anew in each instance - in short to make justice personal...The result was a universal resort to arbitration and compromise as a primary means of settling disputes. It was, and still is, an ingrained principle of the Japanese social system that every dispute should be smoothed out by resort to arbitration*". The bureaucrats of the modern Japanese government are not unlike the ancient *daimyo* of 200 years ago in *Tokugawa* Japan. They still display the characteristics of paternalism, autonomy, and an inclination to settle disputes informally. It is because of these bureaucrats who regulate business that great attention must be paid to administrative policy and guidance rather than strictly to formal law and legal considerations. Johnson describes this as a "*legal consciousness*" that "*pervades almost every aspect of doing business in Japan*". See MS Johnson "The Japanese Legal Milieu and its Relationship to Business" (1979) 13 American Bus LJ 335, 341.

102 Johnson noted that a key reason for the development of administrative guidance was the historical legacy of the administrative elite. Kaufman also notes that both the powerful Ministry of International Trade and Industry and the omnipotent Ministry of Finance are a daily force in the lives of Japanese corporations. They are run by an elite corps of top graduates from prestigious universities (90% from Tokyo University). Historically the officials from these two Ministries have guarded their power jealously and, for example, historically MITI sometimes refused to relinquish procedural controls over imports even when political leaders had publicly committed Japan to greater openness. See Johnson, above n 101, 343. See also CS Kaufman "The United States - Japan Semiconductor Agreement : Chipping Away at Free Trade" (1994) 12 Pacific Basin LR 307, 343.

> The Japanese bureaucrats are the successors to the ancient *daimyo* who were empowered to legislate, adjudicate, and execute justice within their own feudal estate. Today, in Japan, the prerequisite for becoming a bureaucrat is education. The best students from the most eminent universities compete for the privilege of joining the most desired profession : the governmental service. With this sense of inherited authority and educational elitism, the Japanese bureaucrat wields seemingly unlimited authority in interpreting or applying laws, recognising and resolving conflicts and disputes (either economic or political) and effecting solutions to problems.

How does administrative guidance act as an institutional barrier to trade? Administrative guidance is expedited by the extremely close ties between Japanese business and government.[103] Foreign companies are generally alienated by this insular system and prevented from exerting the same degree of influence over their regulatory environment. Consequentially, they may find themselves unable to solicit vital market concessions, or they may find incumbent Japanese firms actively soliciting administrative guidance to carefully slant the regulatory system against them.

Yet ironically administrative guidance has also proved beneficial to foreign nations in their desire to open the Japanese market.[104] It has provided a convenient mechanism for the Japanese Government to exert pressure on Japanese industry to adhere to "voluntary restraint agreements" negotiated between Japan and the United States.[105] Such a situation occurred with the Japan-United States Semiconductor Accord in 1986.[106] Ironically, it may not be in the best interests of foreign countries, such as the United States, to seek the elimination of administrative guidance at the present time.[107]

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103 Foreign companies are generally excluded from the "old-boy" network of former and government officials. After an early retirement (aged 50 or 55), Japanese administrators generally accept positions in major Japanese corporations, usually the same ones they regulated during their tenure in government. This process, known as *amakudarai*, or "*descent from heaven*", provides a substantial link between the companies and the current bureaucrats and assures a particularly good reception for the former bureaucrat's current employer. Foreign companies generally remain outside this important conduit into the administrative process. See M Dean "Administrative Guidance in Japanese Law : A Threat to the Rule of Law?" [1991] J Bus Law 52, 55.

104 The GATT Secretariat comments : "*Much administrative guidance exercised my Ministries enables Japan to meet concerns raised by major trading partners. Import and export guidance has, reportedly, been used to ensure that Japanese firms do not inflame trade frictions with trading partners, or to encourage firms to fulfil bilateral trading undertakings.*" See GATT, above n 2, 89.

105 The American unilateral pressure for trade goals could actually backfire. It forces the Japanese government to use administrative guidance to meet demands. Thus American pressure to improve access to the Japanese market provides a new basis for extra-legal bureaucratic control over the industry - which in turn could engender renewed discrimination against foreign firms. See Takeshi, n 21, 18.

106 In relation to the semiconductor agreement. MITI in effect began to establish a production cartel, issuing quarterly "forecasts" of semiconductor demand and production that carried an implicit administrative imprimatur. Subsequently MITI issued "requests" for production cutbacks. Although there was some initial resistance, within a month all the firms had fallen into line. Lastly, MITI provided "opinions" to firms on their investment plans. See Bergsten, above n 4, 131.

107 The GATT Secretariat notes the Government of Japan announced in its report for the Structural Impediments Initiative talks with the United States that it would ensure that administrative guidance is not intended to restrict market access nor to undermine fair competition: "*Administrative guidance would be implemented in writing as much as possible and, unless good reasons exist not to do so, would be made public when implemented.*" In order to foster greater transparency in the role of administrative guidance and meet its commitments for administrative reform to the United States, the Japanese passed new legislation known as the "Administrative Procedure Law" which came into effect on 1 October 1994. This

3 *The Pervasive Influence of the Nokyo : An Omnipotent Agricultural Co-operative*

The *Nokyo* is a mammoth agricultural cartel traversing the Japanese agricultural sector.[108] It is pyramidal in structure and administered by the Tokyo-based "Central Union of Agricultural Co-operatives" ("*zenchu*"). Prefectural agricultural co-operatives within each of Japan's 47 prefectures form an intermediary tier and these control an estimated 3,000 regional co-operatives.[109] The *Nokyo* is another remnant of Japan's feudal past where farmers had a high status within society due to their critical role in the supply of rice.

The *Nokyo* cartel is extremely well organised and is intimately linked with the political system.[110] Rural electorates in Japan account for a large percentage of Japanese parliamentary seats and tend to be dominated by *Nokyo*-sympathetic politicians. These politicians are frequently bankrolled by the *Nokyo* itself. This concentration of political power seems singly responsible for the outrageous prices Japanese pay for food.[111] Price controls have elevated the price of rice to seven times that of other nations - similarly with beef and selected fruits.[112] National farm subsidy programs are estimated to cost Japan around NZ$50 billion annually.[113]

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stipulates revived procedures for issuing administrative guidance and extensive transparency provisions. It requires all guidance to be given in writing, except where business secrets are involved. All guidelines from Ministries on administrative guidance must be published. See above GATT, n 2, 39, 89. See also "Japan : A Very Different Legal Environment" *East Asian Executive Law Reports*, Hong Kong, 15 October 1988, 1.

108 Domestic agricultural production in Japan is protected from foreign competition through tariffs, quotas, state trading monopolies, and when formal barriers are insufficient, informal barriers to imports. See above Bergsten, n 4, 100.

109 At the local co-operative level , for example, *Nokyo* groups traded ¥6.3 trillion ($US63 billion) worth of agricultural products in the year to March 1993. The co-ops had outstanding deposits in their financial services outlets of ¥69.5 trillion, more than any private Japanese bank. And their insurance-service assets amounted to ¥22.6 million, more than all but one of Japan's insurers. See Y Yasuhiko "A New Perspective on the Rice Issue" (1994) 21:1 Japan Echo 63, 65.

110 Bergsten concludes "*Close examination of individual industry case studies indicates that regulatory barriers tend to emerge in industries where domestic producer lobbies are strong; either primary-product sectors where there are well-established producer lobbies, or highly concentrated or cartelised manufacturing and service sectors where the small number of producer firms facilitates the organisation of industrial lobbies. This confluence of public and private barriers inhibits entry by newcomers, whether foreign or domestic*". The GATT Secretariat also comments "*Japanese producers, including farmers representatives, are much more strongly represented than consumers in the advisory bodies*". See above Bergsten, n 4,72. See also GATT, above n 2, 4. See also K Nishimoto "*Nokyo* : Pressure From the Co-ops" (1972) 7 Japan Interpreter 3, 7.

111 Japanese generally pay 60% more than Americans on food with the *Nokyo* the principal beneficiary.

112 Until a poor harvest in 1993 (caused by a series of typhoons and a cold summer) pushed the government to allow rice imports, the Japanese policy of self-sufficiency meant a virtual ban on rice imports. In 1992 the OECD estimated the subsidy to Japanese rice producers at US$19 billion. In January 1995, the Washington-based Institute for International Economics calculated an implied non-tariff barrier on milled rice of 737%. See Yasuhiko, above n 109, 63.

113 According to OECD estimates, the total transfers from Japanese consumers to producers during 1992 for agricultural products were estimated at US$600 per capita (substantially above the US$440 average for all other OECD nations). The GATT Secretariat comments : "*Various studies have attempted to measure the economic costs of Japan's agricultural policies. Vincent (1989), using a general equilibrium model to simulate the gains to the Japanese economy, found that the removal of agricultural supports could increase Japan's export earnings by some 3% (equivalent to annual gains of Y1,200 billion at 1985 prices). He estimated that Japan's agricultural policies could curtail manufacturing output by between 0.3 and 2% and reduce manufacturing employment demand from 0.4 to 4%. Similarly, Anderson and Tyers (1987) estimated the domestic welfare costs of Japan's agricultural assistance to be some US$20 billion annually (1985 prices), equivalent to over 1% of Japan's GDP*". See Sazanami, above n 11, 40. See also GATT, above n 2, 136.

During the GATT's Uruguay Round the Japanese finally agreed to opened their rice markets to foreign imports. Yet the political influence of the *Nokyo* dramatically limited the extent of the concessions.[114] For example, a 500% tariff on Californian rice is now only being incrementally reduced over a five year period. Yet there now seems to be an anti-*Nokyo* rebellion among Japanese farmers based on perceived injustices and extreme corruption.[115] It seems the cartel is progressively disintegrating and losing its pervasive political influence.[116] This culturally-derived association, embodying the historical feudal power of Japanese farmers, is now losing its potent political power to erect overt Japanese barriers to trade.

B Relational Contracting and the Japanese *Keiretsu* (Corporate Groupings)

The infamous Japanese *keiretsu* are groups of interlocking companies that facilitate anti-competitive practices within their particular industries.[117] The *keiretsu* exist as thousands of cartels ranging from small affiliations to enormous multinational corporate networks.[118] The 200 principal *keiretsu* in Japan control approximately 12,000 medium-sized companies - roughly one third of Japan's business capital.[119]

In the West such commercial structures are frequently outlawed as they allow firms to manipulate prices and inhibit competition.[120] Yet in Japan such behaviour is an incontrovertible feature of business life. While *keiretsu* networks are theoretically

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114 Japan gives substantially more overt protection to agricultural products then to industrial products. These agricultural policies are justified as ensuring food security and stable prices (rice and wheat), to stabilise farm income (dairy and meat), to promote a structural shift to new crops (fruit and vegetables), and to maintain farm income parity (sugar). The GATT Secretariat comments "*State trading in agricultural products in Japan is used by the Government as a means of stabilising supplies to consumers and controlling imports to assist domestic producers of rice, wheat, barley and milk products (mainly skimmed milk powder and butter).*" See Sazanami, above n 11, 20. See also GATT, above n 2, 87.

115 See "Farmers Reap Greater Profit By Skirting *Nokyo* Co-ops and the Law : Agricultural Groups Losing Viability as Markets Evolve", *The Nikkei Weekly*, Tokyo, 18 July 1994.

116 It also seems that despite high levels of assistance, the number of full-time farmers in Japan has fallen rapidly, reflecting the changing structure of Japan's economy. Over four-fifths of farmers are now part-time and, for two-thirds of these, non-farm income is by far the predominant source of income. See GATT, above n 2, 136.

117 In 1995 in the Japanese pulp and paper industry, for example, the Japan Fair Trade Commission ("JFTC") is investigating the absence of written purchase orders for many transactions among Japanese firms (which allow non-transparent contracting practices to flourish) and the custom of making post-transaction price adjustments (which give Japanese firms a second bite at competing for orders). The impact of such practices was calculated by the Institute for International Economics to be reflected in an implied non-tariff barrier rate of 19%. See Sazanami, above n 11, 25.

118 Until recently the term "*keiretsu*" was used by Japanese to refer predominately to the six major industrial groupings of Mitsui, Mitsubushi, Sumitomo, Fuyo, Sanwa and Dai-Ichi Kangyo. These groupings, were typically assembled around a major bank and/or common trading company and involved formal and informal links that frequently included cross-shareholding among the member firms. However, over the past two decades the term *keiretsu* has been extended to describe vertical integration of firms : often stretching from the production of raw materials, through manufacturing, to tied wholesale and retail distribution outlets. Such continuous links are found particularly in automobiles, consumer electronics, cosmetics, pharmaceuticals and photographic equipment. For example, Matsushita, Toyota, Sony, Nissan, Hitachi, Nippon, Toshiba, and Sanyo. See A Helou "The Nature and Competitiveness of Japan's *Keiretsu*" (1993) 27:2 World Trade 99, 102.

119 See N Iwao "Opening Up Fortress Japan" (1990) 17:3 Japan Echo 8, 12.

120 *Keiretsu* are inherently discriminatory. Firms within the group receive preference over those outside.

independent of the State, the influence of the *keiretsu* permeates throughout Japanese business, politics, and society. RL Cutts comments:[121]

> Japanese society is organised by the grouping of families of interest in business, government bureaucracies, political parties, and even universities. The nation is largely lashed together by a web of informal cartels, as well as their formal derivatives, keiretsu. Politics, society, and business are ensnared because the Japanese believe that these insular arrangements maintain the security of the nation, provide full employment, and distribute the burden of risks of all sorts.

Historically, *keiretsu* originated during the Japanese Meiji era of 1869-1912. The rude awakening of the hitherto secluded and feudal Japan to an industrialised world resulted in national humiliation borne of economic inferiority. The Japanese administration remained alive to the threat of colonisation by superior Western powers and embarked on a systematic and state-co-ordinated policy of rapid industrialisation and militarisation. To achieve such rapid reform, the Japanese administration arrogated itself economic power and forged vast state-sponsored industrial networks that mirrored the feudal associations of the past.[122] The wealthy merchant houses of Japan's *Edo* period were transformed into gargantuan financial and industrial conglomerates; the "*zaibatsu*".[123] These *zaibatsu* permitted Japan to swiftly develop a colossal economic and military advantage - until the Japanese defeat in the Second World War.

With Japan's surrender to the United States in 1945, the United States Military Government in Occupation enacted legislation to disband and outlaw the *zaibatsu*.[124] By

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121 See RL Cutts "Capitalism in Japan : Cartels and Keiretsu" (1992) 70 Harvard Bus Rev 48, 49. See also See JD Richards "Japan Fair Trade Commission Guidelines Concerning Distribution Systems and Business Practices : An Illustration of Why Antitrust Law is a Weak Solution to US Trade Problems with Japan" [1993] Wisconsin LR 921, 925.

122 The opening of Japan was imposed by foreign powers in 1858. Moitry notes that this context of national humiliation and economic inferiority precipitated a close collusion between State and industrial interests. State leadership advanced a systematic policy of industrialisation and export orientation. At first loyalty of businesses to the State was sufficient, but during the 1920s that specific means were created - exporting companies. The government allocated production and export quotas to these select companies and even imposed requirements of co-operation on all companies operating in the same field. This provided the *zaibatsu* with fertile ground in which to develop. See Moitry, above n 43, 11.

123 Nariai notes that during the great recession of the 1920s, almost all Japanese industries had formed cartels to survive, and repeatedly resorted to agreements on marketing, prices, or production. At first the binding power of these cartels was not very strong, but after the severe crisis that followed the lifting of the gold embargo in Japan, cartels became popular. The number of cartels snowballed, particularly because the government tried to promote industrial rationalisation by enforcing the *Important Industry Control Law*, which encouraged cartels. Against this background, the existing *zaibatsu* thrived. During World War Two the "*zaibatsu maintained their control over industries, but the government's control was so strong that the zaibatsu virtually served as agents for the government*". See Nariai, above n 14, 23, 27.

124 Following World War II the Japanese legal system was completely remodelled largely at the instigation of the American Military Government in Occupation. The codes of the *Meiji* era, of French and German inspiration, were modified and a new Constitution replaced that of 1889. The spirit of American law has now infused many of Japan's statues. In 1947 the US Military Government passed the Anti-Monopoly Law [Statute No. 54 of 1947]. By Article 9 "state holding companies", the *zaibatsu*, were abolished. These vast financial conglomerates had allowed Japan an enormous economic and military advantage. [The modern-day Korean *chaebol* were modelled on the *zaibatsu*]. However, Fingleton notes that the militarist years had left the Japanese Ministry of Finance ("MOF") with a legacy of massive regulatory powers. When the Americans shut down the military and attempted to break up the *zaibatsu* this created a massive power vacuum into which the MOF stepped. Today, power in Japan is concentrated within a robust pyramid headed by the MOF. See Fingleton, above n 99, 78. See also S Zen'ichi "A Texan Raid on a Japanese Company" (1989) 16,4 Japan Echo 61, 65.

American standards they were considered anti-competitive and economically inefficient.[125] They also constituted a threat to American firms and were perceived as being singly responsible for the awesome power of the Japanese military machine. However, the companies of the former *zaibatsu* began acquiring large volumes of stock in each other and confined their business intercourse to other firms within the original structures. The Japanese bureaucracy quickly reverted to its former ways and permitted, even encouraged, the financial and industrial groups to retain their power.[126] The *keiretsu* networks of today were born. It is this *keiretsu* system which catalysed Japan's "economic miracle".

The *keiretsu* have now become a paradigm for Japanese economic supremacy. So much so, that commentators have suggested the *keiretsu* evidence Japan's own unique brand of capitalism.[127] Instead of adopting a Western consumer orientation, Japanese society places the interests of the producer first.[128] Yet this does not mean competition does not exist within the Japanese economy.[129] Cutts notes that there is nothing sentimental about the *keiretsu*.[130]

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125 The GATT Secretariat comments that examining the role and efficiency of keiretsu groupings in Japan has proved difficult and controversial: "*Even defining the keiretsu remains contentious*". Bergsten comments that a number of important studies have examined the possible impact of *keiretsu* on Japan's trade pattern : Krenin (1988), Petri (1991), Lawrence (1991), Fung (1991), Noland (1992). He noted that each of these reports had its shortcomings, but the consistency in the results, obtained independently by different researchers using different models and data sets, suggested that *keiretsu* have a significant impact on Japanese trade patterns. See GATT, above n 2, 109. See also Bergsten, above n 4, 182.

126 For example, the Mitsui *keiretsu* consists of 24 major companies : Mitsui Bank (the group's main bank), Mitsui Trust (also a bank), Mitsui Bussan (a trading company), Mitsukoshi (a retailer), Mitsui Construction, Sankai Engineering, Mitsui Real Estate, Toray (textiles), Mitsui Toatsu (chemicals), Mitsui Petroleum, Mitsui Mining, Hokkaido Coal, Onoda Cement, Oji Paper, Japan Steel Works, Mitsui M & M (non-ferrous metals), Toyota Motors, Mitsui Shipping, Toshiba (electronics), Mitsui OSK (shipping), Mitsui Warehouse, and Nippon Flour. Cross-shareholding accounts for more than half of all the shares of these firms, and the main bank finances around one-fifth of all their borrowing. See Bergsten, above n 4, 75.

127 There is now widespread recognition of important differences between the Japanese and US brands of market economy. Over a decade ago, C Johnson (1982) portrayed Japan in the earlier post-war period as a "developmental state" akin to mercantilist nations of a previous era. More recently, C Prestowitz, Jr (1988), has called attention to Japan's emphasis on production, which contrasts sharply with America's emphasis on consumption. E Sakakibara (1992) portrays his country as a "non-capitalist market economy". N Iwao (1992) makes a useful distinction between American "market capitalism" and Japanese "network capitalism". S Okita (1992) labelled Japan's model, which he regarded as very useful for developing and emerging market economies, "catch-up capitalism" or "the capitalism of the latecomer".

128 Bergsten comments that the post-war economic policies of the United States and Japan suggest that they have pursued two very different sets of economic priorities : "*The United States set out to create the world's greatest consumer society and, within a single generation, attained a standard of living for most of its people beyond anything history had seen before. Japan, in contrast, set out to create a production machine that would restore both its economic security and its respectability in the family of nations. It too succeeded beyond all historical precedent - the formidably competitive manufacturing sector that emerged is the envy of the world.*" Bergsten notes that while both countries achieved their intended goals in spectacular fashion, their policy-makers never dreamed that realisation of these fundamentally different national purposes would bring them into frontal conflict. See Bergsten, above n 4, 12.

129 The differences between the Japanese and American economies relate primarily to methods of corporate governance, financial markets, labour-management relations, interactions between government and the private sector, and linkages among companies - the *keiretsu* system. Japanese companies respond to the interests of a wide array of stakeholders (notably employees, suppliers, and affiliated firms) rather than mainly to the interest of the shareholders as American firms do. Many of these stakeholders, including the "main banks" and other members of financial *keiretsu*, take a long-term view of the firm, provide a "patient capital" that emphasise long-term market shares rather than immediate profits, and block attempted take-overs. Japanese labour, thanks largely to the promise of lifetime employment and extensive participation in corporate decision-making, has been enormously supportive in raising corporate productivity. The Japanese government, particularly in earlier periods, has provided a system of systematic and sustained support for important domestic industries, both sunrise and sunset. See Bergsten, above n 4, 8.

130 See Cutts, above n 121, 53.

They are totally ruthless with each other and each resembles a fighting clan, uniting its business family against rival *keiretsu* in the battle for market dominance. Indeed, for products such as automobiles, the Japanese market is one of the most fiercely competitive in the world.

Until relatively recently the *keiretsu* were actively encouraged by the Japanese government, although they would clearly violate the strict anti-trust laws of most Western nations.[131] Despite intense American pressure, the use of *keiretsu* has remained an intractable feature of Japanese business and society.[132] Yet why have the *keiretsu* become such an integral part of Japanese culture? Professor N Iwao of Osaka University theorises it is because *keiretsu* practices mirror the Japanese cultural propensity to build long term relationships of trust:[133]

> The Japanese are inclined to value a relationship of trust built up between two organisations over a number of years more highly than factors directly tied to competitiveness in the marketplace. Japanese firms unquestionably operate within the context of tightly knit corporate relationships. Extending far beyond the confines of short-term business transactions, these relationships entail inter-organisational co-operation on all levels. Herein lies the essential difference between Japanese style capitalism and the American brand, with its emphasis on short-term performance. Herein, too, lies the key to Japan's spectacular post-war success.

Yet it is also apparent that the *keiretsu* networks tacitly operate to exclude foreign products.[134] R Dore notes the dilemma facing foreign firms: "*imports penetrate into markets,*

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131 Many cartels are not legally sanctioned by the Japanese Government. For example, a purely private cartel in which Japanese companies agree to control the export prices without the approval of Ministry of International Trade and Industry would violate the Export and Import Transactions Law [Law No 299 of 1952] (*Yushutsunyuu Torihiki Hoo*). Although such a cartel would become legal if sanctioned by the MITI. See Peters, above n 61, 522.

132 In 1974 the United States pressured Japan into establishing the Japan Fair Trade Commission ("JFTC") to enforce the 1947 Anti-monopoly Law and prevent the *zaibatsu* reforming. But the JFTC rapidly became notorious for its ineffectiveness. Under American pressure this has recently changed. Following discussions between the United States and Japan in 1989, the JFTC was strengthened and its independence enhanced. The JFTC drafted new guidelines on anti-competitive practices, especially in the distribution system, clarifying which practices were illegal and which were not. The Japanese Government endorsed this process : *"In accordance with the increasing globalisation of economic activity, it has become an important policy objective to make the Japanese market more open and to protect consumer welfare"*. The JFTC has boosted surveillance of many *keiretsu* and enforcement of unfair trading practices has tripled. The JFTC is now playing a significant role in increasing market access for foreign firms. It has been estimated by the JFTC that almost 90% of all domestic business transactions within Japan are *"among parties involved in long standing relationships in the nature of keiretsu"*. See JF Rill "Statement on Japanese Competition Policies and the United States Response Before the US Senate Judiciary Committee, 29 July 1992" (1992) 16,1 World Competition 143, 143.

133 *Keiretsu* reflect a Japanese cultural emphasis on continuity of the contractual relationship. Verbal and psychological contracts are considered to be as binding as written contracts. Reneging on these verbal contracts often brings swifter and more unforgiving sanctions than any court penalties. Contracts are assumed to be continuous, and this carriers real cash value as a form of insurance against uncertain outcome. The continuity of the business relationship often has sufficient economic value to a subcontracting firm to outweigh discounts or other benefits offered by new suppliers or customers. See above Iwao, n 119, 12. See also Makino, above n 60, 36. See also Maurer, above n 54, 24.

134 The problem with this argument is that discrimination carries a well-known efficiency cost. Firms that do not source from the most efficient suppliers place themselves at a competitive disadvantage. The proven ability of the Japanese electronics firms to compete in world markets implies that they are not competitively disadvantaged in any significant way. Bergsten suggests one possible reason is that vertical integration can capture "*significant pecuniary externalities*". Another is that *keiretsu* might prefer to source from affiliated companies as part of a kind of profit sharing and insurance scheme. See Bergsten, above n 4, 134.

but where there are no markets, only a network of established 'consumer relationships', it is hard for them to make any headway".[135] There is growing anger amongst foreign nations that Japan is engaging in "unfair business practices".[136] Sustained international pressure is being placed on Japan to eliminate the *keiretsu*.[137]

While the Japanese are slowly responding to this external pressure, it is clear that the *keiretsu* remain deeply entrenched within Japanese business culture.[138] The interaction of the *keiretsu* with Japanese society and government has a largely impregnable barrier to international trade.[139] The Japanese automobile industry is illustrative.

1 The Advantages of Vertical Keiretsu : The Japanese Automobile Industry

The Japanese auto industry is notorious for its exploitation of *keiretsu* techniques and manifests the two key "vertical" *keiretsu* techniques used by modern Japanese industry: closed supply pyramids, and discriminatory distribution networks.

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135 See R Dore & I Masamichi "Japan and the United States : Reviewing the Structure of Japan-US Relations" (1992) 14 Japan Echo 37, 40. See also I Ken'ichi "The Legitimacy of Japan's Corporate Groups" (1990) 17:3 Japan Echo 23, 25.

136 The *keiretsu* issue was brought to a head in March 1989 when Texas oil magnate T Boone Pickens attempted to take-over the Japanese auto-parts supplier *Koito*. He demanded representation on *Koito's* Board of Directors but was refused. Enraged, he complained to the United States Congress. The Japanese argued Pickens had been treated no differently to any other hostile company. They explained the *keiretsu* cross-shareholding system was designed to ward-off hostile take-overs *per se*. They also highlighted the fact that in Japanese companies the interests of the employees, not shareholders, reigned supreme. Hence under Japanese law there was no duty to appoint nominees of Pickens to the *Koito* Board. But allegations of Japanese discrimination were sympathetically received by Congress and much cynicism was directed at the Japanese when they invoked cultural differences to justify their stance. See Zen'ichi, above n 124, 66.

137 Further pressure from the US recently led to a revamping of the Japanese Trade and Investment Ombudsmen's Office. It is now completely independent of the Japanese Government and consists of a panel of industry experts with great statutory powers to enforce market opening mechanisms. This is another major step in reducing the power of the *keiretsu*. *Keiretsu* are also under scrutiny from the Japanese Judiciary. The Tokyo District Court recently blocked a ploy to escape a hostile take-over bid attempted by two *keiretsu* supermarket giants *Chuujitsuya* and *Inageya* against the hostile real-estate giant *Shuuwa* The two firms had issued stock to each other at a discount to dilute *Shuuwa's* share. See "Sweeping Overhaul of Trade Ombudsmen" *Japan Times Weekly International Edition*, Tokyo, Japan, 7 June 1994, 3.

138 Sheet glass illustrates the problem. Japan's sheet glass market is supplied primarily by three producers : Asahi Glass, Nippon Sheet Glass, and Central Glass. Not surprisingly, the implied non-tariff barrier in 1989 was calculated by the Institute for International Economics to be 62%. The United States - Japan Structural Impediments Initiative (SII) took up the claim by a US flat glass maker that the domestic distribution network (controlled by the three Japanese producers) was being used to impede market access. The Japanese government eventually agreed to facilitate foreign exports to Japan with an import expansion programme and directed the Ministry of Construction to help foreign firms comply with glass standards used in Japanese construction. At the end of 1993, following continued complaints by American exporters, the JFTC again surveyed conditions in the Japanese glass market. The JFTC reported that it had found "no violations" of Japan's Anti-Monopoly Law. However, the JFTC simultaneously "encouraged" the 3 glass producers to terminate a system of sales targets for distributors that "*may have a negative effect on imports*". See Sazanami, above n 11, 26.

139 It seems that global economic forces will gradually weaken the power of the *keiretsu*. Globalisation of financial markets will weaken financial interdependence and equalise the cost of capital across countries (access to cheap capital has been a major advantage for Japanese companies in the past). Japan's is beginning to apply antitrust policy more aggressively and has started to liberalise its distribution system; both of these initiatives will also erode the *keiretsu* over time. The GATT Secretariat also notes that "*keiretsu*-hopping" by Japanese firms now appears to be increasing, while foreign firms, in line with Japan's recent policies of de-restricting inward foreign investment, are becoming increasingly involved with keiretsu-affiliated firms. The Secretariat concluded that in light of these findings, the role of the *keiretsu* was weakening dramatically. See GATT above n 2, 110. See Bergsten, above n 4, 9.

The supply-side of the vertical *keiretsu* existing within the Japanese auto industry typically comprise horizontally and vertically integrated pyramids of hundreds of suppliers and component manufacturers, tightly ordered into a single structure as if they were a single enterprise.[140] Together they supply all the requirements of the principal auto manufacturer. Subcontracting companies receive cheap financing from contracting companies but in return must enter into long-term supply agreements and typically the contracting companies will also own large share-holdings in their sub-contracting companies.[141] This system has been recognised as providing superb product quality, increased security, and greater manufacturer control - yet it shuts out foreign suppliers.[142] It is also fairly harsh in its operation with the smaller "dispensable" companies at the bottom of the pyramid bearing the brunt of tight business conditions.[143]

The distribution-side of the vertical *keiretsu* regulates the flow of products from the manufacturer to the consumer.[144] In the car industry these take the form of "dealerships" whereby Japanese dealers agree to sell only selected brands of cars - as frequently occurs

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140 Richards notes that *keiretsu* may be categorised into two distinct forms:
First, the Mitsubushi, Mitsui, Sumitomo, Daichi Kangyo and Sanwa groups are all examples of horizontal *keiretsu*. An example of a powerful horizontal keiretsu is provided by the Mitsubishi Group, which includes Japan's largest chemical company, its largest brewery, its fifth largest bank, and its fifth largest automobile company (Mitsubushi's member companies number nearly 190 with annual sales amounting to NZ$500 billion). Such horizontal groups share the following characteristics : a central role played by the group's bank and trading company; mutual stock ownership and interlocking directorships between the member firms; the key companies concentrate on the group's main function while other companies in the group provide supplementary functions; and a common tendency to bring together representatives of member firms to consult, make policy, and monitor activities within the group.
The second type of keiretsu, particularly common in the automobile and electronics industries, has a *vertical* structure with a large parent company having a considerable number of small and medium sized companies under its aegis. Toyota, for example, has 175 primary suppliers and 4000 secondary suppliers. Although the small and medium sized companies are subcontractors to the larger company, the Japanese view subcontracting as an intermediate view of business relationship, existing somewhere between a supplier in the open market and an in-house manufacturer. When most of these contractor-subcontractor relationships were being formed, Japanese measures to nurture the economy prevented foreign companies from operating in the Japanese market - and the long-term nature of relational contracting in the Japanese business environment means that they are now effectively excluded. See Richards, above n 121, 925.

141 At the hub of each *keiretsu* is a bank or cash-rich company (for example a large manufacturer) which provides low cost, "patient" capital. A prime reason for entering a *keiretsu* group was to gain access to this credit. Under the regulated financial system was not readily available through normal channels. But deregulation of the financial system has now lessened the need to maintain these links. See GATT, above n 2, 110. See also Richards, above n 121, 923.

142 For example, the "just-in-time" ("*kanban*") system minimises inventories. This implicitly excludes foreign companies from the automobile component market. Bergsten also comments that some aspects of *keiretsu* behaviour are not only acceptable, but worthy of emulation: "*long-term cross-holdings of corporate shares provide 'patient' capital and encourage effective monitoring of management. Some aspects of vertical corporate integration, such as the "designing-in" of components and just-in-time inventory deliveries, enhance efficiency*". See Bergsten, above n 2, 213. See Iwao, above n 119, 10. See Alden, above n 55, 53.

143 The Japanese argue that the *keiretsu* system is simply a cousin of the corporate networks that are found throughout the industrialised world. Both systems are simply following acknowledged business practices by entering into continuous relationships to ensure that the supply, quality and price of inputs and outputs remain at satisfactory levels. Both systems exploit a nexus of very complex explicit and implicit contracts. See A Morita "Partnering for Competitiveness : The Role of Japanese Business" (1992) 70 Harvard Bus Rev 76, 82.

144 For example Matsushita owns a chain of 25,000 retail outlets throughout Japan which generate roughly 50% of Matsushita's domestic sales. These retail outlets sell only Matsushita goods. Similar patterns exist with other manufacturers within the pharmaceutical, newspaper, processed food, camera and automotive fields. See I Motoshige "Creating a Competitive Commercial Sector" (1990) 17,3 Japan Echo 17.

within other nations. Most Japanese car firms officially permit their dealers to sell foreign brands, but only about 20% of Japanese dealers do so.[145] The reason, according to American officials, is that tradition and informal pressure from Japanese auto makers coerce most Japanese dealers to stock only Japanese vehicles.[146] Yet the Japanese argue that American companies will never establish their own dealership networks in Japan until they make American vehicle parts and servicing more readily available to Japan's notoriously fastidious, and quality-conscious consumers.[147]

2 *The Dangers of Relational Contracting : Dango Collusion in the Construction Sector*

Other arrangements, known as the *dango*, exist within the public works construction industry.[148] These take the form of an omnipresent bid-rigging system that pervades the entire industry, allowing designated bidders to quietly decide among themselves who will win a tender; then they arrange their bids accordingly.[149] Corrupt public officials often provided *dango* contractors with inside information concerning the ceiling prices for each contract.

Technically this practice is illegal and was estimated to cost Japan 50% more than an honest sealed-bid system. Yet until recently, the *dango* contractors remained the single largest donors to the powerful Liberal Democratic Party ("LDP") and accounted for up to 60% of total contributions.[150] Political corruption was rife and enforcement extremely lax.[151] In 1993 the former LDP Minister of Construction, Kishiro Nakamura, was convicted of receiving NZ$200,000 for blocking criminal accusations against the Japanese construction company

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145 BMW and Volkswagen have 160 outlets in Japan, but complain that the biggest impediment to business is the outrageous cost of land. This thwarts the establishment of car-inspection centres and alike. Ford has established 300 dealerships shared with its Mazda Corporation affiliate. GM European has 200 Opel showrooms (via a long-established Japanese car-importer). See "Imports Sell if Japanese Get What They Want" *Asian Wall Street Journal*, 20 May 1995, 1.

146 An irony is that an American auto manufacturer, GM, is one if the worst offenders in the use of such practices. In the United States it actively discriminates against dealers who wish to adopt other franchises. See "United States-Japan Car Talks Show That Wide Rift Remains" *Asian Wall Street Journal*, 13 June 1995, 6.

147 Makino notes, from his experience as a supplier to larger Japanese corporations, that his manufacturer customers were seldom satisfied with an "acceptable quality level" or "adequate industry standard". He comments that a strong drive to improve product quality is built into the Japanese manufacturing system. The manufacturing customers demand, and get (almost without exception) both quality improvements and scheduled price reductions from suppliers. Suppliers are pressured continuously to improve quality and cut production costs. See Makino, above n 60, 10

148 Problems of foreign market access in Japan sue to collusive public and private actions are particularly evident in the area of construction, engineering and architectural services. See Bergsten, above n 4, 161.

149 The legal impediments to entry include a complex system of firm licensing and the selection of firms as designated bidders on particular projects. The primary effect of this institutional arrangement is to create a cartel of licensed general contractors. This cartel generates rents, and the inability of the cartel to completely deter entry encourages excessive local entry and the existence of a fringe of small, inefficient firms. The need then arises for a mechanism to distribute cartel rents. This is achieved via the practice of *dango*, a form of bid-rigging in which firms negotiate with each other as to which firm will participate in bidding on a given project and at what price. See Bergsten, above n 4, 162.

150 Given the importance of construction-industry political contributions to Japanese politicians, the *dango* issue runs directly to the heart of the Japanese political system, meaning that reforms are difficult to obtain. See above Bergsten, n 4, 167.

151 For example, the JFTC angered the Japanese public when it declined to press charges against a Saitama prefecture *dango* case. This reportedly involved 66 construction firms (including Taisei, Japan's largest) and as much as $700 million in public contracts. See Bergsten, above n 4, 78.

Kajima Incorporated during an independent governmental inquiry into the rigging of a major construction project bid.

The Japanese construction market is the world's most lucrative, worth an estimated NZ$650 billion annually, yet foreign construction companies were strictly excluded by the *dango*.[152] Yet on 5 May 1994, under intense pressure from the United States, the Japanese Government tightened bidding practices for public works projects and increased overall transparency.[153] It seems the *dango* practice may now have diminished.[154]

C Relational Contracting and the Japanese Retail Distribution System

Another characteristic feature of the Japanese economy is the excessive complexity of the retail distribution system.[155] It has been described as "*an archaic, fragmented and multi-layered system of small middlemen and retail outlets*".[156] Yet this distribution system is another aspect of Japanese life shrouded in history, tradition and culture. Retailing played an integral role within Japan's feudal "*Edo*" society and has retained its prominence, and family-oriented infrastructure, into the present day.

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152 As mentioned above [n 149], impediments to entry comprise a complex licensing system, and the selection of firm to be designated bidders on particular projects (a pre-tender selection process). Experience within Japan is an important part of this approval and selection process, and this creates a Catch-22 situation for foreign firms. They cannot get into the market because they are not licensed, but they cannot get licensed because they don't have any experience. This has the secondary effect of forcing foreign firms to seek Japanese partners for joint venture work in order to gain the experience necessary for licensing and to increase the likelihood of being selected as a designated bidder. See above Bergsten, n 4, 162.

153 The *dango* issue was one of the most frustrating for the United States with nine years of futile high-level negotiations accompanied by threats of retaliation and counter-retaliation. In 1987, Senator F Murkowski instigated legislation that barred foreign firms from the American market if they had not granted reciprocal access. This was implemented against Kiewet Construction and Kajima Engineering in reaction to a 1988 Washington DC subway project - leading to a shocked reaction by the Japanese. Simultaneously, in 1988, the Reagan administration began moving strongly towards the extraordinary act (at that time) of self-initiating a section 301 case against Japanese construction. Increased threats in May 1988 finally forced an understanding between United States and Japan negotiators on increased transparency of bidding procedures for major Japanese public works procedures. This included the giant US$7.6 billion Kansai International Airport project (the creation of a giant 1,482 acre man-made island, followed by construction of a massive international airport). The agreement was known as the "Major Projects Agreement". In May 1991, and May 1994, this Major Projects Agreement was progressively strengthened: requiring the provision of more information to foreign firms; creating a dispute settlement mechanism; creating guidelines for a new category called "design and build" work; and toughening overall enforcement against the *dango*. See Bergsten, above n 4, 163.

154 Yet clearly some elements of the *dango* remain. This is illustrated by the Kansai International Airport construction project. American firms were excluded from the initial design stage, as Japanese officials were quoted as saying that US firms did not understand the unique characteristics of Japanese soil [mentioned above n 153 and n 68]. Yet apparently the Japanese project managers did not either! The engineering consultant hired to estimate sinkage rates predicted that the island would sink 23 to 39 feet over the next 50 years. Kansai International Airport officials adopted the lower estimate and acted accordingly. Unfortunately the higher figure appears more accurate, and at current sinkage rates the island will be only one metre above the water line sometime in the next century. Observers jokingly predict that the airport will only be operable at low tides! More seriously, the problem has led to massive cost overruns (exacerbated by the *dango*) and concerns about the viability of the airport as originally envisaged. See Bergsten, above n 4, 164. See Punke, above n 41, 58.

155 See Pempel, above n 6, 442.

156 There is a considerable overlap here with the distribution function of the *keiretsu* : many of the major Japanese consumer-goods producers have captive distribution networks, sustained by practices that would be illegal in countries such as the United States. See above Wallis, n 9, 385.

The *Edo* period in Japan lasted from 1603-1867 and signified the unification of Japan and the establishment of a national capital in Edo (now known as Tokyo).[157] This proved a major turning point in Japanese history with *Shogun* (Feudal Lord) Tokugawa Ieyasu able to rationalise Japan's feudal configuration to bring lasting peace and stability to Japanese society.[158] Within this period a slow social revolution occurred as the warlike rule of the Japanese *samurai* was supplanted by rising mercantilism.[159]

Today, in modern Japan, the channels between wholesaler and retailer remain long and complex with goods often changing hands repeatedly among tiers of intermediate distributors.[160] This extreme level of inefficiency has escalated Japanese retail prices.[161] It seems that retail prices in Japan are on average 320% greater than wholesale prices, this compares with only 70% for the United States.[162]

The distribution system has also acted as a kind of latent Japanese social welfare system. The vast numbers of intermediary wholesalers have acted as a mechanism for absorbing much of Japan's unskilled labour.[163] Professor Lee Seung Jai of Tokyo University, during an interview in 1990, observed:[164]

> The distribution sector served as the largest receptacle for people in search of work. It functioned as a sort of employment security system for the potentially jobless throughout the country. The commercial ethic that has followed and developed as a result isn't one that follows an objective criterion of economic rationality. Instead we have a system that has developed along the lines of the Edo-period religious teacher Ishida Baigan, one where multiple layers of distributors are able to coexist. From a domestic perspective there's nothing wrong with this set-up. If the surplus workers hadn't been absorbed into the distribution system, they would have perhaps had to go into the military, or else they would have been treated as charity cases and put on welfare, as in the United States. But foreigners resent the fact that the costs of this unofficial safety net add to the barriers they face when they try to export to Japan.

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157 See Thatcher, above n 42, 531.

158 However, it has been suggested that Japan's unique situation encourages an abundance of small stores because of the limited storage space in most Japanese homes and the low re-order costs of retailers. See GATT, above n 2, 112.

159 The Tokugawa shogunate lasted until 1867 when the feudal system collapsed under increasing international pressure. Emperor Meiji was restored as Sovereign and Japan began opening to the outside world. See Motoshige, above n 144, 21.

160 There are about 429,000 wholesalers and 1.5 million retailers in Japan, nearly twice the number in the US on the basis of number of stores per population. Over 73% of wholesalers have fewer than 9 employees and 75% of retailers have fewer than 4. Combined sales of wholesalers are 3.6 times as large as those of retailers. It is about 1.8:1 in the US, 2.03:1 in the UK, 1.7:1 in Germany and 1.2:1 in France. See MITI *21st Century Vision for Distribution* (MITI, Tokyo, June 1995).

161 Trade barriers penalise Japanese households and industrial purchasers by restricting demand and rising prices, but they also enable domestic firms to maintain higher output and price levels. In addition, non-tariff protection creates "quota rents" - artificial scarcity premiums - that are captured by importers and distributors at the expense of society at large. See Sazanami, above n 11, 21. See also S Taichi "Retailing on the Eve of a Revolution" (1990) 17,3 Japan Echo 12, 13.

162 The Japanese economy is extraordinarily inefficient in some places. The retail sector a classic example with the cumbersome distribution system generally increasing price and decreasing the availability of goods.

163 In 1989 the distribution system employed about 11 million workers. Small family-operated stores and small scale businesses, which employed less than five people, constituted 57% of retail sales, versus 3% in the US and 5% in the UK. See ST Anwar "Efficiency in the Japanese Distribution System : New Developments" (1995) 29:1 World Trade 83, 84.

164 See above Motoshige, n 144, 21.

In his best-selling controversial work "*The Japan That Can Say No*", S Ishihara commented that a streamlining of the Japanese distribution system would immediately produce 300,000 redundancies. It now seems that his estimate was highly conservative.[165] This extreme labour intensivity has also cultivated the intricate packaging associated with many Japanese products. Which in turn has become an integral part of modern Japanese retail custom. Japanese retailers remain proud of the immense intricacy and beauty of their packaging, while Japanese consumers now have an expectation of such high quality service.

There seem to be two primary reasons why the distribution system discriminates against foreign products.[166] First, foreign importers must negotiate with a prolific number of small retailers in order to ensure that their products reach the Japanese consumer. Field notes that these negotiations rarely succeed "*due to a limited understanding of the cultural and historical forces underlying the Japanese retail system*".[167] The second reason concerns the policies of the Japanese Government - which have sustained this complex system via legislation, regulation and administrative guidance. These regulations have frequently been influenced by incumbent Japanese firms to tilt the distribution system against foreign competition.[168]

Attempts by foreign companies to circumvent the distribution system have been strongly resisted by the Japanese. But demands for reform are not confined simply to foreign companies. All producers, including Japanese producers, must contend with its unwieldy complexity. Many Japanese corporations, including Sony and Sanyo, have resoundingly criticised their Government's policy of encouraging the conglomeration and claimed that Japanese consumers are paying too high a price.[169] Yet the entire distribution system is currently undergoing radical reform. It seems likely that such measures will change the very fabric of traditional Japanese society. An example is provided by the recent repeal of the *Japanese Large Retail Store Law 1970* ("Large Store Law").[170]

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165 Punke suggests that the Japanese preference for small stores reflects a cultural valuation not unlike the United States preference for the traditional individual farmer versus the corporate farm. See Punke, above 41, 62.

166 Bergsten also notes the influence of the *keiretsu* within the distribution system creating discrimination via "vertical foreclosure" : "*Vertical foreclosure occurs both in consumer and in capital goods. Vertically integrated firms refuse to carry products of competitors, and product return and rebate systems are used to tilt retailer incentives toward domestically produced products. Sophisticated economic research by Ariga points to administered prices in sectors where there are strong vertical relationships or keiretsu, suggesting that control of the distribution system acts as an effective barrier to entry. Although recent reforms have narrowed the scope of permissible vertical restraints, enforcement remains lax.*" See Bergsten, above n 4, 76. See also T Nishimura *Relational Contracting and the Japanese Legal Consciousness* (Kusuda Smick, Tokyo, 1990), 217.

167 See Field, above n 34, 179. See also "Oriental Renaissance : Survey of Japan" *The Economist*, 9 July 1994, 16.

168 Bergsten notes that both these problems are worsened by the preponderance of small, poorly capitalised stores in the Japanese retail system. The relative weakness of the retailers increases both the discriminatory impact of government regulations and the likelihood of capture by large manufacturers. The numerous small shopkeepers also act as a domestic pressure group to maintain regulations that impede the establishment of large retail stores. See Bergsten, above n 4, 76.

169 Sony and Sanyo have both criticised the circuitous paths their goods must follow to reach consumers.

170 Large Scale Retail Store Law 1970 (*Daiten-Ho*).

1 The Repeal of the Large Store Law : Bowing to Foreign Pressure

In 1990 the Japanese Government bowed to foreign pressure and repealed its regulations governing the size of Japanese retail outlets. This legislative action was taken largely in response to the United States-Japan "Structural Impediments Initiative", a series of American-initiated bilateral negotiations between Japan and the United States aimed at reducing the United States trade deficit. Previously the Large Store Law had strictly regulated the size of stores in order to promote smaller, family operated, retail outlets.[171] Within Japan there were an estimated 1.6 million of such traditional small, family operated shops employing about 6 million Japanese people.

The Large Store Law required prospective store developers and operators to submit a report to the local government outlining the proposed site, size and operating hours of any new retail store above 500 square metres.[172] Local officials could then effectively veto the proposal on any of a number of grounds - and typically did. An extremely close relationship existed between local politicians, retailers, and the estimated 430,000 wholesalers.[173]

This effective veto on development maintained the viability of the numerous small stores by preventing the construction of potentially more efficient larger stores (such as the hypermarkets and large shopping malls familiar in the United States). It prevented larger retailers using economies of scale to provide greater product variety at a lower price. The existing distribution system was therefore sheltered by the government at the expense of the Japanese consumer. Yet the repeal of the Large Store Law is now causing a proliferation of new larger stores that are dramatically changing the face of the current Japanese retail industry.[174]

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171 The principal targets of the Law were large Japanese mass retailers, but the provisions effectively kept foreign retailers out as well. For American trade negotiators, the experience of the United States toy retailer Toys 'R' Us became the *cause célèbre*. See "For 'Toys-R-Us' Chief the Playground is Global", *Chicago Tribune*, Chicago, 19 December 1993.

172 The GATT Secretariat comments that prior to the amendment of the Law, any store of more than 500 sqm had to be discussed by a committee of the Council for Co-ordination of Commercial Activities and "*under these complicated arrangements and practices, its was often also necessary to get the agreement of neighbouring stores prior to submitting an application for a building permit. This resulted in major delays being incurred in processing applications*". The Secretariat noted that the time required to build and operate a large retail store could be anything between 2½ to 10 years and quoted from Itoh and Maruyama (1991): "*In essence, the law and its implementation can virtually stop the construction of a large retail store if the neighbouring stores oppose it*". See GATT, above n 2, 112.

173 Subsequent revisions of this law greatly increased its pervasiveness, and the administration of the law was captured by local advisory committees dominated by small shopkeepers. Similar laws were adopted at the local and the prefectural level, with the result that the time required to gain approval to open a large store stretched to a decade. See Bergsten, n 4, 160.

174 The changes have dramatically reduced the time taken to approve applications, and according to the GATT Secretariat application times are down from between 2½ and 10 years, to only one year. This has resulted in a marked rise in the number of applications for large shop constructions being processed. The GATT Secretariat notes that in 1991 and 1992, some 2,300 cases were processed, compared with between 400 and 500 for similar periods previously. See GATT, above n 2, 112. See also Import Promotion Department *The Japanese Market Continues to Open Up : A Business Person's Guide to the Japanese Market* (Japan External Trade Organisation, Tokyo, 1995), 6. See also See JO Haley "Lessons from a Changing Japan" (1993) 1 Pacific Basin L & Poly J 103, 107.

PART TWO: INTERNATIONAL LEGAL RESPONSES

The first half of this paper outlined some of the characteristics of the more omnipotent and pervasive cultural trade barriers that have thwarted foreign access to the Japanese domestic market. These include the use of administrative guidance, the existence of corporate *keiretsu*, and the inefficient Japanese distribution system.

This part of the paper now explores the existing legal mechanisms that could be applied to cultural trade barriers, and summarises their overall effectiveness. These legal techniques include:

(i) the GATT 1994 and its new WTO Dispute Settlement Body;

(ii) international competition law, including the UNCTAD Code on Restrictive Business Practices 1980;

(iii) unilateral and bilateral responses by individual states, such as the United States' use of Super 301 and Voluntary Restraint Agreements; and

(iv) alternative dispute resolution procedures, such as the proposed APEC Dispute Mediation Service.

This paper also briefly outlines the Japanese Ambassador to New Zealand's novel proposal to the Japan-New Zealand Business Council in 1994; he mooted the creation of a commercial dispute mediation body to assist trading relations between Japan and New Zealand.

V THE GENERAL AGREEMENT ON TARIFFS AND TRADE (GATT) 1994

Public international trade law is guided by a complicated set of international treaties and institutions coalescing around the General Agreement on Tariffs and Trade ("GATT").[175] The GATT was established in 1947 with the fundamental objective of promoting free international trade and thereby enhancing the overall welfare of all nations.[176] To achieve this objective the GATT created a framework for the progressive reduction of tariffs. The GATT's key principle of "Most Favoured Nation" treatment obliged each contracting state to extend to every other contracting state the same favourable tariff concessions that it had granted to any

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175 Many of the original GATT obligations have been supplemented by separately negotiated treaty instruments known as "Codes". See JH Jackson "National Treatment Obligations & Non-tariff Barriers" (1989) 10 Michigan J Int'l L 207, 208.

176 The GATT was drafted in Geneva in 1947 based on generally accepted principles of fair trade with the signatories "*recognising that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of income and effective demand, developing the full use of the resources of the world and expanding the production and exchange of goods*". These objectives were to be attained by "*entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international countries*". See General Agreement on Tariffs and Trade, 30 October 1947, 61 Stat (5), (6) TIAS No 1700, 55 UNTS 194. See also GATT *Text of the General Agreement of the GATT* (GATT Secretariat, Geneva, 1986), 1.

other individual GATT member.[177] In the period following the Second World War, the GATT proved highly successful in reducing tariff barriers and thereby freeing the flow of international trade between the GATT nations.

Since 1947, rounds of intensive multilateral negotiations have gradually supplemented, extended and strengthened the provisions of the original agreement. There have now been eight Rounds of GATT multilateral negotiations. The first five rounds did not substantially alter the form and intent of the original agreement, and they largely dealt with progressive tariff reductions via employment of legally enforceable "tariff bindings". These tariff bindings set out maximum permissible tariff rates for each traded good in gargantuan product lists. Yet the more recent Kennedy, Tokyo and Uruguay Rounds proceeded further, generating substantive reforms to the GATT itself.[178] These reforms have greatly enhanced the impact of the GATT within the international community.

The Tokyo Round of GATT negotiations (1977-1979) directly addressed the issue of non-tariff barriers (such as cultural trade barriers), and resulted in the adoption of six specialised non-tariff "codes" by the GATT Contracting Parties. These codes took the character of discretionary guidelines, and "*left the countries free to develop non-tariff barriers as a response to domestic political economic interests*".[179] Although the Tokyo Round marked a significant step towards resolving non-tariff barriers to trade, it proved largely ineffective.

The subsequent Uruguay Round of GATT multilateral negotiations proved to be the most revolutionary round of them all. In December 1993 the Uruguay Round was concluded after a marathon seven years of negotiations. Many important changes to the GATT have resulted that have extended and altered the regulation of international commerce and reshaped the framework of the global multilateral trading system.[180] In relation to cultural trade barriers, the most important of these changes involve the creation of the World Trade

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177 Article I obliges contracting parties to accord all GATT trading partners the same customs and tariff treatment as any individual GATT trading partner. Article I:1 of the GATT provides: *"Any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties".*

178 The 1994 WTO Understanding carried over the rules and principles of the pre-WTO regimes, yet at the same time, introduced innovations mainly intended to overcome the pre-WTO regimes' deficiencies.

179 See Adams, above n 17, 54.

180 The "Uruguay Round" was the eighth round of multilateral trade negotiations under the GATT and commenced in Punta del Este in Uruguay on 20 September 1986. It was the longest of the GATT rounds, being delayed by a major deadlock between the United States and the European Community over agricultural subsidies. The United States and Japan were the main movers of the Uruguay Round, the Europeans (i.e. France) the main obstructers. The Round was completed on 15 December 1993, with the Final Act signed on 15 April 1994 in Marrakesh, Morocco. See GATT *Final Act and Agreement Establishing the World Trade Organisation, General Agreement on Tariffs and Trade*, Uruguay Round (including GATT 1994), Marrakesh, Morocco 15 April 1994. See also J Schott *The Uruguay Round : An Assessment* (Institute of International Economics, Washington DC, 1994).

Organisation ("WTO"), its Dispute Settlement Body ("DSB"), and the adoption of a new Agreement on Technical Barriers to Trade.[181]

A The Jurisdiction of the WTO : Discovering the Grey Areas of GATT Legality

Does the jurisdiction of the GATT extend to encompass cultural trade barriers such as those manifested by Japan? This is by no means clear. As a treaty concluded between states, the GATT is an instrument of public international law and its obligations accrue *pacta sunt servanda* to the government of each contracting party. While Japan was admitted to the GATT in September 1955 and is clearly a "contracting party", only certain elements of non-tariff barriers can be identified with the obligations of the Japanese Government.[182] Those aspects of cultural trade barriers that cannot be attributed to the Japanese Government will fall outside the current ambit of the GATT.[183]

While a variety of GATT provisions can be applied to cultural trade barriers, the strongest arguments are associated with Article III, the "National Treatment" obligation.[184] Article III obliges the GATT contracting parties to treat all imported goods no worse than domestically produced goods. It is concerned with the treatment of foreign goods once they have passed through customs checkpoints and entered the stream of commerce of the importing nation.[185] Articles III:1 and III:4 provide:

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181 Many additional legal instruments and institutions have been negotiated into the GATT 1994 : a new unified administering body - the World Trade Organisation ("WTO"); improved Dispute Settlement Procedures; a General Agreement on Trade in Services ("GATS"); and an Agreement on Trade Related Intellectual Property Rights ("TRIPS"). This has significantly enlarged the legal system within which international trade will be conducted. See Russell McVeagh McKenzie Bartleet & Co "Understanding The Uruguay Round : International Trade Law Update" [1994] 2 Russell McVeagh McKenzie Bartleet Client Newsletter 1, 3. See also Ministry of Foreign Affairs and Trade *Trading Ahead : The GATT Uruguay Round - Results for New Zealand* (New Zealand Government, Wellington, 1993), 68.

182 Japan was admitted to the GATT with full-membership status in September 1955. This represented a major effort by Japan to re-enter the international community following the termination of the post-World War II American occupation and Japan's subsequent independence in 1952. Japan first applied for membership of the GATT in July 1952, but the initial application was vetoed by the Europeans. Finally, with the influence of the United States, Japan was accepted as a GATT member. Only with Japan's escalating economic power in the late 1960s was Japan targeted for the reduction of tariff barriers (this occurred in the appropriately named "Tokyo Round"). See Adams, above n 17, 55.

183 Bergsten concludes "*Our analysis of a number of individual sectors, however, confirms the view that Japan's access problems represent a complex mix of public policies and private business practices. Government intervention is present in every case studied, and a share of each problem should thus be susceptible to traditional modes of international negotiations. However, restrictive corporate behaviour, usually the expression of oligopoly practices of one type or another, is also omnipresent. This too, could, in some cases be addressed through changes in government policy, and in particular, through more rigorous antitrust enforcement, but it frequently lies beyond the reach of official action*". See Bergsten, above n 4, 220.

184 An Article I action would require proof that the cultural trade barriers favoured one foreign country's products in preference to other foreign countries. An Article III action that would require proof that cultural trade barriers favoured domestic products favour to foreign products. Ironically the pressure from the United States on Japan may lead them away from Article III, but towards violation of Article I (whereby American products are able to penetrate the cultural trade barriers, but other countries' products are not). This allegation was part of the European Community case against Japan in the *Semiconductor* case: *Japan - Trade in Semiconductors (1988)* GATT Panel Report adopted 4 May 1988, BISD 35S/116.

185 A 1958 GATT Dispute Panel report, *Italian Discrimination Against Agricultural Machinery*, provided a fundamental interpretation of the National Treatment clause. In that case the United Kingdom complained that an Italian banking

> **1.** The contracting parties recognise that....regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products....should not be applied to imported or domestic products so as to afford protection to domestic production.
>
> **4.** The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable then that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transport or use.

It should be clarified at the outset, as Professor J Klabbers succinctly points out, that there is "*no such thing as a GATT jurisprudence*" because Panel Reports have no formalised precedential value.[186] Yet there can be no doubt that in practice the GATT Panel Reports do, to some extent, serve as authoritative precedents for subsequent decisions.[187] There have been a variety of Panel Reports that have grappled with the construction of Article III and these provide a ready insight into its potential application.[188]

1 Article III and Indirect Discrimination : Conceptual Problems with the GATT

Article III "jurisprudence" appears to involve three key issues of interpretation: *(i)* identification of "*like products*"; *(ii)* clarification of the scope of the phrase "*laws, regulations and requirements*"; and *(iii)* testing for discrimination. The second and third issues are relevant to this paper; the third issue is undoubtedly the most complex.

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measure provided favourable loans to Italian farmers buying domestically made tractors. The panel interpretation of Article III was accepted by the GATT Contracting Parties and reasoned "*the intent of the drafters was to provide equal conditions of competition once goods have been cleared through customs*". Hence, once imported goods have entered the internal stream of commerce, no government regulatory measure may assist the purchase of domestic goods without doing the same for imported goods. See *Italy - Discrimination Against Imported Agricultural Machinery (1958)*, GATT Panel Report adopted 23 October 1958, BISD 76/90, para 13.

186 See J Klabbers "Jurisprudence in International Trade Law : Article XX of the GATT" (1991) 25:2 World Trade 61, 65. See also Jackson, above n 175, 228. See also JH Jackson "The Jusrisprudence of International Trade : The DISC Case Under the GATT" (1978) 72 Am J Int'l L 747, 749.

187 In the majority of panel proceedings, reference is made to the findings of previous panels. For example, in the report *Canada - Administration of the Foreign Investment Review Act (1983)* [GATT Panel Report adopted 7 February 1984, BISD 30S/140, 151], Canada's argument specifically relied on two previous panel reports with regard to the interpretation of Article III:5 of the GATT. Panels themselves often refer to previous reports, especially the more recently established panels. For instance, in *Canada - Import Restrictions on Ice Cream and Yoghurt (1989)* [GATT Panel Report adopted 5 December 1989, BISD 36S/68, 84] the Panel relied to a considerable extent on a number of other panel reports, among them were the *Foreign Investment Review Act* case; *Japan - Restrictions on Imports of Certain Agricultural Products (1987)* [GATT Panel Report adopted 22 March 1988, BISD 35S/163, s2(d)]; and *European Community - Restrictions on Imports of Dessert Apples: Complaint by Chile (1989)* [GATT Panel Report adopted 22 June 1989, BISD 36S/93]. See Klabbers, above n 186, 66.

188 The recent *Tuna Dolphin* case drew on these previous reports to summarise the current Panel conceptualisation of Article III: "*Article III:2...obliges contracting parties to establish certain competitive conditions for imported products in relation to domestic products.....the words in Article III:4 call for effective equality of opportunity for imported products in respect of the application of laws, regulations or requirements affecting the sale, offering for sale, purchase, transportation, distribution or use of products, and this standard has to be understood as applicable to each individual case of imported products*" [emphasis added]. See *United States - Restrictions on Imports of Tuna: Complaint by Mexico (1991)*, GATT Panel Report 10 January 1994, BISD 41S/187.

The scope of the phrase "*laws, regulations and requirements*" was discussed in an action taken against Canada in 1983, the *Foreign Investment Review Act* case.[189] This concerned legislation which required foreign investors to purchase goods of Canadian origin in preference to imported goods. The issue related to the construction of the Article III:4 term "*requirements*". Canada argued that "*requirements*" should be interpreted as "*mandatory rules applying across-the-board*". The Panel rejected this view and reasoned that this concept was already aptly covered by the term "*regulations*" and the drafters of the GATT must therefore have had "*something different in mind*" when adding the word "*requirements*".[190]

In applying this conclusion to the facts, the Panel noted that while undertakings by foreign investors in Canada were not obligatory, the Canadian Foreign Investment Review Act stated that once any such undertaking was accepted by the Canadian government it became a binding condition on the investor - and compliance could be *legally enforced.* In the view of the Panel this legal enforceability sufficed.[191] This suggests that in order for cultural trade barriers to fall within the ambit of Article III they must concern either laws, regulations, or *legally enforceable* requirements attributable to the Japanese government. However, the GATT Panel clearly left the door open for a broader interpretation if necessary.

In relation to the examples of cultural trade barriers outlined in the first part of this paper, this Article III interpretation would unequivocally apply to discriminatory Japanese product standards,[192] the *shaken* regulations,[193] and the Large Store Law;[194] as these are all legally enforceable "*laws*" and "*regulations*". However, it is doubtful Article III would apply to administrative guidance.[195] The essence of administrative guidance is its legal unenforceability. However, the *Semiconductor* case of 1988 suggests that in some circumstances a mandatory effect may be imputed to administrative guidance. A broader

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189 See *Canada - Administration of the Foreign Investment Review Act (1983)*, GATT Panel Report adopted 7 February 1994, BISD 30S/140.

190 See *Italian Agricultural Products* above n 189, para 5.5. The GATT Panel reasoned: "*The Panel could not subscribe to the Canadian view that the word 'requirements' in Article III:4 should be interpreted as 'mandatory requirements applying across-the-board' because the latter concept was already more aptly covered by the term 'regulations' and the authors of the provision must have had something different in mind when adding the word 'requirements'. The mere fact that the few disputes that have so far been brought before the Contracting Parties regarding the application of Article III:4 have only concerned laws and regulations does not, in the view of the Panel, justify an assimilation of 'requirements' with 'regulations'.*"

191 See *Italian Agricultural Products* above n 189, para 5.4. The Panel stated: "*The Panel noted that written purchase undertakings - leaving aside the manner in which they have been arrived at (voluntary submission, encouragement, negotiation, etc) - once they were accepted , became part of the conditions under which the investment proposals were approved, in which case compliance could be legally enforced. The Panel therefore found that the word 'requirements' as used in Article III:4 could be considered a proper description of existing undertakings*". While the Panel in the *Semiconductor* case found that legal enforceability was a sufficient requirement; the question now arises - was it also a necessary requirement?

192 See text associated with footnote n 65.

193 See text associated with footnote n 76.

194 See text associated with footnote n 171.

195 See text associated with footnote n 85.

interpretation of "*requirements*" may therefore include administrative guidance.

Finally, it seems that *dango* and *keiretsu* practices may only be targeted under Article III if it were proved the Japanese government had passed legislation that either encouraged such practices or accentuated their discriminatory effect.[196] At present such evidence has not been forthcoming. Possible additional and alternative arguments that the GATT imposes a positive duty on governments to pass legislation eliminating such pre-existing discriminatory practices have been regarded by commentators as "*highly untenable*".[197]

The second broad issue relating to Article III is unfortunately less soluble. It essentially requires a determination of the extent of any discrimination against the foreign product, and an assessment of the attributablity of such discrimination to the relevant "*law, measure, or requirement*". In Article III terminology, these two interrelated tests of discrimination and causation may be phrased in the following manner: Have the laws, regulations or restrictions been applied so as to "*affect*" the sale, purchase, transportation, distribution or use of foreign products? Does the effect of this affect "*afford protection to domestic production*"?

Panel reports have typically taken an expansive approach to this issue. They clearly advocate an extremely broad objective test for discriminatory effect, with the purpose of the law, measure or requirement appearing largely irrelevant.[198] However, there remains extreme uncertainty surrounding the appropriate scope of the assessment of causation. Previous panel reports have glossed questions surrounding the appropriateness of recognising indirect ("*de facto*") discrimination and as a result the causation test remains extremely ill-defined. It seems an analogy can be drawn to the tort of negligence and its unruly governing causal test of foreseeability.[199]

The leading GATT Panel report on this issue is the often quoted case *Italy-Discrimination Against Imported Agricultural Machinery (1958)*.[200] Here the United Kingdom complained that Italy had extended special credit facilities to Italian farmers for the

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196 See text associated with footnote n 171.

197 See WJ Davey "Dispute Settlement in GATT" (1987) 11 Fordham Int'l LJ 51, 63. See also N Komuro "WTO Dispute Settlement - Coverage and Procedures of the WTO Understanding" (1995) 29:4 World Trade 5, 27.

198 Although the purpose of the law, regulation or measure may lead to a successful Article XX defence. See Klabbers, above n 186, 78.

199 In tort law the test of foreseeability (causal proximity) was used to regulate the scope of the tort of negligence. From modest beginnings in *Donoghue* v *Stevenson* [1932] AC 562, the concept of foreseeability was incrementally extended (e.g. the *Wagon Mound* case [1961] AC 388). By the 1980s the concept of foreseeability had been expanded into such areas as emotional damage (e.g. *McLoughlin* v *O'Brien* [1983] 1 AC 410) and pure economic loss (e.g. *Junior Books Ltd* v *Vietchi Co Ltd* [1983] 1 AC 520). In 1991 the expansion of the tort of negligence was abruptly halted by the House of Lords in the decision *Murphy* v *Brentwood District Council* [1991] AC 398. This demonstrates that issues of causation and "directness" can be highly arbitrary and they tend to defy rigid tests (these issues are also inherently expansionary).

200 See *Italian Agricultural Products*, above n 185.

purchase of Italian agricultural machinery. In the view of the United Kingdom this favoured Italian products over British products and thus constituted a violation of the National Treatment obligation of Article III. Yet the Italian Government defended that it would be inappropriate for the provisions of Article III to be construed in such a broad way as to cover this situation. Italy charged that this would unnecessarily impinge on the sovereign right of GATT contracting parties to formulate and implement their individual domestic economic policies. Italy also argued that the purpose of their law was not discriminatory and any discriminatory effect was indirect and wholly unintentional. The GATT Panel considered the competing arguments and concluded:[201]

> The selection of the word "affecting" would imply, in the opinion of the Panel, that the drafters of the Article intended to cover in paragraph 4 not only the laws and regulations which *directly* governed the conditions of sale or purchase but also any laws or regulations which *might adversely modify* the conditions of competition between the domestic and imported products on the internal market. [emphasis added]

In terms of the test for discrimination, it appears this panel finding clearly envisaged that a violation of Article III of the GATT would occur if conditions or competition between the domestic and imported products were *"adversely modified"*. In subsequent cases this has been understood in the broadest possible terms.[202] It now seems that *any* clear evidence of a discriminatory or protective effect will suffice. Commentators have labelled this test for discrimination the "effect test".[203]

In relation to the test for causation, the GATT Panel in the *Italian Agricultural Product* case clearly contrasts "*directly*" with "*might adversely modify*". The former suggests intentional discrimination, where foreign and local products are subjected to different regimes by law or regulation. The latter suggests legislation with the unintentional effect of modifying the competitive characteristics of the market so as to introduce a domestic bias. However, in application to the facts this causation test becomes extremely unclear and seems to "open the floodgates" to allow foreign nations to interfere in matters customarily within the domestic jurisdiction of sovereign states.[204] Jackson describes this issue as "*one of the most difficult conceptual problems of the GATT*":[205]

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201 See *Italian Agricultural Products,* above n 185, para 12. This reasoning was supported by another GATT panel in *US-Section 337 of the Tariff Act 1930 (1989)*, GATT Panel Report adopted 7 November 1989, BISD 36S/345, para 5.10.

202 See, for example, *United States -Taxes on Petroleum and Certain Imported Substances (1987)*, GATT Panel Report adopted 17 June 1987, BISD 34S/136.

203 See Jackson, above n 175, 118. See also Field, above n 34, 182.

204 Petersmann notes that the international law principle of sovereign equality of States leads to the same conclusion as the economic theory of comparative advantage. Domestic market failures and their correction via internal non-discriminatory laws should be considered as "*matters essentially within the domestic jurisdiction of any State*" and form part of the comparative advantage of the country concerned. This is the basis for mutually beneficial trade. See EU Petersmann "International Competition Rules for the GATT and World Trading System" (1994) 28:4 World Trade 35, 60. See also *Charter of the United Nations*; San Francisco, 26 June 1945; entered into force, 29 December 1945; (1976) 59 Stat 1031.

205 See Jackson, above n 175, 118.

> One of the most difficult conceptual problems of the GATT is the application of the national treatment obligation in the context of a national regulation which *on its face* appears to be non-discriminatory, but because of various circumstances of the market, has the effect of tilting the scales against imported products.

It seems the issue is not so much whether Article III includes *de facto* discrimination. It is submitted that the *Italian Agricultural Products* case makes it clear that it does. The issue therefore seems to be one of where to draw a line. There are two possible clues to the true scope of the causation test, yet both are ultimately ambiguous. It may be that the final determination of the matter is closely linked to state sovereignty and therefore requires a political solution - such as a new GATT Understanding outlining the correct scope of Article III.[206] Such an Understanding would go a long way to clarifying the legal positions of the United States and Japan in their current market access disputes.

The first clue to the scope of the causation test is provided by the European Community's argument in the *Section 337 of the Tariff Act* case.[207] Here the European Community noted that a previous GATT Panel Report, *Japanese Customs Duties(1987),* had found that Article III:2 of the GATT clearly applied to *de facto* discrimination caused by different tax regimes.[208] Article III:2 provides:

> **2.** The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, *directly or indirectly*, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges in a manner contrary to the principles set forth in paragraph 1. [emphasis added]

The European Community argued that therefore "*de facto, discrimination or protection was prohibited by Article III, irrespective of how it was brought about or what kind of official measure caused it*".[209]

Yet with respect to the European Community, this approach seems to gloss an inherent distinction within Article III between "*internal taxes and other internal charges*" and

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206 To justify holding a State to account for a discriminatory regulation it seems one should ideally assess the validity of the regulation, its effectiveness in addressing its purpose, and its overall discriminatory effect. There are therefore strong analogies to the European Community's current *Cassis de Dijon* jurisprudence. In practice these issues are addressed by the tests of Article III in conjunction with the defence of Article XX - but it seems that the GATT leaves huge "grey areas". See *Rewe-Zentral AG* v *Bundesmonopulverwaltung für Branntwein* [1979] ECR 649 (more commonly known as the *Cassis de Dijon* case).

207 See *United States - Section 337 of the Tariff Act 1930 (1989)*, GATT Panel Report adopted 7 November 1989, BISD 36S/345, para 3.10.

208 See *Japan - Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages (1987)*, GATT Panel Report adopted 10 November 1987, BISD 34S/83, 5.9(c). In relation to this case the European Community noted "*It has been found that Article III:2 should be applied not only to the rate of applicable internal tax, but also to taxation methods and rules for taxation...It has also been found that under Article III:4 what mattered was whether the application of different regimes actually had a discriminatory or protective effect against imports*". [emphasis added]

209 See *Section 337 of the Tariff Act*, above n 207, para 3.10.

"*laws, regulations and requirements*". The words "*indirectly or indirectly*" were vital to the reasoning of the GATT Panel in *Japanese Customs Duties* and these words are only used in paragraph 2 of Article III - which relates solely to "*internal taxes and other charges*". The words "*indirectly or indirectly*" are not used in paragraph 1 (which relates to both "*internal taxes and other internal charges*" and "*laws, regulations and requirements*").[210] Indeed, if the conception put forward by the European Community were correct, one might easily argue that the words "*directly and indirectly*" in paragraph 2 are superfluous. The European Community's interpretation therefore seems to defy Article 31 of the Vienna Convention of the Law of Treaties.[211] As yet the distinction remains unresolved.

A second clue to the scope of the causation test is provided by the opinion of Professor JH Jackson, an eminent authority on GATT law.[212] He asserts strongly that Article III should be liberally interpreted to include *de facto* discrimination so as to give effect to the true spirit and intent of the GATT:[213]

> Under the GATT it can be strongly argued that even though a tax (or regulation) appears on its face to be non-discriminatory, if it has an *effect* of affording protection, and this effect is not essential to the valid regulatory purpose (as suggested in Article XX),[214] then such tax or regulation is inconsistent with the GATT obligation.

However, Jackson immediately notes that there is a United States domestic case *Schieffelin*,[215] that is closely in point and contradicts his arguments. *Schieffelin* concerned a United States tax law that *prima facie* applied equally to both imported and domestically manufactured alcoholic beverages.[216] Yet the law indirectly discriminated against foreign

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210 Paragraph 1 of Article III is set out in the text associated with footnote n 185.

211 Article 31:1 of the Vienna Convention on the Law of Treaties reads: "*A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context in the light of its object and purpose*". See *Vienna Convention on the Law of Treaties*; concluded in Vienna, 23 May 1969; entered into force, 27 January 1988; 1155 UNTS 331; (1969) 8 ILM 679.

212 See Jackson, above n 175, 210.

213 Ironically this approach also draws on Article 31 of the Vienna Convention on the Law of Treaties and reflects the different bias accorded to Article 31 by different schools of thought on the interpretation of international treaties: should a purposive ("teleological") approach be taken, or a literal ("textual") approach? Article 31 mixes elements of both schools of thought and essentially leaves the issue unresolved. Caselaw suggests that Article 31 essentially means that where the provision of a treaty are unclear, the interpretation best favouring the overall object and purpose of the treaty will be adopted (e.g. the *Ambatielos* case). This approach therefore favours Jackson. Sir Geoffrey Palmer, commenting on his recent experience as a temporary judge to the World Court, noted that international judges from the common law tradition seem to incline towards a teleological approach, whereas judges from the civil law tradition favour a textual approach. See *Ambatielos Case* ICJ Reports (1952), 28. See also Sir Geoffrey Palmer *Interview on National Radio*, 11.45am, 26 September 1995.

214 Jackson's reference to Article XX relates to the 1983 GATT Panel Report *United States - Imports of Certain Automotive Spring Assemblies Imports of Certain Automotive Spring Assemblies (1983)* GATT Panel Report adopted 26 May 1983, BISD 30S/107. This concluded that Article XX exceptions, allowed "necessary" differences in the treatment of imports to secure compliance with patent, copyright, and certain other laws.

215 *Schieffelin & Co* v *United States* 424 F.2d 1396 (1970).

216 The law imposed a tax rate on all alcoholic beverages, with the rate of the tax determined by the condition of the alcohol at the time the tax was levied. A higher tax rate applied to "*each gallon below proof*" and meant that during its production, the alcohol could be taxed at a lower rate (alcohol is produced at proof and then watered down). However, this meant that local American whisky producers were able to opt for the levy of this tax while their whisky was at full proof, while

liquor imports by virtue of the unique circumstances of the United States market. It was unclear whether this indirectly discriminatory effect was intended, or even foreseen, by the American legislators.

On legal action by an American importer, a United States court considered the American tax law.[217] The Court held that "*as the tax law applied to domestic and foreign companies equally, the national treatment clause was not violated*". However, the relevant international treaty was not the GATT, but the Anglo-American Treaty of Friendship 1815 which contained a similar national treatment clause. Professor Jackson argues that *Schieffelin* should now be distinguished as the 1815 Friendship Treaty did not employ the exact language of Article III of the GATT.[218]

It seems that Jackson is correct. The court in *Schiefflin* did not apply the "effect test" in the form that it is currently recognised. The "jurisprudence" of Article III of the GATT has evolved considerably since 1970. Today a GATT Panel would not consider whether the tax law *prima facie* applied equally to both foreign and national products; a Panel would instead compare the effect of the tax law on both products and see if this effect was discriminatory. Indeed, in the *Section 337 of the Tariff Act* case, a GATT Panel reasoned that a government may in some circumstances have a positive duty to ensure that enacted legislation is *prima facie* applied differently between foreign and national products so as to ensure that fair conditions of competition are maintained. The strength of the current GATT "effect test" means that *Schiefflin* can largely be discounted.

How then do our conclusions relate to cultural trade barriers? The answer is that we are now placed squarely within one of the notorious "grey areas" of the GATT. Dr A Oxley, previous Chairman of the GATT Council, notes that such "grey areas" occur where offending parties contend that the GATT cannot sanction them directly because their actions have not been demonstrated as being GATT illegal. Yet meanwhile the complaining parties are nearly unanimous in the view that the measures contradict the GATT's market principles and are clearly intolerable. The issues quickly descend from the artificial realm of GATT legality into the international jungle of power politics.

Take, for example, the Japanese *shaken* regulations. Here there exist strong allegations made by the United States that the regulations were "captured" by the Japanese

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Scottish exporters (who exported their whisky bottled for immediate consumption) encountered the higher tax rate. To avoid this tax the Scottish importers would have had to have imported their whisky at 100% proof and then bottled it in the United States. This would have proved extremely expensive and would have prevented the importers marketing their whisky as "Bottled in Scotland". See Jackson, above n 175, 213.

217 The American law predated the GATT so could therefore take advantage of grandfather rights. Jackson notes that several other cases also challenged this law as a violation of certain bilateral treaties, for example *Bercut-Vandervoot & Co* v *United States* 359 US 953 (1959). See Jackson, above n 175, 213.

218 See Jackson, above 175, 214.

auto industry and consciously drafted with a view to creating an indirect discriminatory effect against foreign imports.[219] However these allegations remain unsubstantiated and they would be almost impossible to prove.[220] It can be argued vehemently by Japanese firms that the lack of penetration by American firms into the Japanese car industry is because they have not invested sufficient time, money or resources into the Japanese market - and have not fully adjusted to the different Japanese business culture.[221] In the view of the writer, such issues are so complex as to be effectively insoluble, hence any GATT Panel would probably give Japan the benefit of the doubt.

Ironically, the nature of GATT "grey areas" means that such issues seem to be beyond GATT resolution and are best handled by techniques of dispute resolution where a decisive "black and white" (right or wrong) answer is not required. The most difficult cases of *de facto* discrimination may be more amenable to resolution by mediation.

2 *Article XI of the GATT : Administrative Guidance and the Semiconductor Case*

Article XI of the GATT seems an unlikely champion of those determined to eliminate Japanese cultural barriers to trade, yet in the *Japan - Trade in Semiconductors (1988)* case Article XI proved to have a high degree of potency.[222] Article XI of the GATT relates to a general prohibition of quantitative restrictions to trade and provides:

> **1.** No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses *or other measures*, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

The *Semiconductor* case concerned a situation where the United States had pressured Japan into implementing a "Voluntary Import Expansion" whereby the Japanese would aggressively promote the sales of foreign semi-conductors within Japan.[223] This "*aggressive promotion*" was largely achieved by MITI with the aid of legally unenforceable administrative guidance. Hence the issue was <u>not</u> whether administrative guidance had occurred as Japan clearly admitted that MITI had utilised administrative guidance. The issue was whether the administrative guidance constituted a "*quantitative restriction*" under Article XI that consequentially nullified or impaired an Article II tariff binding. The GATT Panel concluded

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219 As mentioned previously, the discriminatory effect of these regulations occurs only when they interact with the other cultural and legislative characteristics of the Japanese market. See text associated with footnote n 76.

220 Even with the possibilities created by such cases as *Corfu Channel*. This suggested a lowering of the evidential burden of proof when the evidence at issue was essentially within the domestic jurisdiction of the offending state - and thus effectively unobtainable by the complaining party. See *Corfu Channel (Assessment) Case* ICJ Reports (1949), 244.

221 The Japanese could point to the success of BMW as an example of the "correct" approach. See Kinias, above n 62.

222 See *Trade in Semiconductors*, above n 184.

223 See *Trade in Semiconductors*, above n 184, para 3.

that administrative guidance did constitute such a quantitative restriction.

The critical issue concerned the construction of the word "measure". Japan defended that "*measure*" should be read in context with the words "*quotas, import or export licenses*" to mean a legally enforceable obligation. Japan maintained that administrative guidance was merely hortatory with no such legal effect. However, the Panel concluded that a "*measure*" did not necessarily need to be legally binding or mandatory. Ironically they pointed to a GATT Panel Report that had been decided only one month previously, *Japan - Restrictions on Certain Agricultural Products (1989).*[224] This previous case addressed the same Article XI issue with almost identical facts, yet Japan had argued the exact opposite (that administrative guidance was a measure).[225] The Panel in the *Semiconductor* case noted this contradiction and then referred extensively to Japan's arguments in the *Certain Agricultural Products* case - and the Panel conclusions in that case.

In the *Semiconductor* case the Panel reasoned that in order to fall within the purview of Article XI, administrative guidance must satisfy two legal criteria. The first was whether there were reasonable grounds to believe that "*sufficient incentives or disincentives existed for the non-mandatory measure to take effect*".[226] The second was whether the operation of the measure was "*essentially dependent on Government action or intervention*".[227]

On the facts of the case, the first criterion was satisfied because the semiconductor industry knew that the Japanese government had signed a binding agreement with the United States committing Japan to reduce semiconductor output and also knew that non-compliance would be detrimental to Japan. There was therefore an initial element of social peer pressure to comply. But this was dramatically exaggerated by the actions of MITI who required each firm to provide detailed information on a regular basis. Non-compliance could be easily detected by MITI and this would reflect badly on the loyalty of any non-complying firm - thus damaging the firm's credibility and jeopardising its future relationship with MITI. The Panel

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224 See *Japan - Restrictions on Imports of Certain Agricultural Products (1989)*, GATT Panel Report adopted 22 March 1988, BISD 35S/163.

225 Japan had argued in this earlier case that: "to *the extent that governmental measures were effective, it was irrelevant whether or not the measures were mandatory and statutory*", because the governmental measures *were "effectively enforced by detailed directives and instructions to local governments and/or farmers' organisations*". This "*centralised and mutually collaborative structure of policy implementation was the crux of government enforcement in Japan'.* The Panel had also noted in the previous case that the "*practice of administrative guidance played an important role in the enforcement of the Japanese supply restrictions*" and that this practice was a "*traditional tool of Japanese government policy based on consensus and peer pressure*". The earlier Panel concluded that administrative guidance in the special circumstances prevailing in Japan could therefore regarded as a "*governmental measure enforcing supply restrictions*". See *Restrictions on Imports of Certain Agricultural Products*, above n 224.

226 This seems to test the coercive power of the administrative guidance. Although the guidance was technically not mandatory, it seems the Panel was testing for circumstances that indicated the administrative guidance was backed by sufficient incentives or disincentives to create such an overall mandatory effect.

227 This is clearly a causation issue and tests whether the government's involvement was essential to the overall result : But for the government's involvement, would the semiconductor producing firms have reduced their output?

concluded that this intense peer pressure, and a "*climate suggestive of discrimination in the event of non-compliance*", created a sufficient incentive for the non-mandatory administrative measures to have a mandatory effect.[228]

The Panel reasoned that the second criterion was satisfied because the administrative guidance had triggered the application of a cultural "*structure*" through which "*strong peer pressure*" to comply with the administrative guidance could be focused:[229]

> An administrative structure had been created by the Government of Japan which operated to exert maximum pressure on the private sector.....This was exercised through such measures as repeated direct requests by MITI, combined with the statutory requirement for exporters to submit information on export prices, the specific monitoring of company and product-specific costs and export prices and the institution of the supply and demand forecasts mechanism and its utilisation in a manner to directly influence the behaviour of private companies.

The Panel concluded that this "*complex of measures*" exhibited the "*rationale as well as the essential measures*" of government export control.

This reasoning is worthy of commendation and bypasses the difficulties associated with Article III. It now appears that if discriminatory administrative guidance fell within the criteria outlined by the GATT Panel in the *Semiconductor case,* there would be a high probability of success in the GATT. Article XI is clearly the most appropriate GATT provision for handling this unique form of cultural trade barrier.

3 *Attitudinal Barriers and the GATT Agreement on Technical Barriers to Trade*

Attitudinal barriers, such as those resulting from the Japanese "cult of uniqueness", are directly targeted by the GATT to the extent they are incorporated within prejudiced regulatory product standards to form "technical" barriers to trade.[230] Such product standards constitute another form of implicit discrimination that may violate the Article III "National Treatment" obligation. Yet unlike the other cultural trade barriers, those attitudinal barriers that are embodied within product standards are also subject to a special GATT side-agreement - the "*Agreement on Technical Barriers to Trade*".

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228 In the previous Panel case, Japan had stated that: "*although monitoring by the Ministry for International Trade and Industry was limited in scope, it was still meaningful because the Ministry represented a neutral and objective figure overseeing the entire industry while taking into account costs and prices among competing industries in Japan. Monitoring also helped to stamp out suspicion among companies that others were cheating or resorting to dumping.....if the semi-conductor manufacturers were to pursue their own profits and ignore the Ministry of International Trade and Industry's concerns, the whole dumping prevention mechanism, would collapse*" (L/6253, paragraph 29). See *Restrictions on Imports of Certain Agricultural Products*, above n 224.

229 See *Trade in Semiconductors*, above n 184, 157.

230 Blair comments: "*When various national standards are compatible, they can facilitate international trade. When standards impose inconsistent requirements, however, they serve as impediments to trade*". See A Blair "A Process for Implementation of the GATT Standards Agreement in the United States" (1980) 20:3 Virg J Int'l L 699, 721.

There have been two successive Agreements on Technical Barriers to Trade, with the most recent Agreement superseding the former. The first Agreement, derived from the Tokyo Round of 1979 and essentially re-stated the Article III "National Treatment" obligation, while clarifying and expanding its scope.[231] It outlined procedures that should be followed when developing and enforcing technical standards, and it envisaged consultation with affected foreign producers when setting product standards. The Agreement also injected a dose of natural justice into the standard-setting procedure by requiring that all affected parties be given an opportunity to present their arguments to standards-making bodies.[232] Finally, the Tokyo Agreement urged further internationalisation of standards and the mutual recognition of product testing and certification procedures.

The latest Uruguay Round agreement on Technical Barriers to Trade follows this Tokyo Round formula - yet with some dramatic improvements. The GATT contracting parties are now required to follow a novel "*Code of Practice for the Preparation, Adoption and Application of Standards*". This Code replicates many of the Tokyo Round obligations, but now purports to place these obligations directly on the governmental standardising bodies (rather than on the governments themselves). These standardising bodies are themselves required to adhere to non-discrimination principles, to strive for internationalisation, and to ensure the necessary levels of consultation are achieved. All disputes are also now referred to the new WTO Dispute Settlement Body.[233]

The Tokyo Round agreement proved highly successful, and the Uruguay Round modifications proceed further.[234] The GATT now appears to address attitudinal barriers (or at least those attitudes which have crystallised as discriminatory governmental product standards) extremely well.[235]

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231 The Agreement stated "*Parties shall ensure that technical regulations and standards are not prepared, adopted or applied with a view to creating obstacles to international trade, Furthermore, products imported from the territory of any party shall be accorded treatment no less favourable than that accorded to like products originating in any other country.....They shall likewise ensure that neither technical regulations, nor standards, nor their application, have the effect of creating unnecessary obstacles to international trade*". See *Tokyo Round Agreement on Technical Barriers to Trade*, (1979) 18 ILM 1, GATT:BISD 26S/8 (1980), TIAS 9616, 31 UST 405.

232 Jackson notes that the temptation of legislators and officials to shape regulatory or tax measures so as to favour domestic producers seems to be very great, and proposals to do this are constantly suggested. See Jackson, above n 175, 210. See also K Simmonds & B Hill *Law and Practice Under the GATT* (Vol II, Oceana, New York, 1994), 5.

233 The Uruguay Round *Agreement on Technical Barriers to Trade* refers in its preamble to the following objectives : "*to encourage the development of international standards and conformity assessment systems in order to improve the efficiency of production and reduce transaction costs; to ensure that technical regulations and standards, as well as testing and certification procedures; to not create unnecessary obstacles to trade; and to prevent no country from, among other things, taking measures necessary for the protection of human, animal and plant life or health, of the environment, or of its essential security interests*". See *Uruguay Round Agreement on Technical Barriers to Trade* in *The GATT Uruguay Round Final Act and Agreement Establishing the World Trade Organisation*, above n 180.

234 For example, the Agreement will extend the *Tokyo Round Agreement on Technical Barriers to Trade* by broadening the definitions of "technical regulation" and "standards" to include also the processing and production methods related to the characteristics of the product itself. See Petersmann, above n 204, 45.

235 However, both agreements specifically note that Article XX of the GATT will continue to provide a valid defence. See text associated with footnote 236.

4 *Legitimate Discrimination under Article XX : Exemptions for Cultural Trade Barriers?*

Article XX of the GATT provides a general defence to allegations of discrimination by exempting situations where discrimination has occurred to achieve legitimate policy goals, (such as the protection of human health, public morals, the environment, national treasures or exhaustible natural resources). To prevent the potential exploitation of such an exemption by governments, Article XX explicitly tests the reasonableness of any such regulations by maintaining that they are:

> Subject to the requirement that such measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade.

Dr J Klabbers notes that caselaw on Article XX seems to have come into vogue, with ten GATT Panel Reports now examining its scope.[236] Most of these reports have been concerned with paragraph (d) which deals primarily with "*measures necessary to secure compliance with laws or regulations which are not inconsistent with [the GATT]*". There seems a general consensus that this nebulous paragraph hides four different "reasonableness" requirements. The first two apply to all the paragraphs of Article XX. The third applies to paragraphs (a), (b) and (d). The fourth is specific to paragraph (d).

First, the measures implemented by the government must not result in "arbitrary or unjustifiable" discrimination. Second, such measures must not result in a disguised restriction to international trade. Third, measures taken must be necessary to reach the public policy purpose intended. Fourth, they must be taken in order to secure compliance with laws or regulations that are in themselves not inconsistent with the GATT.

On analysing eight of the ten cases, Klabbers notes that there is a broad consensus that Article XX calls for a restrictive interpretation as a broad interpretation would run "*counter to the object and purpose of the GATT*".[237] The case *Canada - Measures Affecting Imports of Unprocessed Herring and Salmon (1988)* also clarified that because of this restrictive approach, all four of the reasonableness requirements must be satisfied in order to establish a valid defence.[238]

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236 See Klabbers, above n 186, 64.

237 See Klabbers, above n 186, 81. The cases Klabbers examined were: *United States - Prohibition of Tuna and Tuna Products from Canada,* GATT Panel Report adopted 22 February 1982, BISD 29S/91; *United States - Imports of Certain Automotive Spring Assemblies (1983),* GATT Panel Report adopted 26 May 1983, BISD 30S/107; the *Foreign Investment Review Act* case (above n 189); the *Japanese Agricultural Restrictions* case (above n 187); the *Unprocessed Herring and Salmon* case (below n 238); *EEC - Imports on Spare Parts and Components*, GATT Panel Report adopted 16 May 1990, BISD 37S/132; and *Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes*, GATT Panel Report adopted 7 November 1990, BISD 37S/200.

238 See *Canada - Measures Affecting Imports of Unprocessed Herring and Salmon*, GATT Panel Report adopted 22 March 1988, BISD 35S/98.

In relation to the Japanese cultural trade barriers outlined in this paper, it is apparent that the issues involved remain extremely complex.[239] Some of the barriers would clearly fail to satisfy an Article XX defence, such as the anecdotal examples of Japanese technical barriers to trade. While other alleged barriers, such as the *shaken* regulations, seem to have a sound public policy basis - such as protecting the Japanese consumer. Essentially, a value judgement would be required by a GATT Panel based on the strength of the relative arguments of each side. History demonstrates that such arguments are likely to be ingenious.

The reasonableness requirement causing the downfall of most Article XX defences is the (third) requirement of "necessity". In the *Section 337 of the Tariff Act* case, the GATT Panel outlined this requirement in the following terms:[240]

> It was clear to the Panel that a contracting party cannot justify a measure inconsistent with another GATT provision as "*necessary*" in terms of Article XX : (d) if an alternative measure which it could be expected to employ and which is not inconsistent with any other GATT provision is available to it.

It is highly likely that such measures as the *shaken* regulations could have been drafted in a manner that would have been less likely to cause their indirect discriminatory effect.

B The 1994 GATT Dispute Settlement Procedure : Conflict Resolution Under the WTO

The GATT Dispute Resolution Procedure was harshly criticised in previous academic articles.[241] Commentators asserted that it was "*ill suited to dealing with the problem of cultural trade barriers*" or "*not necessarily in a position to cope with most disputes of a cultural trade barrier nature*".[242] Many examples were cited of lengthy hearings, only to have the final report of the dispute resolution panel blocked by an effective veto at the critical adoption stage.[243] However, with the recent completion of the Uruguay Round, the GATT dispute resolution procedure has been dramatically modified - particularly in relation to time

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239 However, Gröetzinger warns: "*It is often no simple task...to determine whether the intent behind the development of a particular standard was for [protecting health or safety] or whether it was created primarily to protect a domestic industry from foreign competition*" See J Gröetzinger "The New GATT Code and International Harmonisation of Products Standards" (1975) 8 Cornell Int'l LJ 168, 170.

240 See *Section 337 of the Tariff Act 1930*, above n 207.

241 Criticisms of the pre-WTO dispute settlement procedures centred around the adjudicative phases of the mechanism, ranging from complaints about the establishment of a panel to implementation of recommendations. For example, establishment of a panel was sometimes delayed because of resistance by the respondent party, as a reluctant party could block the Council decision to establish a panel. The panel process was also criticised for lacking transparency. And the adoption of panel reports could be blocked due to a consensus requirement. See, for example, Davey, above n 197, 55.

242 See Davey, above n 197, 55.

243 Up until March 1995, 195 cases have been brought under Article XXIII. In 98 of these cases, Panel Reports (including Working Party Reports) were circulated or prepared, whereas in the remaining 97 cases, a matter subject to consultations was not referred to Contracting Parties under Article XXIII:2 or a complaint was withdrawn after the establishment of a panel. In 81 of the above-mentioned 98 cases, Panel Reports were adopted, and in the 17 remaining cases, Panel Reports have not yet been adopted. See Komuro, above n 197, 89.

constraints and the infamous veto.[244] There is now a comprehensive and streamlined procedure that wields substantive legal weight within the GATT framework.[245]

The question arises, is the new WTO dispute resolution procedure better equipped for resolving matters relating to cultural trade barriers? This matter can only be determined by undertaking a close analysis of the procedural differences between the prior and present dispute settlement bodies.[246]

1 Article XXIII - Nullification or Impairment : The Key to GATT Dispute Settlement

The GATT dispute resolution procedure is accessed via Article XXIII:1 of the GATT which gives complaining parties a choice of three different procedures : 1(a), 1(b) or 1(c). This requirement is continued by paragraph 3.1 of the new "GATT 1994 Dispute Settlement Understanding" which notes that the parties "*affirm their adherence to the principles for the management of disputes heretofore applied under Articles XXII and XXIII of the GATT 1947*". Article XXIII:1 of the GATT provides :

> If any contracting party considers that any benefit accruing to it directly or indirectly under the GATT is being nullified or impaired or the attainment of any objective of the GATT is being impeded as the result of :
>
> (a) the failure of another contracting party to carry out its obligations under the GATT;
>
> or (b) the application by another contracting party of any measure;
>
> or (c) the existence of any other situation;
>
> the contracting party may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting parties which it considers to be concerned....".

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244 In early GATT history a complaint would be heard and considered by the entire body of contracting parties or a working group of a substantial number of them (including the parties to the dispute). Over time, it became customary to assign a dispute to a panel of three or five experts. The 1979 Understanding codified this practice. The latest Uruguay Round agreement refines and modifies it in the light of its perceived failings. See P Pescatore "The GATT Dispute Settlement Mechanism : Its Present Situation and Its Prospects" (1991) 25:1 World Trade 5, 12.

245 Since its accession to the GATT, Japan has been a defendant to 16 procedures: *Silk Yarn (1977)* BISD, 255/10; *Leather (1978)* 26S/320, *(1979)* 27S/118, *(1983)* 31S/94, and *(1985)* L/5826; *Manufactured Tobacco (1980)* 28S/100; *General Nullification and Impairment (1983)* L/5826; *Agricultural Products (1986)* 36S/163, *(1986)* L/6070, *(1988)* L6322, *(1988)* L/6333, and *(1988)* L/6355; *Customs Duties on Alcoholic Beverages (1986)* 26S/163; *Semiconductors (1987)* 35S/116; *Lumber (1987)* 26S/167; and *Copper (1987)* L/6456. And in 3 cases Japan has been the complainant: *Anti-dumping Measures by the EEC (1988)* 37S/132, *(1992)* ADP/78l; and *(1992)* ADP/79. In 10 of the 16 cases against Japan, bilateral solutions were found, or measures were taken by Japan, so that the complaints were withdrawn prior to the completion of Panel proceedings. In one case, Japanese measures were found consistent with GATT provisions. In another case, conciliation was undertaken by the Director-General. In 4 panel cases, Japanese measures were found inconsistent with the GATT and Japan has now taken steps to implement Panel recommendations. See GATT, above n 2, 199.

246 Panel reports were previously adopted by consensus of the Contracting Parties. Consensus is not defined in the GATT and had been developed for political and practical reasons, for example, to avoid voting. Consensus differs from unanimity in that it is not prevented by an absence or abstention, but it is similar to unanimity in that both are subject to a veto by any Member present at the meeting. In the previous GATT context, parties to a dispute were endowed with the right to participate in the Council's decision-making process and could, therefore, block the consensus adoption of panel reports. Thus the consensus rule, in conjunction with the right of attendence, conferred an effective veto power on disputing parties and considerably delayed the procedures. The practice of blocking considerably weakened the functioning of the GATT 1947 dispute settlement mechanisms. See Komuro, above n 197, 30.

These three alternatives for bringing an action within the purview of the new WTO Dispute Settlement Body each result in a different burden of proof on the complaining party and an associated different procedural consequence.[247]

Article XXIII:1(a) requires the complaining state to prove that the offending state directly violated a GATT obligation. This then triggers a presumption of "*nullification and impairment*" and the validity of the complaint is affirmed. Yet our previous discussion suggests that a direct violation of a GATT obligation in relation to Japanese cultural trade barriers would be extremely difficult to establish. An Article III case typically faces extremely tough issues of implicit discrimination, or sound defences under Article XX. An Article XI action against administrative guidance may therefore be the only clear contender for a paragraph 1(a) "Direct Violation" action.

The second alternative, Article XXIII:1(b), bypasses the need to demonstrate a direct violation of the GATT. Instead the test becomes one of "nullification or impairment" of any GATT objective or benefit. The basic objectives of the GATT are stated within the GATT preamble and are outlined in fairly broad terms as being the substantial reduction of tariffs and "*other barriers to trade*", and the "*elimination of discriminatory treatment in international commerce*". This clearly a test with a much lower threshold.[248] "Benefit" has also been interpreted extremely broadly by previous GATT Panels.[249] However, Article XXIII:1(b) also requires some "measure" to have been taken by the offending state. This eliminates the potential for any 1(b) actions to allege a breach of a positive duty to act.

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247 Articles XXII and XXIII of the GATT, which are too laconic to establish clear dispute settlement procedures, were supplemented by the following instruments of the Contracting Parties: *(i)* The 1966 Decision on Procedures Under Article XXIII for Developing Countries ("1966 Decision"); *(ii)* The Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance of 28 November 1979 ("1979 Understanding") and its annexed Agreed Description of the Customary Practice of the GATT in the Field of Dispute Settlement ("Annex to 1979 Understanding"); *(iii)* The 1982 Decision on Dispute Settlement Procedures adopted at the Thirty-Eighth Session ("1982 Decision"); *(iv)* The 1984 Decision on Dispute Settlement Procedures, adopted at the Fortieth Session ("1984 Decision"); and *(v)* the 1989 Decision on Improvements to the GATT Dispute Settlement Rules and Procedures ("1989 Decision"). Finally, we now have the new Dispute Settlement Understanding of the Uruguay Round ("GATT 1994 DSB Understanding").

248 All panel reports, except one, concerning nullification and impairment relate to the nullification and impairment of benefits accruing from tariff concessions under Article II of the GATT. Past GATT practice suggests that non-violation nullification or impairment has only been found where the offsetting of a benefit accruing under tariff concessions could be proved (the test being one of "reasonable and legitimate expectation"). This practice, coinciding with the drafters intent that non-violation procedures "*serve mainly to protect the balance of tariff concessions*" (*Oilseeds* case) lest a benefit under the tariff binding be subsequently frustrated, does not preclude non-violation complaints from being filed because of nullification or impairment of a benefit other then a tariff concession. The 1985 Panel Report on *Citrus Products* coped with the question of whether a benefit accruing to the US in the form of MFN treatment was being nullified or impaired as a result of tariff preferences on certain fresh citrus products extended under agreements between the EC and certain Mediterranean countries. Although this Panel found nullification and impairment, the Panel Report was unfortunately not adopted by the Contracting Parties. The Panel commented : "*Although non-violation complaints have related to benefits arising from Article II on tariff concessions, this does not signify that non-violations are limited only to these benefit. The drafting history of Article XXIII confirms that this Article, including paragraph 1(b) thereof, protected any benefit under the General Agreement...The basic purpose of Article XXIII:1(b) is to provide for offsetting or compensatory adjustment in situation where the balance of rights and obligations of the Contracting Parties has been disturbed*". See *Panel Report on EEC - Tariff Treatment of Citrus Products from Certain Mediterranean Countries*, L/5776.

249 See, for example, *Australian Subsidy on Ammonium Sulphate (1952)* GATT Panel Report adopted 3 April 1950, CP4/39.

Paragraph 26.1 of the Dispute Settlement Understanding outlines the different procedural consequences for this second alternative. These include a requirement that the complaining state present a "detailed justification" to support any complaint. And if the panel finds against the offending state, then the offending state is not obliged to withdraw the offending measure, but may simply provide compensation to the complaining party.[250]

The third alternative, Article XXIII:1(c), also bypasses the need to demonstrate a violation of the GATT and the same test of "nullification and impairment" applies as in 1(b). Actions under 1(c) are termed "Situation Complaints" and do not require a "measure" to be taken by the offending party; they simply require "any other situation" - so 1(c) is therefore extremely broad in scope.[251] A complaining state only need prove nullification or impairment of a GATT objective.[252] Yet there remain substantial procedural difficulties with Article XXIII:1(c).[253] By virtue of Paragraph 26.2 of the Dispute Settlement Understanding:

> Where....a panel determines that the matter is covered by this paragraph, the proceedings of this Understanding shall apply only up to and including the point in the proceedings where the panel report has been issues to the Members. The dispute settlement rules and procedures contained in the Decision of the GATT Council Representatives of 12 April 1989 (BISD 36S/61) shall apply to consideration for adoption, and surveillance, and implementation of recommendations and rulings.

This means that actions taken under Article XXIII:1(c) may not exploit the streamlined adoption procedures of the new WTO Dispute Settlement Body. Instead the GATT Panel Reports must still be adopted by consensus.[254] This will give the offending state an opportunity to prevent adoption of the report by exercising their effective veto - which proved the major hurdle to effective dispute resolution prior to 1994. Hence, in relation to Japanese cultural trade barriers, any Article XXIII:1(c) action may be stymied at the adoption stage by Japan voting against the report.

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250 The concept of a "non-violation" impairment of the GATT seems to run contrary to the current trend towards a greater use of adjudication in GATT dispute settlement. These non-violation actions are, by their very nature, more amenable to negotiation than adjudication. This tension is resolved to some extent by the new procedural modifications. See EA Vermulst "An Overview of the WTO Dispute Settlement System and its Relationship with the Uruguay Round : Nice on Paper But Too Much Stress for the System?" (1995) 29:2 World Trade 131, 137.

251 In 1983, the European Community requested the establishment of a working party, claiming that its benefits under the GATT were nullified or impaired by situations "*Peculiar to the Japanese economy which have resulted in a lower level of imports especially of manufactured products, as compared with other industrial countries*". The complaint was, however, ultimately not pursued. See *Japan - General Nullification and Impairment of Benefits to EEC*, L/5479.

252 Komuro comments that it remains to be seen whether the non-violation provision could be invoked against governmental inaction (i.e. omission liability) since nullification or impairment of a GATT objective would be extremely difficult to establish in each case. For example, the complainant would need to establish that the government had a duty to legislate to restrict the anti-competitive practices of the Japanese *keiretsu*, and that the failure to do so nullified or impaired a GATT objective. See Komuro, above n 197, 70.

253 This clearly indicates that 1(c) is seen as highly exceptional and not to be lightly invoked. See Vermulst, above n 250, 138.

254 The 1989 Decision stated "*The parties to the dispute shall have the right to participate fully in the consideration of the panel reports by the Council, and their views shall be fully recorded. The practice of adopting panel reports by consensus shall be continued, without prejudice to the GATT provisions on decision-making which remain applicable. However, the delaying of the process of dispute settlement shall be avoided*". This means that panel reports are adopted by positive consensus. Parties to disputes, having the right to participate fully in the consideration of panel reports by the GATT Council, can therefore block the adoption of the panel reports by a veto power. See also above n 246.

2 *Conclusion : The New Procedure is Better Equipped to Handle Cultural Trade Barriers*

The Dispute Settlement Understanding of GATT 1994, incorporates, streamlines and substantially modifies the previous GATT Dispute Settlement Procedures.[255] The central institution of the new Dispute Settlement Understanding is the Dispute Settlement Body. This comprises the General Council of the World Trade Organisation (constituting representatives from each of the member nations), fulfilling its administrative function between the biennial meetings of the "Ministerial Conference" (the governing body of the World Trade Organisation). The Dispute Settlement Body administers the dispute settlement process and allocates disputes referred to it to a "Dispute Panel" of 3 or 5 individuals. The Dispute Panel has a tight time frame within which it must hear the affected parties, investigate the situation, and then produce a report outlining rulings and recommendations. Issues of law may be appealed to a special Appellate Tribunal.[256] This entire process must be completed within a year. The final report is tabled before the Dispute Settlement Body who may only reject the report by a consensus decision. This creates an almost automatic acceptance mechanism.[257] Once the report is adopted by the Dispute Settlement Body it takes international legal force.[258]

Cultural barriers to trade are extremely contentious in nature and must be approached with sensitivity. They typically accentuate trade conflicts by highlighting differences in the underlying values between the societies, as Professor GB Kaplan notes "*where principles clash, conflict is the inevitable outcome*".[259] Disputes concerning cultural barriers are therefore typically expansive and highly emotive.

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255 The jurisprudence established by a series of panel rulings will continue to be useful. This is corroborated by Article XVI.1 of the WTO Agreement which provides : "*Except as otherwise provided for under this Agreement or the Multilateral Trade Agreements, the WTO shall be guided by the decisions, procedures and the customary practices followed by the Contracting Parties to the GATT 1947 and the bodies established in the framework of the GATT 1947*".

256 The creation of an appellate body is a completely new innovation under the World Trade Organisation as no parallel organisation existed previously. The appellate body, which will only review disputes on points of law, will be composed of seven persons who are unaffiliated with any government, any three of which will sit on appeal on a given case. The purpose of the appellate body is two-fold. First, it provides a review mechanism that will help ensure that the decisions of the panel are sound. Secondly, the review panel, through the consistency of its members, will help to ensure that there is a consistency amongst rulings. This in turn should help to promote legal certainty in international trade matters. See E Rowbotham "The Changing Nature of Dispute Settlement Under the GATT" (1995) 5 Global Env Change 71, 72. See also RA Brand "Competing Philosophies of GATT Dispute Resolution and the Draft Understanding on Dispute Settlement" (1993) 27:3 World Trade 117, 119. See also L Wang "Some Observations on the Dispute Settlement System of the World Trade Organisation" (1995) 29:2 World Trade 172, 179.

257 Considering the inconvenience of the consensus rule, as well as the veto power of parties to a dispute, the WTO Understanding instituted the so-called "negative consensus rule" for decision-making by a newly created Dispute Settlement Body ("DSB"), which replaced the existing GATT Ministerial Council. Article 2.4 of the WTO Understanding provides : "*Where the rules and procedures of this Understanding provide for the DSB to take a decision, it shall do so by consensus*". The footnote to this provision states "*The DSB shall be deemed to have decided by consensus on a matter submitted for its consideration, if no Member, present at the meeting of the DSB when the decision is taken, formally objects to the proposed decision*". This conceptual reversal is one of the major innovations achieved by the WTO and mean that decisions of the Dispute Settlement Body are adopted automatically, unless unanimously opposed.

258 See PTB Kohona "Dispute Resolution Under the World Trade Organisation : An Overview" (1994) 28:5 World Trade 23.

259 See GB Kaplan "The Use of Arbitration to Resolve Market Access Disputes" (1989) 22 Cornell Int'l LJ 469, 475.

The Dispute Settlement Procedure of GATT 1994 adopts a more legalistic approach based on adjudication.[260] Dr EA Vermulst comments, for example:[261]

> The consistent trend over the past decade has been to introduce more formal rules into GATT Dispute Settlement and, hence, further legalise dispute settlement in international trade law. Against this background of slow change, the Dispute Settlement Understanding has leaped to the forward. The Dispute Settlement Understanding creates a system of rules that are not only more comprehensive than the body of law in force in GATT Dispute Settlement, but which - on paper- is almost exemplary compared with dispute settlement in other fields of public international law.

The mediatory aspects of the process have also been strengthened.[262] It seems the new Dispute Settlement Procedure provides a fair, impartial and sympathetic method for dealing with cultural issues and should dissipate much of the heat generated between the United States and Japan in their current trade disputes.[263] Member nations confidently assert that this mechanism is both transparent and consistent, and will be used as the first step in resolving future trade disputes. It seems that while the GATT clearly has some significant limitations in relation to cultural trade barriers, the politically or culturally sensitive characteristics of these barriers are no longer likely to be callously steamrollered or ignored.[264]

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260 Recourse to a GATT panel is a last step in a dispute, and consultation and conciliation efforts must first be exhausted. The new rules endow panel proceedings with a more pronounced litigious flavour and foster a more formal and rule-oriented approach to decision-making, The entire process is likely to become more adjudicatory and less diplomatic and panel reports could have an even greater precedential effect. The willingness of States to be bound by the rules, procedures and decisions of a supra-national authority is evidence of the willingness of States to cede some of their sovereignty and marks a significant departure from past practice. See Wang, above n 256, 179.

261 See Vermulst, above n 250, 131.

262 Parallel with a strengthening of the adjudicative procedure, the Dispute Settlement Understanding has maintained the negotiating aspects in the dispute settlement procedures. Panels are required to consult regularly with the parties and give them adequate opportunity to develop mutually satisfactory solutions to the dispute. The provision continues the emphasis on the primary objective of reaching solutions which are mutually acceptable. Other negotiating aspects, by which governments regain control of the adjudicatory procedure, may be found at various stages of the panel process : terms of reference; composition of panellists; principles to be adhered to by panels; and interim review of draft panel reports by the parties. They may also be seen in the provisions on informal dispute settlement procedures such as good offices and conciliation (paragraph 5.1). See Komuro, above n 197, 42.

263 Kohona comments : "*The approach to dispute settlement reflected in paragraph 3.2 is consistent with the objectives of those countries which sought to achieve a better rules-based international dispute settlement system to deal with international trade disputes.....it will contribute towards enhancing the security, certainty and predictability of the system and provide a greater juristic basis for the decisions of the Dispute Settlement Body. However, this will require a sympathetic and sensitive approach from those charged with resolving disputes in view of the need to produce results which are compatible with the long-standing objective of the GATT system of seeking results which are generally acceptable to the parties and consequentially, effective.*" See Kohona, above n 258, 29.

264 However, Vermulst also notes that now countries no longer have the option of blocking the adoption of Panel Reports, it is "*expected the pressure on the dispute settlement system will shift to the implementation phase*". Vermulst reasons that jurisdictions such as the European Community or the United States may simply refuse to implement politically palatable - but adopted - panel decisions. An indication of this is provided by the American implementing legislation for the Uruguay Round Agreement. In an Agreement between the United States' Administration and Senator R Dole, the following text was adopted [11 ITR at 1865 (1994)]: "*The Administration will support legislation next year to establish a WTO Dispute Settlement Review Commission. The Commission would consist of five Federal appellate judges, appointed by the President.....It will review all final WTO dispute settlement reports, adverse to the United States, to determine whether the panel exceeded its authority or acted outside the scope of the Agreement.....If there are three affirmative determinations in any five year period, any member of each House may introduce a joint resolution to disapprove United States participation in the WTO - and if the resolution is enacted by Congress and signed by the President, the United States would commence withdrawal from the WTO agreement*". See Vermulst, above n 250, 153.

VI INTERNATIONAL COMPETITION LAW

Japanese *keiretsu* are non-governmental in character and thus fall outside the current ambit of the GATT. Yet it appears *keiretsu* practices may be challengeable in international law if the Japanese Government had a demonstrable international obligation to enact anti-trust legislation to outlaw them.[265] At present the principal international law on this matter is provided by the United Nations Conference on Trade and Development ("UNCTAD") Code on Restrictive Business Practices.[266]

A The UNCTAD Code on Restrictive Business Practices 1980

The UNCTAD Code was unanimously adopted by the United Nations General Assembly in December 1980 and was intended to form a nucleus for the establishment of a new International Economic Order.[267] Customarily the United Nations has taken a hard line against restrictive business practices as exemplified by a General Assembly resolution in the Seventh Session:[268]

> Restrictive business practices adversely affecting international trade, particularly that of developing countries, should be eliminated and efforts should be made at the national and international levels with the objective of negotiating a set of equitable principles and rules.

In contrast to the GATT, the UNCTAD Code does not affect Governmental operations but instead targets private enterprise. The key is provided by section B(1) which defines "*Restrictive Business Practices*" as:[269]

> Acts or behaviour of enterprises which, through an abuse of a dominant position of market power, limit access to markets or otherwise unduly restrict competition, having or likely to have adverse effects on international trade.

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265 Japan already has an Antimonopoly Act that prohibits: private monopolisation; unreasonable restraints on trade; unfair trade practices; anti-competitive activities of trade associations; and anti-competitive mergers. The Act is administered by the Japan Fair Trade Commission ("JFTC"), an independent agency attached to the Prime Minister's office and comprising a chairman and four commissioners. Any person, or firm, may lodge a complaint with the JFTC about any practices which are suspected of violation of the Act and the JFTC then has powers to conduct investigations and hearings. Where the JFTC finds a violation, it uses a "cease and desist" order to eliminate the violation; it may also issues warnings in cases where suspicious conduct exists. The GATT Secretariat notes that in 1991, 33 warnings and 24 cease and desist orders were issued. However, complaints from foreign nations have highlighted the acute lack of resources of the JFTC and the resulting lack of enforcement of the Antimonopoly Act. See GATT, above n 2, 106. See also S Umezawa "The Main Policy of the Fair Trade Commission for 1988" (1988) 22:1 World Trade 117.

266 See UNCTAD *The Set of Multilaterally Agreed Principles and Rules for the Control of Restrictive Business Practices,* UN Doc TD/RBP/10, Annex, adopted by consensus, UN General Assembly, Res 35/63, 35th session, 5 December 1980.

267 The activities of UNCTAD have centred on three tasks: the collection, analysis, and dissemination of information; the development of model national laws; and the development of international codes. Although codes are of general application, they principally benefit developing nations. The information dissemination activities involved occasional in-depth studies of restrictive business practices and annual reports on national anti-trust regulations. See TL Brewer "International Regulation of Restrictive Business Practices" (1982)16:1 World Trade 108, 111.

268 See United Nations General Assembly Resolution 3362 (S-VII), sect I, para 10.

269 Section B(1) of the UNCTAD Code.

Section D of the Code lists the practices that enterprises must refrain from following, these include price-fixing, collusive tendering, and general collusion. Firms are also obliged to desist from predatory behaviour, discriminatory pricing, and acquisitions that would hinder competition. By section E, the world's governments are urged to develop restrictive business practices legislation that would outlaw the various section D practices. And section F calls for increased international action to promote national policies and developments that are consistent with Code objectives.[270]

Anti-competitive Japanese business practises, such as *keiretsu* collusion or *dango* contracting, would clearly fall within the ambit of the UNCTAD Code.[271] Yet it is also true that the Code would not apply to most governmental measures; these are within the proper jurisdiction of the GATT.

However, the UNCTAD Code lacks a mechanism for effective dispute settlement and has been treated with a high degree of cynicism by developed nations.[272] During the negotiation of the UNCTAD Code, the developing countries argued strongly for UNCTAD to adopt a dispute settlement role and suggested that the Secretary-General should be vested with a power to convene consultations.[273] The developed nations disapproved of this idea, yet agreed that "*mechanisms to establish a framework for consultation should be an important aspect of the code*".[274] Therefore while the UNCTAD Code now provides that member states should "*give full consideration to requests for consultation*", and requires that all such consultations must be conducted in good faith, it contains no conflict-resolution procedures.

The legal status of the Code is controversial. At most it is "soft" customary international law and only morally binding.[275] Developed nations assert that it represents a set of aspirations, rather then binding legal precepts.[276] Contrary to the wishes of developing nations the Code was deliberately drafted in non-mandatory terms so as not to create legally binding obligations. Arguments that some of its provisions have crystallised into norms of customary international law are thus extremely tenuous. Professor TL Brewer concludes "*the*

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270 Vermulst notes that the basic goals of competition policy are to ensure the best possible functioning of the market by protecting the competitive system from distorting practices or restraints. See EA Vermulst "A European Practitioners View of the GATT System : Should Competition Law Violations Distorting International Trade be Subject to GATT Panels" (1994) 28:4 World Trade 5, 7.

271 For example, the Japanese *dango* involves "collusive tendering" which is specifically targeted by the Code. See Brewer, above n 267, 115.

272 This cynicism was largely caused by political conflict between developed and developing nations.

273 Petersmann notes that when preparing for the Uruguay Round, proposals by less developed nations to include restrictive business practices on the agenda were resisted by developed countries (notably the US). See above Petersmann, n 204, 40.

274 See Petersmann, above n 204, 42.

275 For a discussion of the nature of "soft" international law see Sir Geoffrey Palmer "New Ways to Make International Environmental Law" (1992) 86 Am J Int'l L 260, 269.

276 Acceptance of these principles and rules is voluntary for both firms and governments. However, Brewer notes that the fact that the Code was approved by the United Nations General Assembly without dissent means it carries considerable authoritative weight. See Brewer, above n 267, 111.

UNCTAD Code has no immediate effect as international law and does not include mechanisms for international enforcement".[277] It seems clear the Code will not bind Japan. Yet it remains indicative of international pressure to tighten national anti-trust legislation.

B The Draft International Antitrust Code and its Endorsement by the E.C.

In January 1994, Dr K Van Miert, the European Community Competition Commissioner, endorsed a Draft International Antitrust Code based on the UNCTAD Code.[278] He contended that this should be adopted within the GATT umbrella under an administering body known as the International Antitrust Authority.[279] This Authority would aim to eliminate cartels and open markets closed by biased distribution systems.[280]

Article 19 of the Draft International Antitrust Code would grant the Authority broad powers.[281] Not only could it request action by national authorities, but it would take legal action itself if a national authority refused. The proposed Authority would also be empowered

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277 Brewer commented in 1982: "*Although some developed countries may not regard resolutions of the General Assembly as being binding, even voluntary guidelines should be taken by developing countries as authorising the enactment of national legislation giving effect to the guidelines*". The United Nations Resolution has actually taken the status of weak customary international law with many countries choosing to give effect to it capriciously. For a discussion of the legal weight of United Nations Resolutions, see LD Guruswamy, Sir Geoffrey Palmer & BH Weston *International Environmental Law and World Order* (West Publishing Co, St Paul, 1994), 129. See also Brewer, above n 267, 111.

278 See *Draft International Trust Code* (1993) 5:5 WTM 126. The basic principles underlying the Code are, in part, similar to those of GATT law: international minimum standards for transborder cases; incorporation of international rules into domestic laws and their enforcement via domestic competition authorities and courts; national treatment with regard to domestic and international competition; international dispute settlement proceedings; and integration into the GATT-WTO system. Yet Petersmann notes that many states will remain reluctant to transform soft law rules into hard-and-fast GATT rules as long as the GATT permits them to maintain tariff safeguard measures. See Petersmann, above n 204, 39, 79.

279 Indeed, Jackson suggests: "*It seems quite clear that the subject of competition policy is one of the most important gaps in the structure of international economic relations...as trade policy becomes more and more intricate and sophisticated, it is becoming increasingly clear that the lack of rules concerning competition can result in various actions which tend to undermine the goals of a liberal world trading system*". Jackson comments that international trade policy cannot be completely separated from competition policy and notes that there are many examples of how trade law touches upon, or overlaps with, competition law. He personally advocates a modest "*competition policy code*" to be negotiated into the World Trade Organisation context. See Jackson, above n 70, 82, 86.

280 Van Miert did not see an independent collective enforcement authority as feasible: "*one should not even dream about a world-wide and independent competition authority*". He instead envisaged multilateral adoption of minimum rules along the lines of the UNCTAD Code. Once these rules were accepted, they would be enforceable through national channels. To ensure international efficacy, enforcement would be backed by GATT Dispute Settlement procedures and an authority established under the GATT umbrella. A similar proposal was made by United States Assistant Attorney-General J Rill, who argued "*it seems timely to explore the desirability of creating a forum within the GATT for the exchange of competition goals, substance, and process among the world's largest economic partners. There are substantial precedents for such a structure for dialogue, including the G-7 on economic policy*". See Rill, above n 132, 148. Yet the extent of support by the GATT Secretariat is unclear. See, for example, their reservations in GATT, above n 2, 108.

281 The OECD and UNCTAD have worked on a variety of such proposals for decades. For example, in 1976, the OECD adopted guidelines for multinational enterprises which included rules on restrictive business practices. The section on competition enjoined firms to "*refrain from actions which adversely affect competition in the relevant market by abusing a dominant position of market power, by means of, for example, (a) anti-competitive acquisitions, (b) predatory behaviour, (c) unreasonable refusal to deal, (d) anti-competitive abuse of industrial property rights, (e) discriminatory pricing*". See OECD, *Declaration on International Investment and Multinational Enterprises, Annex : Guidelines for Multinational Enterprises*, June 1976.

to sue private parties. The Code clearly endows the Authority with considerable legal power to wield within the international community.[282]

The International Antitrust Working Group suggested that draft Article 4 should define illegal restraints to trade to include horizontal and vertical distribution strategies; these would include "*agreements, understandings, and concerted practices between or among competitors that fix prices, divide customers or territories, or assign quotas*".[283] Article 13 of the Agreement would also provide:

> If in a non-competitive highly concentrated market, the market structure induces persistent abuses involving the exercise of significant market power adversely affecting at least one other party, the National Antitrust Authority of that nation shall order the restructuring of that undertaking.

The Japanese *keiretsu* visibly fall within the ambit of the Code. Indeed, Van Miert noted that the proposal had been consciously drafted with a view to targeting the Japanese *keiretsu* and biased Asian distribution systems. He charged "*it seems a good time to integrate the Korean and Japanese economies into the world market*".[284]

As yet the idea remains conceptual and appears more of a political weapon for applying strategic pressure to Japan. The proposal has been raised and discussed within the OECD and Van Miert has advocated strongly that it should now be placed on the agenda for the next GATT multilateral round.[285] If such an agreement was eventually adopted, the GATT's jurisdiction would then extend into the private sector.[286] The original mandate for the GATT included such restrictive business practices, but in 1960 the parties did not have a sufficient consensus to incorporate this issue within the GATT Treaty.[287] In the meantime, *keiretsu* practices remain legal in international law.

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282 To fall within the ambit of the Code, any restraint on competition would have to affect at least two participating nations. A nation would be deemed to be "affected" if there were economic advantages (or disadvantages) from the anti-competitive behaviour within its territory, "*or otherwise on its commerce*"; or, alternatively, if citizens or companies based within the nation were the perpetrators or victims of the anti-competitive restraint. See Petersmann, above n 204, 42.

283 The International Antitrust Working Group is a private institution comprised of 12 academic lawyers. They submitted the Draft International Antitrust Agreement to GATT Director-General P Sutherland, and the media, in July 1993. The Code was submitted "*in order to avoid mutually harmful competition policy conflicts and overcome the vision gap and jurisdictional gap of national competition laws*". See Petersmann, above n 204, 37.

284 See "World Competition Code", *Business Law Brief*, Brussels, Belgium, 12 January 1994.

285 Bergsten notes that there is widespread agreement that one of the objectives for the next GATT round is to forge a new code on competition policies. Vermulst comments that a GATT framework for handling international and anti-competitive behaviour will possibly be established during the Berlin Round and "*the ongoing work in the OECD will probably pave the way for this*". See Bergsten, above n 4, 225. See also Vermulst, above n 270, 25.

286 Petersmann notes that international competition rules are more difficult to negotiate than international trade laws as national competition rules continue to differ widely: "*in contrast to the world-wide consensus on an optimal ranking of trade policy instruments, there is no agreed theory and political consensus on an optimal ranking of competition policy instruments*". The uncertainty in competition theory, the differences among national competition policies, and the higher legitimacy of national law militate against potent international anti-trust law. See Petersmann, above n 204, 48.

287 Jackson notes that because of the close connection between trade policy and competition policy, competition policy was addressed within Sections IV (Commercial Policy) and V (Restrictive Business Practices) of the Havana Charter. As a result of the demise of the Charter, the emerging GATT attempted to take over this competition law role: "*Several efforts were made to address the competition issues. A 1954 working party recommended postponement of consideration in*

VII UNILATERAL AND BILATERAL RESPONSES OF THE UNITED STATES

The United States dominated global trade following the Second World War, permitting Americans to bask in economic prosperity. However, by the late 1960s many nations, including Japan, had rejuvenated their industrial muscle and began challenging the American position. Commensurate with this declining American competitiveness, United States producers faced burdensome discrimination in foreign markets. The resulting United States trade imbalance, especially with Japan, caused much consternation to American legislators.[288] They enacted the United States Trade Act 1974, with section 301 granting the President sweeping powers to take unilateral retaliatory action against unjustifiable or unreasonable trade practices employed by foreign nations:

> If the President determines that action by the United States is appropriate...to respond to any act, policy or practice of a foreign country or instrumentality that...is unjustifiable, unreasonable and burdens or restricts United States commerce...he shall take all appropriate and feasible action within his power to enforce such rights or to obtain the elimination of such act, policy or practice.

In reality such unilateral retaliatory action has rarely been taken.[289] But threatened invocation of section 301 has provided an invaluable device for coercing foreign nations to negotiate bilateral trade concessions.[290] The United States' unilateral and bilateral responses to cultural trade barriers therefore seem inherently interlinked.[291]

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the light of activities then occurring in the United Nations ECOSOC. At a 1956 session of the GATT Contracting Parties, a committee was charged with further work, and this committee set up a commission of experts on the subject." Eventually the working parties concluded that sufficient consensus did not exist. They also noted: "*Such action would involve a grave risk of retaliatory measures which would be taken on the basis of judgements which would have to be made without factual information about the restrictive practice in question, with counterproductive effects to trade*". See Jackson, above n 70, 114. See Vermulst, above n 270, 10.

288 Most economists agree that the main causes of the trade deficit were the misguided American economic policies in the early 1980's. Gradual changes in the global competitive environment also caused the United States to decline in international competitiveness. Thatcher comments: "*The conflicting interests between the consumers and producers created a dilemma for planners and negotiators of United States trade policy. In the post World War II system of ostensibly free trade, American producers and exporters continued to be plagued by restrictive markets and industrial targeting in other countries, while United States consumers received a great boon in the variety of available goods.*" See Thatcher, above n 42, 510.

289 Between 1979 and 1991, American firms filed a total of 5 countervailing duty and 58 dumping suits against Japanese exporters, 43 of these resulted in restrictions on trade. See Bergsten, above n 4, 70.

290 An example of a bilateral initiative to address Japanese trade barriers was provided by the Structural Impediment Initiative ("SII") talks. Here the US agreed to improve its education system and seek to lengthen the time horizon of its private investors. In return, Japan agreed to strengthen its antitrust enforcement to limit *keiretsu* collusion, and to amend its Large Store Law to open its distribution system to more efficient volume merchants (such as Toys 'R' Us). See K Shini'ichi "Japan and the United States : Opting for a Global Alliance" (1992) 14 Japan Echo 26, 28.

291 Bergsten notes that in tactical terms the United States has deployed an extensive array of techniques against Japan. Some initiatives have been pursued multilaterally: these include exchange rate realignments in the G-5 and G-7, and efforts to improve access to the Japanese market through negotiations on tariffs, government procurement, subsidies, and other trade issues (i.e. the Kennedy, Tokyo and Uruguay GATT Rounds). Other initiatives have been pursued in the bilateral mode: such as the SII talks and the sector-specific negotiations that have produced VERs and VIEs. The United States has also taken unilateral measures against Japan (notably antidumping), and, in 1987, retaliated against Japanese non-compliance with the 1986 Semiconductor Trade Agreement. Unilateral retaliation has been repeatedly threatened in other instances as well. Another mode of dialogue, a regional one, could become available in the future if the recently established APEC evolves into a major forum for trade and broader economic relations. See Bergsten, above n 4, 17.

A A Unilateral Response : The Super 301 Provision

The United States has a history of unilateral trade action that stretches back over 200 years.[292] As early as 1794 the American Congress empowered President George Washington to restrict imports from foreign nations that were deemed to be unfairly discriminating against American products. As the flows of international trade gradually increased in magnitude and sophistication, this Presidential authority was progressively refined and strengthened.[293]

Section 301, and its amendments in 1979, 1984, 1988 and 1994, further expanded the scope for such unilateral action while enacting a new set of procedural guidelines. Matters could be brought to the President's attention by private complainants filing a petition with the United States Trade Representative ("USTR").[294] The USTR would then consider the grievance and assess whether a full investigation should be conducted.[295] A full investigation required consultation with both the American public and with the offending Government. Dispute resolution procedures could be applied if necessary. If the USTR's final recommendation was positive, the President was left with a broad discretion to take "*all appropriate and feasible action within his power*" to enforce the rights of the United States.[296]

While the United States Congress repeatedly called for vigorous Presidential action, the President tended to adopt a more conservative approach. Sanctions were only invoked in exceptional circumstances with Section 301 employed more as a device for increasing American leverage in bilateral trade negotiations. Threats of use of section 301 were also utilised to assuage the protectionistic sentiment within Congress, and thus thwart potentially protectionistic American legislation. Professor KB Thatcher comments:[297]

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292 Horlick comments that unilateral action is the "stick" of American trade policy, with negotiations being the "carrot". See G Horlick "Dispute Resolution Mechanism : Will the United States Play by the Rules" (1994) 29:3 World Trade 164, 169.

293 Current United States legislation on sanctions consists of six different laws: *(i)* Section 301 of the Trade Act 1974; *(iii)* Super 301; *(iii)* the revised Super 301 enacted by Executive Order in March 1994; *(iv)* Special 301 for the protection of intellectual property rights; *(v)* the Telecommunications 301 provisions (Section 1371-1382 of the Omnibus Trade and Competitiveness Act of 1988); and *(vi)* provisions involving government procurement (the Federal Buy-American Act as amended by Section 7003 of the Omnibus Trade Act).

294 McCarthy describes trade policy within the United States as a "*producer-oriented, complaint-initiated trade policy system.*" See CL McCarthy "Unilateralism, Bilateralism, Regionalism, Multilateralism and Functionalism" (1994) 4 Transnat'l L & Cont Probs 1, 38.

295 Upon complaints from interested parties, or on his or her own initiative, the United States Trade Representative initiates investigations into the trade practices concerned, and at the same time enters into consultations with the relevant country. The United States Trade Representative then determines what action he or she should take within the statutory time limit. The time limit for trade agreement violations is 30 days after the conclusion of dispute settlement procedures or 18 months after the initiation of the investigation, whichever comes sooner). The time limit for other situations is twelve months. Finally the Representative may take action within thirty days of the decision to do so or within 180 days, in the case of delay. See Komuro, above n 197, 73.

296 The scope of retaliatory action under section 301 is wide enough to embrace various measures including: suspending, withdrawing or preventing the application of benefits of trade agreement concessions; imposing duties and import restriction on goods; and levying or imposing other restrictions on services (e.g. restricting market entry for companies from the offending country). See Komuro, above n 197, 74.

297 See Thatcher, above n 42, 517.

In the face of crescendoing demands from Congress to use section 301 aggressively to retaliate against alleged offending nations, the President and the United States Trade Representative have held the deleterious effects of section 301 in check while at the same time using section 301 both as a safety valve against protectionistic sentiments in Congress, and as a negotiating lever to cajole trading parties to reduce barriers to United States exports.

1 *A "Super 301" Procedure : The United States Congress Takes a Tough Unilateral Stance*

Yet the fervently protectionistic Congress became increasingly dissatisfied with section 301. In their eyes the President's conservatism was obstructing its effective use.[298] The section was also restricted to the actions of the governments and the dispute settlement procedures appeared prohibitively time consuming.[299] Congress therefore passed the Omnibus Trade and Competitiveness Act 1988 which streamlined the procedure and reduced the potential for Presidential inaction. These amendments became known as the "Super 301" provisions. While the previous scheme sanctioned retaliatory action against specific companies or products, Super 301 now permitted retaliation against entire nations. These amendments clearly signified an attempt by Congress to assert its role in the formulation of United States trade policy.[300]

Within the Super 301 amendments, Congress also introduced a second procedure for unilateral action. This required the USTR to annually identify the foreign unfair trade practices imposing the greatest burden on American exporters, and to nominate "priority foreign countries" engaging in such unfair practices.[301] After submitting these findings to Congress, the USTR was automatically required to initiate a full investigation into each priority country.[302] C Svernlöv notes that it was this mandatory initiation procedure which

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298 Thatcher argues that the legislative history illustrates the ambigous purpose of section 301: "*On the one hand, there is a strong congressional call for vigorous Presidential action, while on the other, there are intimidations that the same strong language is only a threat to give United States negotiators additional leverage in bargaining for reductions of unfair trade practices by other nations*". See Thatcher, above n 42, 498

299 See Thatcher, above n 42, 506

300 Super 301 was in part an effort by a Democratic Congress to force a Republican President to take a "tougher" approach to trade policy, especially on sector-specific issues and particularly with Japan; it also represented an effort to strengthen the hand of the agencies responsible for trade issues (the United States Trade Representative and Department of Commerce) *vis-à-vis* the foreign policy agencies (the Department of Defence, Department of State and the National Security Council). See Bergsten, above n 4, 231.

301 For example, the countries with the largest trade surpluses with the United States - such as Japan (NZ$100 billion), South Korea (NZ$33 billion), the European Community (NZ$21 billion), and Brazil (NZ$10 billion).

302 Under Super 301, the USTR was required to present a report to Congress within 30 days of submitting the National Trade Estimate to the President and Congress. In the report the USTR was required to identify: "*trade barriers and trade-distorting practices that deserved priority consideration during trade negotiations ("priority practices"); and countries that should be given priority attention in negotiations ("priority foreign countries")*". Within 21 days of submitting the report, the USTR was required to initiate investigations of priority practices and, simultaneously, to enter into negotiations with priority countries. Unlike those under regular Section 301, these investigations were initiated without waiting for a complaint from interested parties. In case of failure to reach an agreement through negotiations, sanctions would be taken under Section 301. In 1989, Japan, India and Brazil were identified as priority countries, however investigations did not lead to sanctions. See C Svernlöv "Super 301 : Gone But Not Forgotten" (1992) 26:3 World Trade 125, 128.

earned the 1988 amending provisions the nickname "Super 301" - as the mandatory procedure supplemented the discretionary initiation procedure.[303]

Upon initiation of any Super 301 investigation, the United States Trade Representative was required to commence bilateral negotiations with the offending nation to eliminate, "*or solicit compensation for*", the unfair trade practice. Super 301 therefore clearly supported the use of bilateral negotiations. Indeed, Japan was singled out for special treatment in this regard, with the Act stating:[304]

> The Congress finds that:
>
> (7) Our trade and economic relations with Japan are complex and cannot be effectively resolved through narrow sector-by-sector negotiations;
>
> (8) A major problem between the United States and Japan is the absence of political will in Japan to import; and
>
> (9) Meaningful negotiations must take place at the highest level, at a special summit of political leaders from both countries.

This entire procedure was governed by a strict three year time frame. If an agreement was reached, the investigation was terminated. If not, and a positive determination resulted, the President was obliged to:[305]

> (A) Suspend, withdraw, or prevent the application of benefits of trade agreement concessions to carry out a trade agreement with a foreign country....; or
>
> (B) Impose duties or other import restrictions on the goods of, and, notwithstanding any other provision of law offers or other restrictions on the services of, the foreign country for such time as the United States Trade Representative determines appropriate; or
>
> (C) Enter into any binding agreements with such foreign country that commit the foreign country to:
>
> (i) eliminate, or phase out, the act, policy or practice; or
>
> (ii) eliminate any burden or restriction or United States commerce resulting from such act, policy, or practice; or
>
> (iii) provide the United States Trade Representative with benefits;
>
> that are satisfactory to the United States Trade Representative.

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303 See Svernlöv, above n 302, 129.

304 Bergsten argues that the nature of the Japanese political system almost makes it axiomatic that the United States should employ the maximum level of unilateral pressure in virtually every sectoral negotiation (although he also notes this is now anachronistic in light of Japan now constituting a global economic superpower). Japan's political system usually operates on the basis of widespread consensus, which is difficult to achieve and takes a long time to formulate. This is especially so in cases that seek to disrupt traditional Japanese practices that are widely accepted throughout the country. Foreign pressure ("*gaiatsu*") has thus frequently proved necessary to galvanise the system - and has succeeded on numerous occasions. Bergsten suggests that the unilateral actions of the past, including those taken under Super 301, have had considerable success in opening the Japanese market - particularly when they have found Japanese groups that shared American interests. See Bergsten, above n 4, 230. See Adams, above n 17, 52.

305 In summary: retaliation is mandatory if the act, policy or practice of a foreign government is either in violation of the GATT or any other trade agreements, or is unjustifiable and burdens or restricts United States commerce. Retaliation is also mandatory if United States rights under any trade agreement are denied by the foreign country. On the other hand, retaliation is discretionary if the act, policy or practice of the foreign country is unreasonable or discriminatory and burdens or restricts United States commerce. See FO Boadu "Enforcing US Foreign Trade Legislation : Expanded Presidential Discretion?" (1990) 24,2 World Trade 79, 82.

In May 1989, Japan was formally cited under Super 301 and retaliatory action was threatened.[306] The Japanese were outraged and recalled similar action taken against them following alleged dumping of semiconductors in Asia.[307] Japan threatened counter-retaliatory measures and a massive United States-Japan trade war loomed. This situation was likened to a trade version of the military "Mutually Assured Destruction" ("MAD") syndrome. Neither party would win, but each trader would propel the other (and the rest of the globe) into a severe economic depression.[308] But fortunately this heated stand-off gradually cooled and because Super 301 was situated within a three year "sunset" clause, it subsequently lapsed; yet friction remained.[309] Measures taken by Japan largely proved unsatisfactory to the United States, with the newly inaugurated President Clinton re-adopting a hard-line approach.[310] In March 1994, the Super 301 provision was reinstated for another five years.[311]

Yet much concern has been voiced at the current highly strained state of US-Japan relations that has resulted. United States policy towards Japan has been perceived as "floundering in indecision".[312] The United States has recently started advocating strict quotas for its products in an attempt to break cultural trade barriers via 'managed trade'. This policy has been severely criticised by both Japan, and the rest of the world, as contradicting the free-trade ambitions of the GATT.[313] The United States successes do not necessarily mean that unilateral action is the best approach for resolving cultural trade barriers - in terms of remaining in amicable relations, it may well prove to be the worst.[314]

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306 See US Government *Initiation of Investigation Under Section 301 of the Trade Act 1974 : Japan's Practice with Regard to the Manufacture, Importation and Sale of Tobacco Products*, (1985) No 301-350, 50 Fed Reg 27, 609.

307 The "semiconductor fiasco" involved the invocation of section 301 against Japan on the basis of dumping of semiconductors in Asia contrary to an explicit anti-dumping treaty with the United States. On 17 April 1987, the United States imposed a 100% punitive tariff on all Japanese semiconductors imported into the United States and similar tariffs on other semiconductor-related products. The situation was sensationalised by statistics showing that although American manufacturers shared 55% of the European semiconductor market, they only shared 8.5% of the semiconductor market in Japan. See K Ohe "A Case Study of the US-Japan Semiconductor Agreement" (1989) 17 Aust Bus LR 126, 135.

308 See Nukazawa, above n 25 (and discussion in associated text).

309 Super 301 was situated in a three year "sunset" clause in the Omnibus Trade and Competitiveness Act 1988. It thus lapsed early in 1991. See Y Taizo "The New United States Trade Act in Perspective" (1988) 15,4 Japan Echo 12.

310 The United States-Japan trade frictions in 1994 centred on improved access of foreign glass manufacturers to the Japanese market. The Americans were demanding that objective and "transparent" standards be created. A report by the JFTC in June 1993 had indicated that large kickbacks, associated with the *dango* cartel, were occurring within the glass market and this was hampering foreign competition. The United States threatened Japan with the use of Super 301 and the two nations entered into bilateral negotiations which resulted in a "Glass Trade Accord". See "United States Seeks Objective Criteria on Glass Trade", *Jiji Press Ticker Service*, Tokyo, 22 July 1994.

311 In March 1994, President Clinton signed an Executive Order reinstating Super 301. The revised Super 301 provision differs from the original provision in two ways. First, the provision is not statutory legislation. The President can, therefore, terminate or amend the new Super 301 provision at any time. Second, the revise Super 301 provision allows the President more discretion in imposing retaliatory measures then did the original provision. See Komuro, above n 197, 75.

312 See S Awanohara "Golden Opportunity : Washington Sees a Chance to Redraft Its Japanese Policy" *Far Eastern Economic Review*, 21 July 1994, 24.

313 The GATT Secretariat comments: "*The tendency for major trading partners to press for, and Japan's readiness to agree to, management of specific trade problems as a means of addressing bilateral imbalances could, if left unchecked, subject the multilateral system to potentially damaging pressures*" See GATT, above n 2, 6.

314 The United States Trade Representative Carla Hills herself said in 1991 "*The current Super 301 is a clumsy device - not subtle, delicate or even appropriate*". See Svernlöv, above n 302, 132.

2 *Holding the United States in Check : Is the Use of Super 301 Contrary to the GATT?*

Under the GATT 1947, American unilateral retaliatory action in situations governed by GATT rules would have violated the GATT if such action was taken without prior GATT Dispute Panel authorisation.[315] The American Super 301 provision was therefore drafted to allow unilateral action to be abandoned if a GATT Dispute Panel found against the United States.[316] By virtue of paragraph 23 the new GATT 1994 Dispute Settlement Understanding ("DSU") this 1947 situation is maintained. Paragraph 23 of the DSU provides:

> 23. **Strengthening of the Multilateral System**
>
> 23.1 When members seek the redress of a violation of obligations....under the covered agreements....they shall have recourse to, and abide by, the rules and procedures of this Understanding.
>
> 23.2 In such cases, members shall:
>
> (a) not make a determination to the effect that a violation has occurred....except through recourse to dispute settlement in accordance with the rules and proceedings 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;

Hence, the United States must still obtain Dispute Panel authorisation for any unilateral action.[317] Yet these provisions arguably suggest that if the relevant circumstances are beyond

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315 Under the GATT, retaliation is a last resort when the offending party fails to implement the recommendations of the Contracting Parties. The complaining party may take retaliatory action on a discriminatory basis *vis-á-vis* the offending party, subject to strict conditions prescribed by Article XXIII:2. First, retaliation should be authorised by the Contracting Parties. Unilateral retaliation without the GATTs authorisation is prohibited. The purpose of requiring such an authorisation is to prevent the contracting parties from taking unnecessary and excessive measures in retaliation. Second, retaliation may only be authorised if, in the view of the Contracting Parties, "*the circumstances are serious enough to justify such action*". Third, the extent of such retaliation is limited, since retaliation takes the form of suspension of the application to the offending party of "*such concessions or other obligations under this Agreement as the Contracting Parties determine to be appropriate in the circumstances*". Finally, once retaliation is taken, the party to which the retaliation is addressed: "*shall then be free, not later than sixty days after such action is taken, to give written notice to the Executive Secretary of its intention to withdraw from this [the GATT] and such withdrawal shall take effect upon the sixtieth day following the day on which the notice is received*". See Komuro, above n 197, 24.

316 These provisions of US trade law are not necessarily in compliance with American obligations under the GATT. Legally speaking, for unilateral retaliation to be justified, two conditions must be met. First the subject-field of the retaliation, must not be covered by a WTO Agreement. For example, anti-competitive practices of a foreign country may be subject to unilateral retaliation. Yet the extent of the WTO's jurisdiction is in such cases remains highly unclear, and is only likely to be resolved on a case-by-case basis as WTO caselaw develops. The second condition is that retaliatory measures must be consistent with the provisions of the GATT and its covered agreements. Accordingly, any introduction of quantitative restrictions or an increase of tariffs is forbidden without authorisation from the DSB. See Komuro, above n 197, 77.

317 Although retaliation has been contemplated several times, the Council of the Contracting Parties authorised it only once (43 years ago) in *US - Restrictions on Dairy Products (1952)*, GATT Panel Report adopted 8 November 1952, BISD 1S/62. The GATT Panel found United States import restrictions on dairy products inconsistent with the GATT provisions and, under the circumstances, they were sufficiently serious to justify retaliation by the Netherlands. The decision authorised the Netherlands to "*suspend the application to the United States of their obligation under the General Agreement to the extent necessary to allow the Netherlands to impose an upper limit of 60,000 metric tons on imports of wheat flour from the United States during the calendar year 1953*". The decision emphasised three crucial elements for assessing the appropriateness of retaliation: the value of the trade involved; the impairment suffered by the Netherlands; and that the principal objective of retaliation is to contribute to the eventual solution of the matter in accordance with the objectives and spirit of the GATT. But the Council did not authorise retaliation in five subsequent GATT cases because the offending party in each case exercised its effective veto to stop consensus adoption [see *French Import Restrictions* BISD 11S/94;

the proper jurisdiction of the WTO, then any unilateral action will not violate the GATT.

Under the 1947 rules, if a Dispute Panel found that the United States had violated the GATT, the United States could still block the adoption of the Dispute Panel report thereby avoiding formal censure.[318] Under the new Dispute Settlement Understanding this veto is no longer possible. PTB Kohona, an Australian negotiator during the Uruguay Round, explained that the United States wished to abolish and completely reverse the consensus requirement for adoption of Dispute Panel reports to eliminate the possibility of a veto.[319] The other GATT members agreed, but only on the basis that the United States would refrain from taking unilateral action:[320]

> Agreement on the new text was reached on the assumption that the United States had agreed to resort to the Uruguay Round Dispute Settlement Understanding to deal with international trade disputes, and not rely on unilateral trade measures.

A GATT Panel Report condemning the United States for unauthorised unilateral action would certainly result in unavoidable political humiliation for the American administration.[321]

It is theoretically possible for the United States to ignore any findings of a GATT Dispute Panel as these reports are not self-executing in American law. However, such inaction would place the United States in further direct violation of the GATT.[322] This may permit retaliatory action by other GATT members (which is unlikely due to the political clout of the United States); the United States may lose credibility under the GATT; or non-compliance may undermine global confidence in the GATT leading to retaliatory infringements by American trading partners. The publicity from any refusal by the United States to recognise a GATT Dispute Panel finding would again undoubtedly prove severely politically damaging for the President of the United States.

United States Sugar BISD 37S/228; *United States Superfund* BISD 34S/136; *Canadian Alcoholic Drinks* BISD 39S/27; *EEC Oilseeds Subsidies* BISD 39S/27]. See Horlick, above n 292, 169.

318 In practice, the US blocked a number of reports including those concerning: Wine and Grapes; EC Wheat Flour Subsidies; Countervailing Duties on Brazilian Footwear; Anti-Dumping Duties on Swedish Pipes and Tubes; Anti-dumping Duties on Swedish Stainless Steel Plate; Anti-dumping Duties on Mexican Cement; Procurement of a Sonar Mapping System; Countervailing Duties on European Steel Products; and Income Tax Legislation. See Komuro, above n 197, 32.

319 Kohona explains, ironically, that "*some negotiating parties originally expressed a preference for the consensus approach to be retained in relation to the adoption of panel reports. The United States, on the other hand, supported changing this approach due to its perception that the consensus approach hindered effective dispute settlement and enforcement*". See Kohona, above n 258, 39.

320 See "Japan Takes Moral High Ground", *International Herald Tribune*, New York, 28 June 1994. See also "Japan's MITI Panel Raps US Trade Policy" *Jiji Press*, Tokyo, 31 May 1994.

321 A recognition of this potential scenario lead the General Accounting Office of the United States Congress to report in 1994 : "*Administration officials acknowledge, however, that the United States Government, in taking unilateral action must be careful not to impose sanctions that violate United States obligations or are otherwise actionable under the Uruguay Round Agreements. Use of such sanctions would violate United States obligations and give the offending country an opportunity to use the new WTO dispute settlement procedures to retaliate against the United States*". Horlick comments that this reflects a new "*acute consciousness*" of GATT obligations within the American Government. See Horlick, above n 292, 167.

322 See Svernlöv, above n 302, 131.

Commentators such as Professor KB Thatcher also argue that unilateral action in any situation would contravene GATT obligations.[323] Unilateral action undermines the inherent multilateral doctrine of the GATT embodied within such fundamental precepts as the Most Favoured Nation principle of Article I.[324] Unilateral action against a nation would remove most-favoured-nation treatment for that nation. Thatcher also notes the danger of moving away from the multilateral ambitions of the GATT, and back towards inherently discriminatory bilateral alternatives:[325]

> More than anything else, section 301 has caused frequent bilateral resolution of trade disputes outside the GATT framework. This process has created short-term solutions to many trade problems , frequently at the expense of long-term possibilities for more open trade, and to the detriment of the GATT as an organ for international dispute resolution.

B A Bilateral Response : Voluntary Export Restraints and Voluntary Import Expansions

Voluntary Export Restraints ("VERs") are *ad hoc* agreements negotiated bilaterally between governments, or between foreign industry and a government.[326] Their essential feature is that they are characterised by both parties as "voluntary" and are thus legally unenforceable.[327] To date they have been employed largely by the United States in a protectionistic attempt to reduce the quantity of particular imports.[328]

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323 This view was supported by the Director-General of the GATT who stated there was "*no exception*" to GATT rules which prohibit a country from imposing retaliatory measures. However, Thatcher also suggests that the circumspect use of Super 301 may be effective in: assuaging the protectionistic sentiment in the United States (especially within Congress); publicising trade barriers in foreign countries like Japan; and inducing other countries to lower their barriers. See Thatcher, above n 42, 494.

324 Politically, only great powers can credibly resort to the threat of retaliation. This is another of the basic reasons for the creation of regional trade blocs which alone are capable of wielding the economic power necessary to resort to effective sanctions and to bring successfully into play the dissuasive effects of such a threat. Clearly this is unfair to small nations and encourages the type of discrimination and conflict that is anathema to the GATT. See Pescatore, above n 244, 15.

325 See Thatcher, above n 42, 516.

326 The GATT Secretariat defines them in the following way: "*A Voluntary Export Restraint is a measure by which the Government or an industry in the importing country arranges with the Government or the competing industry in an exporting country for a restriction on the volume of the latter's exports....but from an economic perspective, the problem of defining a Voluntary Export Restraint becomes largely irrelevant. Any Voluntary Export Restraint that operates in the exporting country to restrict imports to particular countries, whether or not directly involving the government of the exporting country, would have similar economic consequences. The word "voluntary" is of course a misnomer - these arrangements are generally undertaken at the insistence of importing countries which threaten retaliatory action....They are therefore used by governments of importing countries as a means of managing trade to protect sensitive domestic industries.* By this definition, the term "Voluntary Export Restraint" is a generic reference for all bilaterally agreed measures to restrain exports. See GATT, above n 2, 115.

327 Technically a Voluntary Export Restraint is unilateral and administered by the exporting country, being "voluntary" in the sense that the country has the formal right to eliminate or modify it. But usually a Voluntary Export Restraint arises because of direct or indirect pressure from an importing country; it can be thought of as voluntary only in the sense that the exporting country may prefer it to alternative trade barriers that the importing country might use. See Bergsten, n 2, 45. See also GATT, above n 2, 116.

328 Japan has also employed a Voluntary Export Restraint in relation to Korean knitwear in February 1989. The Voluntary Export Restraint restrained Korean exports to Japan, and allowed Chinese knitwear makers to increase their share of the Japanese market while making windfall profits. It proved highly counter-productive. See EC Emerson "Voluntary Restraint Agreements and Democratic Decision-making" (1991) 31 Virg J Int'l L 281, 281.

Voluntary Export Restraints date from the 1960s but were re-established by the Reagan administration in the 1980s for such products as automobiles, machine tools, steel and textiles.[329] The most notorious VERs were negotiated in 1984 in an attempt to protect the American steel industry from the damaging effect of foreign competition.[330] These foreign competitors were exploiting new technology to produce higher quality steel at lower prices, thus undercutting the more inefficient American steel producers. The Reagan administration considered that some form of protectionism was essential as domestic steel production had a high strategic value (both economically and militarily) and employed 270,000 Americans.

Voluntary Export Restraints are particularly pernicious as they constitute a form of protectionism that is unlikely to be challenged by other GATT nations.[331] They transfer wealth to the exporting country, and effectively bribe that country with "tariff-equivalent revenue" - hence complaints to the WTO are unlikely.[332] This revenue is created because the artificial reduction in supply permits the foreign exporters to charge higher than normal prices, thus achieving super-normal profits at the expense of consumers.[333] For example, the steel VERs dramatically increased the price of steel during the late 1980s. Between January 1988 and March 1989 the price of steel within the United States soared 20%. This in turn affected steel-dependent industries causing temporary shutdowns, layoffs and cancellations of export sales. There is overwhelming evidence that the use of Voluntary Export Restraints propagates major inefficiencies and distortions within an economy.[334]

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329 United States President Lyndon B Johnston was the first to implement a Voluntary Export Restraint programme, this was also in response to increased foreign steel imports. See T Fillinger "The Anatomy of Protectionism : The Voluntary Restraint Agreements on Steel Imports" (1988) 35 UCLA LR 953, 957.

330 Fillinger notes that between 1984 and 1987, the Reagan administration steel negotiators endorsed Voluntary Export Restraints with representatives of 28 countries. These agreements, covering 80% of imported steel, constituted some of the broadest protection ever awarded to American industry. See Fillinger, above n 329, 953. See also CP Seebald "Life After Voluntary Restraint Agreements : The Future of the Steel Industry" (1992) 25 Geo Wash J Int'l L & Econ 875, 875.

331 The GATT Secretariat explains that a typical VER raises prices in the importing country and leads to trade diversion. It also gives rise to economic rents, welfare losses, and global as well as national resource misallocation in both the exporting and importing countries. VERs tend to spread, fragmenting the trading system into a series of market-sharing arrangements, dominated by the major trading nations. And VERs may create vested interests in both the importing and exporting country, leading to VER entrenchment. Preusse compares the economic effects of VERs to the effects of tariffs and concludes that VERs are worse when dynamic effects are taken into consideration. The country's loss of welfare is increased because foreign exporters are given the chance of enforcing a monopolistic pricing policy. Their introduction is usually the result of successful rent-seeking. The direct costs of their bargaining and implementation are usually high. Implementation occurs covertly and bypasses public accountability mechanisms (and the global accountability mechanisms of the GATT). They are frequently justified as "short-term" measures, but in reality they have often become entrenched and are then perpetuated by vested interests. Preusse warns that they tend to tilt the equilibrium between free-trade and protectionism in favour of the protectionist sentiments. See Preusse, above n 28, 15. See GATT, above n 2, 116.

332 VERs have built in compensation for the foreign supplier in the form of economic rents and also provide a degree of certainty in market access. See GATT, above n 2, 116.

333 The "Auto Voluntary Export Restraint", for example, effectively represented a transfer payment running to billions of dollars from American consumers to Japanese producers.

334 A broad range of economic, trade and legal literature concludes that such protectionism hurts the home economy in the long run. A Brookings Institution report regarding the Japanese automobile Voluntary Export Restraints calculated an annual consumer cost of $150,000 for each job preserved in the US industry. The total consumer loss was US$4.3 billion. Protectionism damages the ability to trade abroad, kills incentives to reinvest and modernise, causes the loss of jobs, and disrupts and distorts the international economy. Petersmann notes that modern trade and public-choice theory confirm that

Voluntary Export Restraints are also constitutionally abhorrent in the United States. They permit the President to bypass Congress and directly negotiate with a foreign nation or industry.[335] In the 1974 United States case *Consumers Union of US Inc* v *Kissenger,*[336] the Court reasoned that as Voluntary Export Restraints were "*purely voluntary unenforceable actions*", and as nothing in the United States Constitution prevented the President from negotiating unenforceable agreements, they were thus not subject to judicial review.[337] This meant that the executive branch of Government was given a virtually unlimited discretion. Dr EC Emerson comments: "*Voluntary Export Restraints operate in a no-mans-land where political accountability is abandoned and the injured have little recourse*".[338]

This points to another of the essential difficulties with VERs in the United States, a high lack of political accountability.[339] United States companies have been able to apply direct pressure to the executive branch of Government to solicit VERs, thereby bypassing Congress. As Professor KC Kennedy observes, this is constitutionally inappropriate:[340]

> Voluntary restraint agreements are short-sighted, insidiously erode the integrity of national law in Western democracies, and permit discrete legislative minorities to obtain political results that a legislative majority is publicly unwilling to support.

Strictly speaking, Voluntary Export Restraints are illegal under the GATT. They violate Article XIX which provides that import relief measures can only be imposed on a finding of "serious injury". They run afoul of the Article I "Most Favoured Nation" principle, whereby trading partners must be given equal treatment.[341] And VERs violate Article XI,

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trade restrictions such as VRAs almost always reduce the potential income of the restricting economy (e.g. because of rent-seeking and market distortions). See Fillinger, above n 329, 991. See also Petersmann, above n 204, 59.

335 The "President" in this context means the executive branch of the United States Government - as represented by the United States Trade Representative.

336 506 F.2d 136 (DC Circuit, 1974).

337 The Court reasoned "*the steel import restraints do not purport to be enforceable, either as contracts or as government actions with the force of law; and the Executive has no sanctions to invoke in order to compel observance by the foreign producers of their self-denying representations, They are a statement of intent on the part of the foreign producer association*". See Emerson, above n 328, 302.

338 See Emerson, above n 328, 310.

339 Voluntary Export Restriants are often embraced because they have a low political visibility. See KC Kennedy "Voluntary Restraint Agreements : A Threat to Representative Democracy" (1987) 11 Hastings Int'l & Comp LR 1, 12.

340 Kennedy notes that the VER cycle begins with calls for protectionist trade legislation by "*one or more members of Congress who raise the overworked spectre of foreign imports displacing thousand of honest hard-working American citizens.*" The odds that this legislation would ever be enacted remain remote. The mere threat of passage of such protectionist legislation will then result in the negotiation of Voluntary Export Restraints by the President with exporting countries in order to stem the perceived protectionism. This action is accentuated by further political pressure applied directly to the President by the petitioning parties in support of their bid in Congress. See Kennedy, above n 339, 36, 40.

341 The promise of a fixed market share to any country would *prima facie* violate most-favoured-nation treatment. The GATT Secretariat comments "*A VER is by its very nature an instrument of selective trade control, in contradiction to the very principle of non-discrimination that has served as the cornerstone of multilateral rules since World War II*". Such non-discrimination in economic terms means that a given level of protection for domestic producers can be achieved at minimum cost to domestic consumers and the rest of the world. The principle also protects the interests of smaller trading nations and helps to ensure the access of new entrants to the international market place. Its role in multilateral trade rules lends transparency and predictability to international trade relations and to domestic decision making. Voluntary Export Restraints clearly undermine these objectives. See GATT, above n 2, 116. See Kaufman, above n 102, 352.

which precludes the use of quantitative restrictions on trade.[342] Yet while VERs are technically illegal under the GATT, in reality they have formed another "grey area" of GATT legality. They are a subtle form of protectionism that have eluded GATT scrutiny due to the political benefits accruing to one nation and the economic rents accruing to the other.

1 Voluntary Import Expansions : A More Appropriate Response to Cultural Trade Barriers?

Voluntary Import Expansions ("VIE"s) are a novel and reverse form of Voluntary Export Restraint and constitute another form of managed trade. They apply when a powerful exporting country is attempting to enter the market of an importing country, and finds structural barriers impeding market entry. In this situation the exporting country applies pressure to the importing country to enter into bilateral negotiations. In the resulting agreement the importing country pledges to open their domestic market to the exporting country's products. As with the Voluntary Export Restraint this pledge remains legally unenforceable (although in reality VIEs are typically backed by a credible threat of sanctions). Metaphorically, while VERs act as a shield, VIEs operate as a sword.

Voluntary Import Expansions have a political appeal that have seen them supplant the use of VERs in recent years: Voluntary Import Expansions do not cause direct economic costs to the economy of the powerful nation; they allow politicians to be perceived as "*achieving something*"; and they assuage domestic protectionistic sentiment and associated pressures for retaliatory action. They have been portrayed by both Japan and the United States as a "*short term pressure valve to reduce trade tensions between our two nations*".[343]

However, it is also clear that scepticism of Voluntary Import Expansions is in order.[344] They appear highly susceptible to political capture. And if they are administered in such a way as to prefer one country above others (as seems to be the case), they will also cause trade diversion - with the importing nation gaining at the expense of third-country producers.[345] This is clearly anathema to the "Most Favoured Nation" principle of the GATT.

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342 Emerson comments that this Article XI prohibition was another cornerstone of the GATT system. The use of tariffs exclusively, it was believed, would ensure transparency and allow nations to bargain for open trade more easily because information concerning market accessibility would be readily available. See Emerson, above n 328, 293.

343 The GATT Secretariat notes that Japan's export measures are typically described as "*transitional, temporary, exceptional steps*" to avoid "*sharp and disruptive increases*" in exports. See GATT, above n 2, 37.

344 Difficulties with VIEs include: risk of political capture; a weak scientific basis for setting quantitative targets; actual outcomes may in part be generated by fundamental economic forces beyond any government's control (i.e. changes in demand, technological innovations); and enforcement of these agreements is problematic. See Bergsten, above n 4, 120.

345 Whether a VIE is globally welfare-enhancing comes down to whether the initial situation is distorted or not, and if it is, how. If the foreign market is protected and a VIE is implemented on a non-preferential basis among foreign suppliers, the VIE may be globally welfare-enhancing although producers in the protected country will lose. If the market is protected and the VIE is administered preferentially, it is possible that both the importing and the exporting countries as a whole may gain at the expense of importing country and third-country producers. If the market is initially undistorted, the VIE will reduce importing country welfare and increase exporting country welfare. Indeed, the exporting country would prefer the VIE over an equivalent export subsidy because of the favourable VIE terms-of-trade effects. See Bergsten, above n 4, 132.

The arguments of the European Community in the *Semiconductor* case are illustrative.[346] The Semiconductor Agreement was a Voluntary Import Expansion, coupled with a five year Voluntary Export Restraint, that was negotiated between Japan and the United States in 1986. The United States had threatened severe anti-dumping action against Japan following the alleged dumping of Japanese semiconductors in Asia and the United States; this had led Japan to seek a negotiated solution.[347] The terms of the resulting agreement included that Japan would "*impress on Japanese producers the need to take advantage of increased market access opportunities for foreign products*".[348] Japan would also restrict the entry of certain types of cheap semiconductors into the United States.

The European Community launched a nullification and impairment action against Japan in the GATT alleging use of administrative guidance by the Ministry of International Trade and Industry to encourage Japanese producers to buy American chips in preference to all other chips.[349] The European Community argued that this constituted discriminatory preferential treatment and therefore nullified or impaired Article I of the GATT. However, due to insufficient evidence the action of the European Community failed. It is clear that Voluntary Import Expansions constitute yet another "grey area" of GATT legality.

2 *The Current Use of VIEs and VERs Against Japanese Trade Barriers*

VERs and VIEs were first applied to perceived Japanese trade barriers in 1981.[350] The success of Japanese vehicle imports into the United States in the early 1980s alarmed the incumbent American auto manufacturers. These manufacturers lobbied Congress for oppressive legislative proposals that would restrict the import of Japanese cars. Faced with the probable enactment of such laws, the Japanese Government initiated talks with the American Government to attempt to resolve the issue. As a result of the negotiations, Japan entered into a recurring VRA which restricted the import of Japanese cars into the United

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346 See *Trade in Semiconductors*, above n 184.

347 Semiconductors are also known as "silicon chips".

348 The *Semiconductor Agreement* contained four principal provisions aimed at increasing foreign firms access to the Japanese domestic market. The Japanese government would encourage Japanese producers and consumers of semiconductors to purchase more foreign semiconductors. The Japanese government would establish an organisation in Japan to help foreign producers increased sales in Japan. The Japanese government would promote long-term relationships between Japanese and foreign firms. And finally, the Japanese government would ensure full and equitable access for foreign firms to patents generated by government sponsored research and development. See Bergsten, above n 4, 130, 226.

349 There were two separate actions in the *Semiconductor* case. The first was an action against Japan under Article XI which related to the use of administrative guidance to restrict entry of foreign semiconductors into the Japanese market. This argument succeeded. The second action was an action under Article I which related to the alleged use of administrative guidance by the Japanese Ministry of International Trade and Industry to give the United States preferential treatment over other countries. This argument failed. See *Trade in Semiconductors*, above n 184.

350 Some of Japan's most successful exports to the United States have been limited by Voluntary Export Restraints for a considerable period of time: automobiles, machine tools, steel, textiles and apparel. Some of America's exports to Japan are also promoted by Voluntary Import Expansions: Japan has a commitment to import specific quantities of semiconductors, and Japanese industries have set targets for importing auto parts and automobiles. See Bergsten, above n 4, 16.

States.[351] Ironically this proved exceptionally lucrative for Japanese auto exporters by promoting the cartelisation of the market. This permitted the Japanese exporters to cream huge profits from the artificially high prices at the expense of American consumers.[352]

In recognition of the adverse effect of Voluntary Export Restraints, the United States is now clearly favouring the use of Voluntary Import Expansions in its trade relations with Japan.[353] Dr Fred Bergsten of the Institute for International Economics notes that this policy trend is a result of the apparent success of the Semiconductor Voluntary Import Expansion which raised the market share of foreign semiconductors within Japan.[354] This achievement spurred interest in similar approaches to other sectors.[355] However, Voluntary Import Expansions are frequently a result of bilateral negotiations provoked by continued threats and coercion - which is clearly an insensitive procedure for approaching seemingly intractable cultural differences. Such threats have the inevitable result of increasing trade conflict, and heightening political and social tensions between the two nations. This has potentially damaging long-term repercussions for the stability of the international trading environment.

Voluntary Import Expansions also indicate a trend away from the fundamental GATT principle of multilateral free trade towards numerically managed bilateral trade. This is fundamentally abhorrent to the GATT. In their January 1993 Trade Policy Review of Japan, the GATT Secretariat asserted:

> Japan continues to stand outside, and to criticise regional and bilateral approaches to trade as undermining the multilateral trading system. However, its readiness, when confronted by such pressures, to accept bilateral solutions for trade problems, including voluntary restrain agreements

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351 The Voluntary Export Restraints negotiated in 1981 were to last four years (1981-1984). In 1985 they were extended for the first time, and thereafter have been annually renewed up until the present. See Preusse, above n 28, 11.

352 This provided a textbook example of the self-defeating nature of Voluntary Export Restraints. Japanese producers initially responded to the Voluntary Export Restraint by raising prices on their cars, which now had an additional scarcity value due to their limited supply. With the prices of Japanese cars escalating, American and European producers were free to raise prices as well. An estimated US$5.8 billion to $10.3 billion in quota rents were transferred annually from United States consumers to the world's automobile producers. Most of these rents were captured by Japanese producers, and for several years in the 1980s Toyota was the most profitable firm in Japan. These excess profits were ploughed back into investment in new plants, equipment, and research and development, making the Japanese firms even more formidable (hence further eroding the long-term market share of the major American producers). See Bergsten, above n 4, 106.

353 Voluntary Import Expansions are now also being called by the euphemism "temporary quantitative indicators". These are justified as "*simulating what both sides expect would happen in a particular sector if Japanese businesses and consumers made purchase decisions on the sole basis of commercial considerations*". See Bergsten, above n 4, 19.

354 Bergsten comments that Voluntary Import Expansions may make some sense as a mechanism to force the adaptation of a system that was developed in the closed policy-oriented environment of Japan in the 1950s and 1960s. A VIE could then be considered as a temporary compensatory policy to move the Japanese system closer to a free trade equilibrium. It may act as a prod to internationalise the keiretsu. It is precisely this encouragement to bring non-Japanese firms abroad in product development and the "design-in" phase that could be the avenue by which this inherently discriminatory structure is made compatible with an open international trade system. However, Bergsten also comments that "*in light of the potential pitfalls of the VIE approach, one should be very cautious about advocating them*". See Bergsten, above n 4, 196.

355 The Semiconductor Agreement can take substantial credit for the increased share of foreign companies in the semiconductor market - yet it is still too early to assess the results of the new Voluntary Import Expansions on automobiles and auto parts. Keitaro comments that it has been a "*gold mine*" for Japanese companies, setting a price that will allow them to obtain a "*handsome profit*". See H Keitaro "Economic Options After Reagan" (1988) 15:4 Japan Echo 31, 32.

> and market-opening agreements, continues to give the impression of a country which, while seeking to reduce frictions with all trading partners, favours the growth of grey-area measures and of managed trade in certain sensitive areas. Such bilateral solutions to trade problems, unless fully consistent with the principles of the multilateral trading system, including non-discrimination, contribute to the erosion of confidence in the system and of the system itself.

It therefore seems that while Voluntary Export Restraints are clearly recognised as an economic evil by most nations, the economic costs and benefits of Voluntary Import Expansions remain murky. Voluntary Import Expansions remain the current subject of heated debate among the GATT nations and issues of their GATT legality and acceptability remain unresolved.[356] It seems that the use of Voluntary Import Expansions in the relationship between the United States and Japan unfortunately seems set to continue.[357]

C A Bilateral Resolution of Cultural Differences : The Structural Impediments Initiative

Existing bilateral channels between the United States and Japan include the Joint United States - Japan Committee on Trade and Economic Affairs, established by agreement on 2 June 1961.[358] The Agreement provides for regular consultation for the purpose of reducing economic conflict, promoting information exchange and resolving trading differences.[359] The Committee has facilitated closer trade consultations and the negotiation of Voluntary Export Restraints and Voluntary Import Expansions. However, when Japan was declared a "priority country" under Super 301, Japan abruptly refused to negotiate with the United States - and Adams notes that the functioning of the Committee became "*somewhat mitigated*".[360]

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356 In his concluding remarks, the Chairman of the GATT Council commented: "*Members recognised that the so-called voluntary 'VIE' and 'VER' agreements necessarily involve both exporting and importing partners. However, the continuing persistent use of these measures by Japan in certain sensitive areas could lead to diversion of trade into third markets and erode confidence in the multilateral trading system*". In response, the Japanese government defended: "*With international trade being affected by protectionistic movements, Japan seeks to avert the imposition of unilateral import restrictions by importing countries, and ultimately to restore free trade, by implementing minimal VERs and VIEs in regard to automobiles, textiles, machine tools, and other products. Such restraints are considered emergency and unavoidable measures and are based on the request, agreement, or some form of consent of the importing country*". See GATT (Volume II), above n 2, 6, 22.

357 This is exemplified by recent the June 1995 "Auto Trade Dispute". Japan's refusal to negotiate with the US was based on a perception that such an agreement would constitute managed trade and would violate GATT's most-favoured-nation obligation. The 28 June 1995 accord saw the United States drop its requirement of strictly quantified US-Japan auto trade, and adopt much vaguer requirements - this pacified Japan and permitted an eleventh hour settlement. See "Japan Takes Moral High Ground", *International Herald Tribune*, New York, 28 June 1994. See also "Stalled Negotiations Leave Clinton Mulling Long List of Targets", *Asian Wall Street Journal*, Hong Kong, 8 May 1995. See also "US Weighs its Tactics in Trade Battle : Coercing Japan May Break Rule", *Asian Wall Street Journal*, Hong Kong, 23 May 1995.

358 11 UST 1633.

359 The Agreement provides for regular consultation for the following purposes : "*(1) To consider means of promoting economic collaboration between the two countries; (2) In particular, to exchange information and views on matters which might adversely affect the continued expansion of mutually profitable trade; and (3) To report to the respective governments on such discussions in order that consideration may be govern to measures deemed appropriate and necessary to eliminate economic conflict in the international policies of the two countries, to provide for a fuller measure of economic collaboration and to encourage the low of trade*". See above n 358.

360 See Adams, above n 17, 53.

Most commentators agree that the series of bilateral discussions instigated between the United States and Japan in 1990 were an outstanding example of the correct approach to be taken in sensitively resolving differences between the two nations.[361] The talks were named the "Structural Impediments Initiative", and were a year-long round of talks aimed at identifying the structural obstacles to balanced trade in each other's economies and to explore possible corrective measures.[362] In the final Structural Impediments Initiative Agreement, concluded in June 1990, Japan agreed to:

1. Spend Y430 trillion on public works over 10 years;
2. Encourage personal consumption by narrowing the gap between domestic and foreign prices and by streamlining the distribution system;
3. Stabilise land prices and promote housing construction; and
4. Reform the transactions that occur within the *keiretsu*, or corporate groups.

In return the United States agreed to:

1. Reduce its budget deficit and increase its domestic saving rate;
2. Improve the competitiveness of United States industries; and
3. Strengthen its education system and worker training programmes.

While Japan has now implemented many of these agreed measures, it seems the United States may have reneged. This is unfortunate as the Structural Impediments Initiative represents a classic example of the negotiated "*mutually beneficial outcome*" that is currently applauded within negotiation theory.[363] The approach has also been welcomed by the Japanese. Indeed, in their January 1993 submission to the GATT Secretariat, the Government of Japan stated:[364]

> Structural consultations are a new type of initiative, undertaken for the purpose of promoting dialogue between countries whose economies have grown deeply interdependent. Pursues with a view towards achieving a further expansion of free trade. Such consultations should be seen as making a positive contribution to the free economy, since their results are applied without discrimination.

It is submitted this overwhelmingly represents the optimal bilateral method for resolving cultural barriers to trade.[365]

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361 See ST Anwar "The Impact of the Structural Impediments Initiative ("SII") on United States - Japan Trade" (1992) 16:2 World Competition 53, 62. See also Nariai, above n 14, 60.

362 See Anwar, above n 361, 58.

363 This is also known as "principled" or "consensual" negotiation. See, for example, R Fisher, W Ury & B Patten *Getting to YES : Negotiating to Agreement Without Giving In* (2 ed, Houghton Mifflin, Boston, 1991).

364 See GATT, above n 2, 18.

365 Bergsten provides a key insight into the most appropriate response to cultural trade barriers: "*The experiences of the telecommunications talks illustrate the metaphor of an onion, in which successive Japanese impediments to trade must be removed incrementally, like the layers of an onion*". He concludes "*the structural and sector-specific sources of market access problems in Japan require subtle and sophisticated policy responses by the United States (and other foreigners)*". Bergsten also notes that increased corporate alliances between American and Japanese firms are also now reducing the prospects for conflict. See Bergsten, above n 4, 201.

VIII ALTERNATIVE DISPUTE RESOLUTION PROPOSALS

A Achieving the APEC Vision : An Asia-Pacific Dispute Mediation Service

1 The Asia - Pacific Economic Co-operation

The Asia-Pacific Economic Co-operation ("APEC") was inaugurated in Canberra in 1989 with the ambition of facilitating large-scale economic co-operation among the nations of the Asia-Pacific.[366] Essentially APEC is a "super" regional trade area. It can be viewed as an attempt to bridge regional integration efforts within East Asia, with those of the West, to further harmonise international trade across Asia and the Pacific.[367] The challenge of the APEC nations was therefore to develop a structure that could accommodate great diversity.[368] As a result the building blocks of APEC were crafted carefully and informally, utilising an innovative tripartite structure of businessmen, academics and officials.[369]

In 1992, APEC commissioned an advisory panel, the APEC Eminent Persons Group, to chart the organisation's long term future.[370] The Eminent Persons Group presented its initial report "*A Vision APEC*" to the APEC member nations in Seattle, November 1993. This report outlined a four-part strategy that was aimed at creating a new Asia-Pacific economic community to liberalise trade within the Asia-Pacific region.[371] The report was adopted

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366 The Asia-Pacific Region accounts for 40% of the world's population and 50% of it's economic output. This is double the size of the EC. This region is currently the most dynamic in the global economy and its geographical members, particularly on the Asian side, now represent the world's fastest growing economies. The current members of APEC include: New Zealand, Australia, Papua New Guinea, Indonesia, the Philippines, Malaysia, Singapore, Brunei, Thailand, China, Hong Kong, Taiwan, South Korea, Japan, Canada, United States, Mexico, and Chile. This covers virtually the entire spectrum of economic development. See "US Commitment to APEC : The Eagleberger Speech" *US Department of State Dispatch*, Washington DC, 7 December 1993. See also "APEC Panel to Discuss Economic Issues", *Japan Economic Newsletter*, Tokyo, 17 March 1994. See also "The Centre of Gravity Shifts East" *Vancouver Sun*, Vancouver, 13 November 1993.

367 The idea originated from a speech by former Australian Prime Minister Bob Hawke in Seoul in January 1989, and a studiously vague statement of intent inviting nations to discussions in Canberra.

368 The Eminent Persons Group ("EPG") themselves stated: "*We are of course aware of the difficulties in achieving the proposed vision. There are sharp differences in levels of economic development in the region. All of our economies are based on market principles but there are considerable differences in the means by which the member economies implement these principles. There are significant differences in cultures, languages, legal systems and other key features of our societies. We are pursuing the first truly intercontinental economic enterprise*". See Eminent Persons Group *Achieving the APEC Vision : Free and Open Trade in the Asia-Pacific* (APEC, Singapore, 1994), 7.

369 See A Elek "Asia Pacific Economic Co-operation (APEC)" [1991] Southeast Asian Affairs 33, 35.

370 The APEC Eminent Persons Group comprises 11 members including businessmen, economists, former government officials and political leaders and academic experts. One person was nominated from each of the APEC members at the time. See "APEC and World Trade : A Force for Liberalisation", *Foreign Affairs*, London, 7 June 1994.

371 The four components of the strategy announced by the APEC Eminent Persons Group in *A Vision APEC* were:
(1) Members should declare an ultimate goal of free trade in the Asia-Pacific Region, and set a target date for it by 1996.
(2) Members should launch an immediate trade facilitation programme including a dispute settlement mechanism.
(3) APEC should initiate infrastructure enhancement programmes for trade, education, and technical co-operation.
(4) APEC should begin modest institutional development, including a permanent secretariat and Ministerial Conference.
See "Highlights of APEC Eminent Persons Group Report", *Japan Economic Newswire*, Tokyo, 19 November 1993. See also "APEC Seen to be Set on Course for Liberalising World Trade" *Agence France Presse*, Paris, 21 July 1994.

unanimously by the APEC member nations and the Eminent Persons Group were asked to develop a strategic plan for its implementation.[372] In November 1994, the Eminent Persons Group presented their second report, "*Achieving the APEC Vision*", to the second annual APEC leaders' summit in Bogor, Indonesia.[373] These recommendations were again unanimously endorsed and then subsequently actioned via the "Bogor Declaration". It seems that APEC has now unequivocally embarked on its voyage into the Pacific Century.

The Bogor Declaration is ambitious and aims for free and open trade in the Asia-Pacific by the year 2020.[374] Key components of the Declaration include: the implementation of a strict timetable for comprehensive trade liberalisation among the member economies; the adoption of a concord on investment principles; the creation of an APEC Asia-Pacific Dispute Mediation Service; greater harmonisation and mutual recognition among the member nations where possible; and increased co-operation on macro-economic and environmental issues.[375] The importance of the emergence of APEC to New Zealand was underlined by our Prime Minister, the Rt Hon Jim Bolger, in June 1995:[376]

> APEC's significance to New Zealand reaches beyond economic and trade dimensions. It has created a unique grouping of diverse economies around the Pacific rim, building cohesion across the Pacific and within Asia as well. This interaction makes a vital contribution to sound political and strategic relationships.

2 *The Proposed APEC Asia-Pacific Dispute Mediation Service*

The proposed APEC Asia-Pacific Dispute Mediation Service is directly relevant to the issue of cultural trade barriers. It seems it is being crafted specifically to handle the types of fierce bilateral disputes that have characterised the relationship between the United States and the countries of Asia over the past decade. The Eminent Persons Group's proposal for the Dispute Mediation Service was outlined in the Bogor Declaration in the following terms:[377]

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372 R Noor, the executive director of APEC, stated: "*Trade liberalisation is at the heart of APEC. APEC is a door opener and a facilitator for industry. APEC provides a forum for personal interaction between the powerful and the less powerful, the rich and the economically more modest. In APEC councils, Papua New Guinea has the same voice as the United States. China's President rubs shoulders with Singapore's Prime Minister. National antagonists meet on neutral territory in an atmosphere of bonhomie...I am now suggesting that we need to stretch our conceptual horizon and begin to think of APEC as an organisation which can now produce co-operative solutions to our common regional problems.*" See "Finance Minister's Show Up APEC's Uncertain Role", *Business Times*, New York, 18 March 1994.

373 See Eminent Persons Group, above n 368.

374 The APEC leaders launched the implementation of APEC in Bogor last year. We are now in a five year preparatory phase, with initial implementation of liberalisation measures to occur by the year 2000. The aim is to achieve complete free trade by 2020, with the more advanced nations achieving this goal by the year 2010. See Eminent Persons Group, above n 368, 112.

375 Australian Government "Promoting Integration with the Asia-Pacific Region (APEC)", Internet, Australian Government Home Page, Canberra, accessed 18 May 1995.

376 See Ministry of Foreign Affairs & Trade *Asia Pacific Economic Co-operation* (New Zealand Government, Wellington, June 1995), 2

377 See *APEC Economic Leaders Declaration of Common Resolve*, Bogor, Indonesia, 15 November 1994.

> Trade and economic disputes among APEC economies have negative implications for the implementation of agreed co-operative arrangements as well as for the spirit of co-operation. To assist in resolving such disputes and in avoiding their recurrence, we agree to examine the possibility of a voluntary dispute mediation service, to supplement the WTO dispute settlement mechanism, which should continue to be the primary channel for resolving disputes.

The Eminent Persons Group have clearly recognised and endorsed the new Uruguay Round improvements to the GATT and have urged all APEC member nations to make full use of the WTO dispute settlement procedures for settling their future trade disputes. Yet the Group also noted that the WTO procedures only cover those issues directly contemplated by the GATT. They reasoned that where issues were beyond the purview of the GATT the prospect of unilateral action and retaliation between nations remained a very real threat.[378] Bearing these two points in mind, they proposed an APEC mediation service that would be carefully designed to supplement the WTO system and would "*fill a major gap in the global dispute settlement arsenal*":[379]

> APEC could fill a major gap in the global dispute settlement arsenal by offering a mediation process that would cover other areas of potential dispute among members, whether or not the organisation had adopted rules in those areas.

The Eminent Persons Group commented that they initially based their proposal on GATT and NAFTA precedents. Yet they explained that the traditional arbitral approach to resolving international trade disputes, adopted by both NAFTA and the GATT, would be inappropriate for the unique Asia-Pacific context. Arbitration requires the existence of agreed standards against which to judge compliance and this in turn requires a significant degree of comparability of laws among the participating APEC economies. This condition was not in line with the objective realities of the region.

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378 A prime cause of conflict is what Edmond describes as "cognitive" conflict and relates to ones understanding of a situation. Different people have different perceptions of similar or even identical events and issues. In one sense this is simply a reflection of different life experiences and cultural backgrounds. Another main source of conflict is a difference of values, particularly cultural values. As the world community integrates to a greater extent, cultures are being exposed to each other and differences inevitably create misunderstanding and friction. International trade is perhaps the arena where this is most apparent. For example, in their report, the EPG comment: "*There are those who believe that international security will be threatened in the future by a clash of civilisations. If that were to happen, our Asia Pacific community would be particularly vulnerable because it is home to a number of distinct cultures. A successful evolution of APEC could play a major role in preventing any such conflicts*". See DP Edmond "Alternative Dispute Resolution : A Conceptual Overview" (1988) 22 Kobe Uni LR 1, 6. See also Eminent Persons Group, above n 368, 59.

379 See Eminent Persons Group, above n 368, 24. This would not interfere with the existing GATT Dispute Settlement Body, but would aim to enhance its operation. Probably sitting as a tier below it. It would "*provide APEC with a forum for action, in which Japan's market access problems could be addressed*". See "US Cautious to New Asia Trade Bloc", *Business Times*, New York, 25 July 1994. See also "Australia Undecided on APEC Trade Proposal", The *Reuter European Business Report*, London, 20 July 1994. See also "Now That the Rising Sam is Eclipsing the Rising Sun", *Business Times*, New York, 21 July 1994. See also "APEC Should Promote Open Regionalism : Economist Says", *The Strait Times*, Singapore, 21 June 1994. See also A Elek "Trade Policy Options for the Asia-Pacific Region in the 90's : Potential for Open Regionalism" (1992) 82(2) Am Econ R 74. See also GC Hufbauer & JJ Schott *Western Hemisphere Economic Integration* (Institute International Economics, Washington DC, 1994), 72.

The Eminent Persons Group alternatively premised their dispute resolution procedure on mediation.[380] This signifies a search for a more consensual approach to problem solving, and reflects a view that each dispute is different, and that different types of conflict may be more suited to different kinds of dispute resolution procedures. Some international disputes may be able to be resolved more efficiently by arbitration, others may be better suited to resolution by mediation. A greater variety of dispute resolution procedures allows greater scope for tailoring the procedure to their individual needs. Yet the Eminent Persons Group noted that the APEC Dispute Mediation Serve would, in some cases, also serve to channel bilateral trade disputes back into the multilateral system:[381]

> We believe that the existence of these bilateral disputes, taken in conjunction with the broader factors already described, argues strongly for accelerating the process of APEC co-operation. Indeed, APEC should make every effort to begin channelling such disputes, to the greatest extent possible, into multilateral rather than bilateral, channels. Doing so, in some cases, would improve the prospects for resolving the disputes successfully.

In terms of structure, the Eminent Persons Group envisaged that the Dispute Mediation Service would comprise a tribunal of experts selected by mutual consent of the parties from a roster of experts held by the APEC Secretariat. This roster would represent the "*finest expert opinion from both governmental and non-governmental organisations within the APEC region*". Essentially the disputants would agree to the terms of reference and constitution of the tribunal and would then use their Dispute Tribunal for impartial expert opinion and advice (requesting reports from their Dispute Tribunal as required).[382] Firm time deadlines would apply at each stage of the mediation process to avoid the delays that characterised the pre-1994 GATT dispute resolution procedures (and thus pushed many nations to attempt bilateral and unilateral solutions).

The Eminent Persons Group emphasised that the essence of this process was that it was completely voluntary and it was designed solely for facilitating mutually beneficial solutions. The aim would be to create an "*attractive and effective mechanism for helping to resolve disputes that proved intractable through normal channels*".[383] It would provide an appropriate forum for the parties where conventional bilateral channels were proving problematic. Essentially the Mediation Service would allow complex disputes to be addressed in a principled manner. The Eminent Persons Group then warned that the proposal should be

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380 Edmond, for example, comments : "*There is an important relationship between disputes and processes. Not only are some disputes are 'better' resolved by one process than another, but submitting a particular dispute to the 'wrong' process is fraught with problems*". See Edmond, above n 378, 23.

381 See Eminent Persons Group, above n 368, 11.

382 Other procedural recommendations include: the ability of the parties to "*solicit the views of third parties with legitimate concerns about the issue in question*"; the parties may seek the advice of the APEC Commission on Trade and Investment (which has already had discussed the many US-Japan disputes); and panel recommendations would be "binding" on the parties only if the parties agreed in advance to be bound by them. See Eminent Persons Group, above n 368, 24.

383 See Eminent Persons Group, above n 368, 25.

given the highest priority as the increasing ferocity of the bilateral trade disputes between the United States and Japan was threatening the positive evolution of the APEC community.[384]

Following the Eminent Persons Group report, the October 1994 "*Business Blueprint for APEC*" suggested that the proposed Dispute Mediation Service should also be extended to include international inter-company disputes within the APEC region.[385] However, the status of this suggestion is currently unclear. In November 1994, the earlier recommendations of the Eminent Persons Group were wholly endorsed and the APEC Asia-Pacific Dispute Mediation Service is currently in the process of being established.

It is submitted that this proposal is highly commendable, if not superb. It will prove perfect for addressing cultural trade barrier issues and is exactly in line with the proposals and conclusions of a number of commentators in this area.[386]

B A New Zealand Approach : Ambassador Taniguchi's Proposal

In March 1994, Japan's Ambassador to New Zealand, Ambassador Taniguchi, advocated a possible complaint management function for the New Zealand-Japan Business Council.[387] He suggested an "*ombudsman system*" or "*complaint management committee with impartial eyes*". This would be aimed at creating a new institutional mechanism to deal with problems and difficulties arising in pragmatic, day-to-day, business transactions between Japan and New Zealand:[388]

> Let me address the question of complaint management as a possible additional function of your Council. The more our mutual activities and closer economic relations develop, the more various problems and difficulties in the actual day-to-day business transactions will inevitably arise. I am given to understand that at the annual meeting between our Councils, the attendants engage

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384 The EPG also commented : "*In making these proposals for an APEC Dispute Mediation Service, we again reflect on the evolution of the community of Asia-Pacific economies. Members of such a community should both seek, and respond positively to, the views of their peers governing the conduct of economic relations throughout the region. To be sure, it would be premature to consider adoption of binding dispute settlement rules and procedures at this stage of APEC. But our vision of its future development must surely include effective means to settle the disagreements that will inevitably arise, and we believe that this set of proposals should thus rank high on the APEC agenda*". See Eminent Persons Group, above n 368, 25.

385 The recommendations included : "*APEC should establish dispute settlement mechanisms within the APEC framework. These mechanisms should be used to settle intergovernmental and inter-company disputes*". See *Pacific Business Forum Report - A Business Blueprint for APEC : Strategies for Growth and Common Prosperity*, 15 October 1994. See also M Rudner "Institutional Approaches to Regional Trade & Co-operation in the Asia-Pacific" (1994) 4 Transnat'l L & Cont Probs 159, 173.

386 Field proposed a "Multilateral Trade Facilitation Committee" that would facilitate communication, negotiation, mutual understanding, and co-operation. It would remain informal, based on principles of mediation. See Field, above n 34, 193.

387 Japan-NZ Business Council "Ambassador Suggests Council Should Take-on Complaint Management" [1994] 3 The Japan File 3.

388 See Ambassador Taniguchi *Speech at the AGM of the Japan-New Zealand Business Council* Wellington, 17 March 1994. See Appendix of this paper for a copy of Ambassador Taniguchi's speech.

> themselves in reviewing the macro-economic situation and the overall economic prospects of both countries. Even in the corridors outside the plenary, they would be occupied with the general economic trend rather than tackling individual details in business.
>
> However, I would suggest to you today that there is an additional area to which the Japan-New Zealand Business Council should address itself. It should set up a new institutional mechanism to deal with these concrete yet micro problems. What about an Ombudsman system or a complaint management committee with impartial eyes? Once some sort of framework is established, business people could directly submit problems, and suitable information could be exchanged to enable them to solve the particular issues.

The New Zealand-Japan Business Council is a private institution with a membership constituting businesses, institutions and individuals engaged in commerce with Japan.[389] The Council's objective is to "*foster and develop long term economic and trading relations with the Japanese*".[390] Many eminent business-people are included within the Business Council's roughly 160 members.[391] In light of his proposal, Ambassador Taniguchi suggested membership of the Council should now be extended to include smaller-sized companies such as those entering niches within the Japanese market:[392]

> With a view to encouraging such systems, it would make sense that your Council extend membership to smaller-sized companies which recently started business in new niche markets in both countries, this is in addition to the present members which are relatively large scale companies with long experience. Even if these smaller companies were not necessarily accepted as full regular members, there could be an associate membership system or provision for their submissions on an ad hoc basis.

This appears a suggestion worthy of serious consideration.

It appears that Taniguchi envisaged his "Complaint Management Committee" as promoting greater communication and negotiation between Japanese and New Zealand companies. It would provide a welcome forum for increasing inter-cultural understanding between Japan and New Zealand with a view to building long-term relationships. It could also provide useful information and advice.

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389 The Japan-New Zealand Business Council is one of seven New Zealand business councils operating to promote trade between New Zealand and foreign countries. It is administered by the New Zealand International Business Council.

390 See Japan New Zealand Business Council *Notes to the Accounts* Wellington, 31 December 1993, para 3.

391 For example the members of the Japan Advisory Board, an institution created by the Japan-New Zealand Business Council, include: the Chief Executives of the National Bank, Fletcher Challenge, Sealord Products, Carter Holt Harvey, Nelson Pine; the Managing Directors of The Helicopter Line, Comalco New Zealand, Air New Zealand; the Chairmen of the New Zealand Dairy Board, New Zealand Kiwifruit Marketing Board. The function of the Japan Advisory Board is to liaise with Ministers, Government officials and their advisors on matters relating to the relationship between Japan and New Zealand. See "Japan Advisory Board Named" *The Japan File,* Wellington, 1 April 1994.

392 See Taniguchi, above n 388.

In principle, a Complaint Management Committee of this nature would act as a mediator and facilitator in the event of international trade disputes.[393] A single conciliator and interpreter could be provided for minor issues between companies; an informal mediating tribunal to discuss more intractable issues. Arbitration would prove too formal and is best left to a superior institution or, alternatively, could be organised by the Complaint Management Committee in special circumstances if this was what the two disputing companies desired. The Committee would remain concerned with the micro practicality of daily business.

Conceptually, such a Complaint Management Committee would sit at the bottom of a dispute resolution pyramid for managing New Zealand's trade relations with Japan. The upper tier would constitute the World Trade Organisation and its new Dispute Settlement Body. This is able to give a highly authoritative adjudicative ruling on major trade issues (for example, New Zealand complained to the GATT Ministerial Council about access of our beef to the Korean market in 1989).[394] The middle tiers of this pyramid would constitute normal diplomatic channels and the new APEC Asia-Pacific Dispute Mediation Service. These would enable both inter-governmental negotiation and mediation, and the mediation of large inter-company disputes. The lower tier would comprise the smaller and more informal Complaint Management Committee. This would provide advice, promote greater understanding of cultural differences, and provide a pragmatic forum for the discussion, negotiation and mediation of inter-company disputes.[395]

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393 In the context of the United States - Japan relations, fundamental differences were apparent in the way each country perceived the role of law. This in itself rapidly impeded further negotiations. Japan started from a perspective emphasising informal, consensual relations. The United States meanwhile emphasised coercive legal regulation. These approaches reflect cultural differences between the legal systems of the two nations. Japan's legal system is based largely on conciliation and mediation. While America's legal system is overwhelmingly adversarial. It seems that if New Zealand adopted a *conciliation* or *mediation* based approach, this would be welcomed by the Japanese - as indicated by Ambassador Taniguchi's speech. See S Koyama "Introduction to Conciliation in Japanese Law" (1971) Rev Ind Dr Compare 77,81. See also K Mushakoji "The Cultural Premises of Japanese Diplomacy" (1972) 7 Japan Interpreter 3. See also E Wilkinson *Japan Versus the West : Image and Reality* (Penguin Books, London, 1990). See also R Benjamin "Images of Conflict Resolution and Social Control : American and Japanese Views Towards the American Adversary System" (1975) 19:1 J Conflict Resolution 123, 127.

394 See *Republic of Korea - Restrictions on Imports of Beef : Complaint by New Zealand (1989)*, GATT Panel Report adopted 7 November 1989, BISD 36S/234.

395 Arbitration requires value judgements as to which party is "wrong". This would detract from a "win-win" outcome. The four primary methods of dispute settlement are: negotiation, mediation, arbitration, and adjudication. Conceptually, dispute resolution can be seen as a collection of processes falling along a continuum. At one end lie consensual processes, at the other end coercive processes: Negotiation is the least coercive and most consensual. The parties resolve disputes informally among themselves. Negotiation thus empowers the parties - they control the process, their own participation, and the solution. Mediation takes a further step along the continuum. A third party is involved who may articulate the rationale behind arguments, deflate unreasonable claims, clarify values, seek joint gains, and otherwise facilitate settlement. The mediator may persuade and cajole, but has no power to impose decisions. Arbitration requires the parties to select a third party and agree to be bound by his or her decision. The procedure is private and informal but has the advantage of enforceability. The decision of the arbitrator may be upheld by a court of law. Adjudication utilises the highly formal and coercive power of the legal system. The decision of a judge is enforced by the absolute authority of Government. This system has limited flexibility and disempowers the parties. It also accentuates differences, resulting in "win-lose" outcomes. See Edmond, above n 378, 14. See also J Bercovitch "International Mediation and Dispute Settlement : Evaluating the Conditions for Successful Mediation" (1991) 7 Negotiation J 17, 30. See also B Hall & M Noguchi "Intercultural Conflict : A Case Study" (1993) 17 Int'l J Intercultural Relations 399, 415.

IX CONCLUSION

With the success of the GATT in suppressing tariffs and quotas, non-tariff barriers to multilateral trade have emerged into the international arena. In this modern renaissance of subtle protectionism, many of these new trade barriers are proving extraordinarily complex and some even appear intractable. In the most difficult cases such trade restrictions embody long-standing cultural beliefs and practices. This has given rise to the concept of a "cultural trade barrier": an impediment to international trade stemming, to a significant degree, from an entrenched cultural pattern within a society. Cultural trade barriers are inherently contumacious and may often remain deeply rooted in national pride and identity. Japan's corporate *keiretsu*, or use of relational contracting, provide two emotive illustrations. To attack these practices is akin to assaulting Japanese social values as well. It seems that cultural trade barriers are spawning a new dimension of issues within international trade.

Within this context, Japan has been targeted by the international community due to her perceived introspective attitudes and alleged anti-competitive institutional practices. The United States has spearheaded a policy of aggressive unilateral action. In America's crusade against Japan it seems the voluntary export restraint has become a shield, the voluntary import expansion a sword. Credibility has been provided by the frequent use of Super 301. Such action is anathema to the GATT and risks undermining the multilateral stability of the entire international trading community.

Yet the GATT appears severely restricted in its ability to deal with such seemingly intractable cultural differences. As this paper demonstrates, allegations of Japanese indirect discrimination tend to descend into a murky "grey area" of causation. Meanwhile, trade barriers caused by anti-competitive commercial practices appear to elude GATT scrutiny entirely. Indeed, the current infancy of international competition law seems to thwarts any substantive action whatsoever. As a result of such complications, and the frequent gaps and grey areas in the GATT, the existing international tendency towards unilateral and bilateral action has been further exaggerated.

Recently the laws and procedures of public international trade law were infused with a new life. The streamlined dispute resolution procedures of the new World Trade Organisation have increased global confidence in the GATT and enhanced its credibility as a regulator of international commerce. Meanwhile, the nations of the Asia-Pacific are establishing their own Dispute Mediation Service. This would further supplement and fortify the GATT by providing an alternative venue for the resolution of grievances that may not be amenable to immediate GATT adjudication. Both these processes are refining a set of international institutions and mechanisms that will be extremely well suited to resolving the many issues raised by this paper.

Such a trend is deserving of much praise. The optimal strategy for resolving cultural differences is based on a patient and consensual approach - where differences are discussed and worked through carefully in an atmosphere conducive to mutual co-operation. Archetypes include the United States - Japan Structural Impediments Initiative of 1980 and the new APEC forum (with its associated Asia-Pacific Dispute Mediation Service). In the New Zealand context Japanese Ambassador Taniguchi has suggested a similar model, albeit at a micro level. Taniguchi's proposal emulates international trends and appears entirely appropriate for facilitating increased understanding between our two nations.

In conclusion, the further adoption of such archetypes by the global community would provide a clear and sensible arrangement for promoting international trade with Japan. It would ameliorate the current frictions that are endangering the multilateral trading system. It would realise a vision of cultural harmony as we advance towards a new age.

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APPENDICES

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APPENDIX 1 : Attitudinal Cultural Trade Barrier - Indian Example

Patriotic fast-food crusade

By CHRISTOPHER THOMAS

COCA-COLA, Pepsi, Kentucky Fried Chicken and McDonald's are being targeted by Indian nationalists worried by Western cultural contamination. Demonstrations are planned against the foreign invaders in most big cities, the vanguard of a movement that threatens to undermine attempts to attract overseas investment.

Bombay is the epicentre of the campaign, which has overtones of xenophobia, a legacy of centuries of colonial experience. There is scant chance that India's modernisation drive will be derailed, but there are signs that desperately needed investment in infrastructure will be lost.

The economic reform programme launched in 1991 largely ran out of steam almost two years ago because of resistance from the poor, who were becoming poorer. Growing anti-foreign sentiment could force further political retreat. The campaign is not targeted against investment in roads, telephones, water, sewerage systems and electricity, but against consumer goods that India does not urgently need.

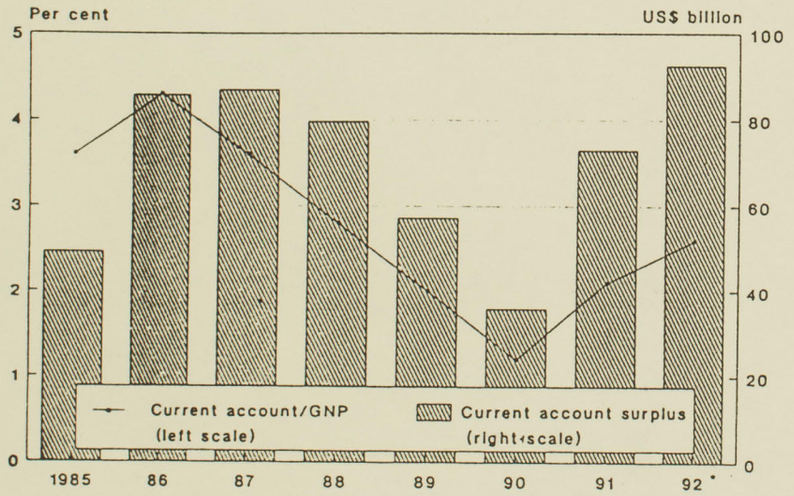
The Swadeshi Jagran Manch, a front organisation of the Hindu extremist party, the RSS, wants to drive Pepsi and Coca-Cola out of India and to block American-owned fast-food outlets. The fact that McDonald's is responsible for many dead cows adds a religious dimension, though its burgers in India would be beefless. "We do not need global competition," says Mr S Gurumurthy, the Manch convenor. "Let there be fierce internal competition for the domestic market. Why should we globalise our economy to satisfy Western hunger for new markets?"

Such hostility puts the Bharatiya Janata Party (BJP), the main opposition party in parliament, in difficulty. It needs to bow to nationalist sentiment while not driving India in on itself once more. It is linked, however, with organisations heading the campaigns against Coca-Cola and others, and will have to pay lip service to their ideologies.

The manifestations of resurgent patriotism — Hindu, Indian and regional — are many. That is particularly true in Maharashtra state, the richest in the country, and its capital, Bombay. In July, the city was renamed Mumbai, its ancient Marathi name. The state government, a combination of the BJP and Shiv Sena (Army of Shivaji), cancelled the construction of a US$2.8 billion power plant by Enron, an American company, the biggest foreign investment project in India. The newly elected state administration alleged corruption by its Congress party predecessor. Enron said that it had already spent US$300 million on the project and threatened to sue. Foreign investors are trying to decide whether the cancellation was an aberration or the start of a political trend. Either way, it has made potential investors nervous.

Even within India the extremism of Shiv Sena creates unease. A Delhi-based publisher, Rupa and Co, excluded Bombay from the release of Salman Rushdie's new book, *The Moor's Last Sigh*, because it contains apparent uncomplimentary allusions to Bal Thackeray, the leader of Shiv Sena, which runs a private army of thugs known as Sainiks. — *The Times*

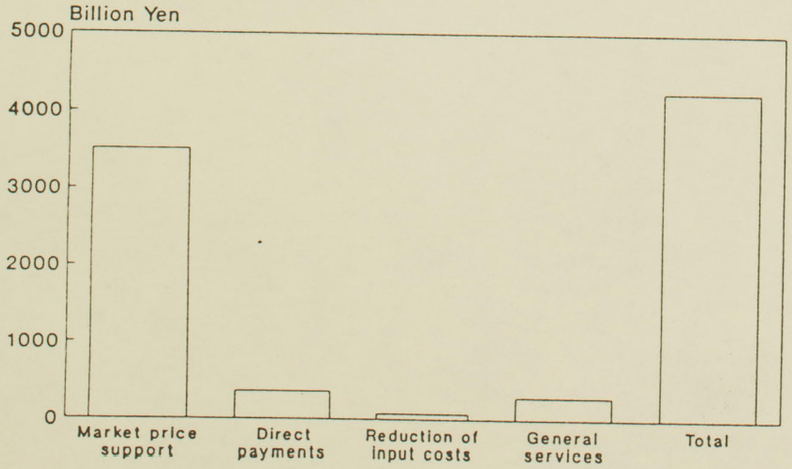
Current account surpluses of Japan, 1985-92



* Forecast

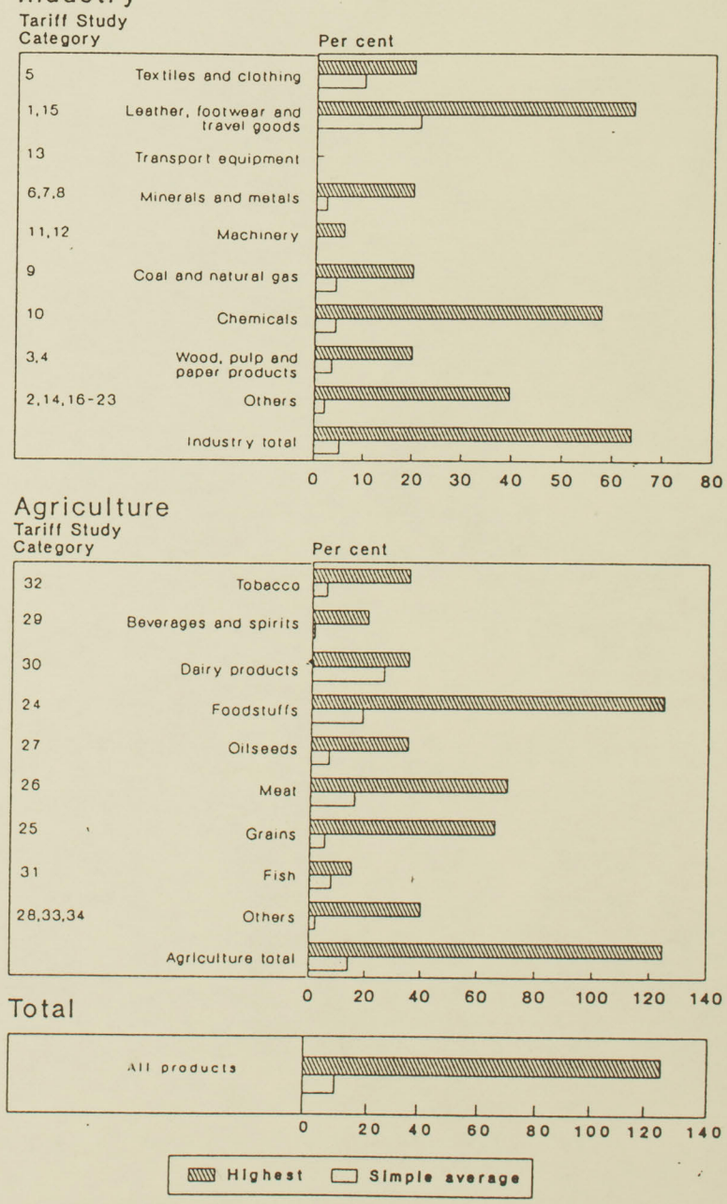
Source: OECD.

Measures assisting Japanese agriculture, 1991



Source: OECD (1992), Agricultural Policies, Markets and Trade: Monitoring and Outlook 1992, Assistance to OECD Agriculture, March.

Tariff levels in Japan by product category, 1991

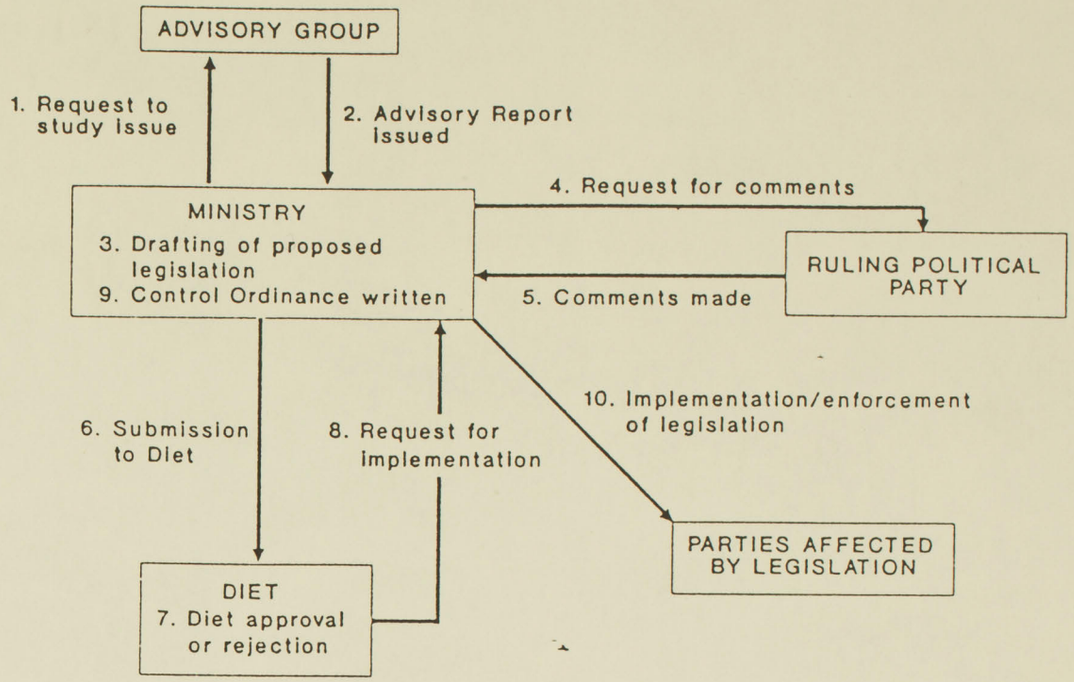


Source: Tables AV.1, 2, 5, 6, 8-21; GATT Secretariat estimates.

APPENDIX 2 : Japanese Trade Statistics

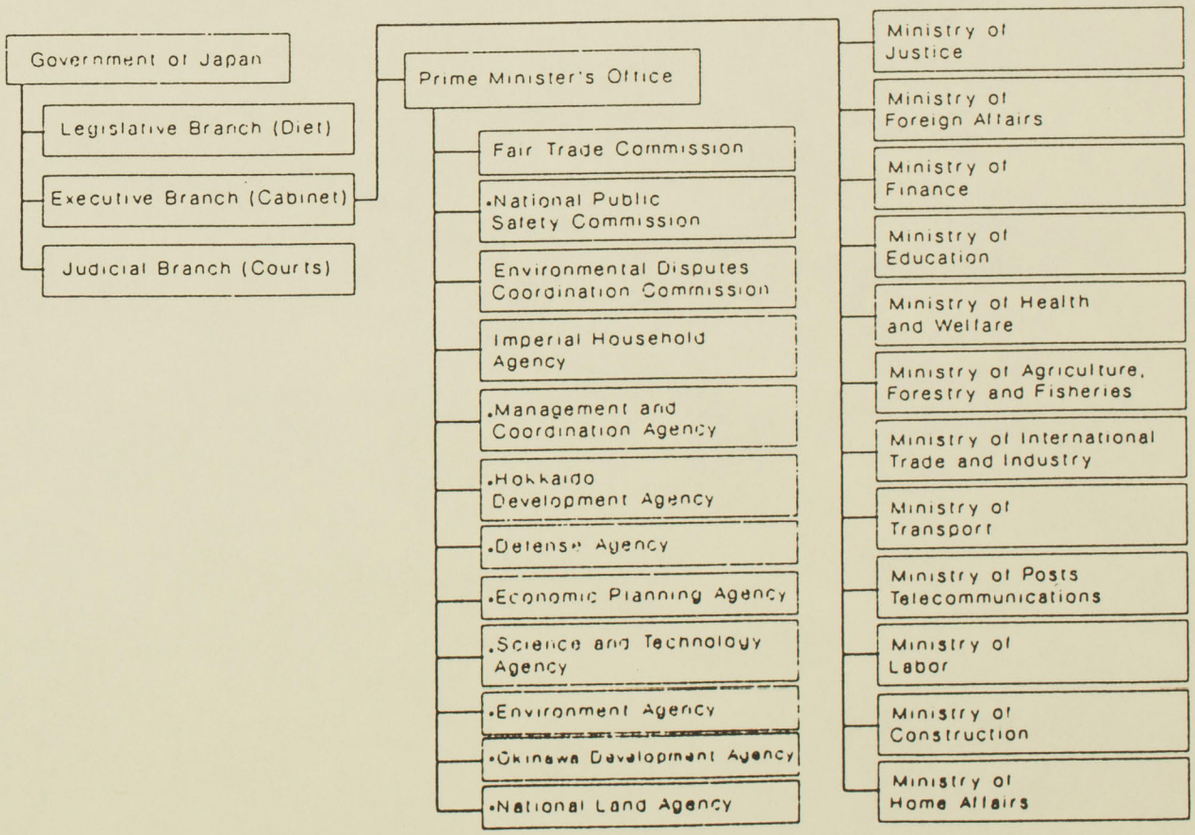
APPENDIX 3 : Japanese Government Structure

Trade policy formulation in Japan



Source: GATT Secretariat based on information supplied by the Government of Japan

Organization of the Japanese government



Note: Commission and Agencies marked with an asterisk (*) are external organs of the Prime Minister's Office and headed by Ministers of State.

Source: GATT Secretariat, based on information supplied by the Government of Japan.

APPENDIX 4: Non-tariff Barriers – Implied Rates for Japan

Unit value differentials, tariff and nontariff barrier rates, imports, domestic production, and import penetration, 1989[a] (percentages unless noted otherwise)

Sector and product category	Unit value differential[b]	Tariff rate[c]	Implied nontariff barrier rate[d]	Imports (billions of 1989 yen)	Annual growth in imports, 1985–89[e]	Domestic production (billions of 1989 yen)	Import penetration[f]
Food and beverages	280.7	8.2	272.5	2,000	6.0	19,311	9.4
Wheat	477.8	0.0	477.8	164	-9.0	162	50.3
Soybeans	423.6	0.0	423.6	185	-11.2	60	75.5
Citrus fruits	128.5	14.1	114.4	79	1.1	290	21.4
Oilseeds other than soybeans	628.6	0.0	628.6	83	-10.1	1	99.3
Leaf tobacco	119.6	0.0	119.6	3	28.0	136	2.2
Dressed carcasses (beef, pork, etc.) and poultry	38.6	14.1	24.5	622	11.5	1,931	24.4
Processed meat products	119.8	17.9	101.9	31	16.1	835	3.5
Dairy products	228.6	17.6	211.0	83	7.0	483	14.7
Milled rice	737.1	0.0	737.1	2	-2.4	3,040	0.1
Bread	346.5	6.5	340.0	1	11.7	1,008	0.1
Confectionery goods	210.8	18.8	192.0	58	10.3	1,226	4.5
Canned or bottled vegetables and fruits	139.2	18.0	121.2	93	4.3	379	19.6
Beer	143.0	1.7	141.3	24	41.1	2,294	1.0
Whiskey and brandy	94.1	5.9	88.2	291	16.4	469	38.3
Tea and roasted coffee	718.4	11.9	706.5	19	-4.7	599	3.1
Sparkling and still beverages	197.0	17.1	179.9	27	56.1	2,383	1.1
Tobacco products	241.2	0.0	241.2	237	21.9	4,015	5.6
Textiles and light industries	102.5	11.0	91.5	1,364	20.9	4,983	21.5
Cotton yarn	39.6	5.3	34.3	84	-4.7	337	19.9
Knit fabrics	8.1	8.1	0.0	451	19.8	1,256	26.4
Clothing	292.6	10.4	282.2	567	25.0	1,351	29.6
Plywood	30.7	11.6	19.1	159	56.1	995	13.7
Paper	22.1	3.3	18.8	73	13.7	874	7.7
Leather footwear	13.8	6.4	7.4	31	18.6	170	15.3
Metal products	59.5	0.8	58.7	1197	1.1	2,119	36.1
Copper ore	159.2	0.0	159.2	261	4.6	3	98.9
Sheet glass	63.1	1.3	61.8	37	24.4	673	5.2
Clay refractories	180.3	1.2	179.1	9	0.2	385	2.3
Ferroalloys	21.6	3.5	18.1	178	7.8	239	42.6
Lead (incl. regenerated)	23.4	3.5	19.9	9	-5.3	62	12.2
Regenerated aluminum	25.9	0.8	25.1	174	18.0	551	24.0
Other nonferrous metals	13.5	0.4	13.1	530	-3.4	205	72.1
Chemical products	128.3	1.4	126.9	1,356	-11.8	12,088	10.1
Natural gas	113.4	0.0	113.4	770	-20.5	78	90.7
Nitric fertilizers	84.8	0.0	84.8	6	29.6	40	13.2
Soda ash	148.5	0.0	148.5	7	-1.5	47	12.3
Caustic soda	223.7	4.9	218.8	1	24.3	192	0.8
Titanium oxide	39.8	4.1	35.7	20	10.5	106	15.6
Methane derivatives	193.0	2.3	190.7	38	-2.9	144	20.8
Industrial oil and fat	44.7	0.8	43.9	11	-3.4	74	13.1
Polyethylene	33.2	5.7	27.5	32	10.9	1,356	2.3
Pharmaceuticals	8.5	3.4	5.1	395	4.9	5,552	6.6
Cosmetics, toilet preparations	661.6	2.0	659.6	55	18.3	837	6.1
Gasoline	229.0	5.5	223.5	21	35.6	3,663	0.6
Machinery	140.2	0.3	139.9	1,274	12.2	15,511	7.6
Chemical machinery	61.1	0.1	61.0	59	5.0	1,142	4.9
Radio and television sets	607.0	0.0	607.0	44	53.8	1,022	4.1
Electric computing equipment	75.8	0.0	75.8	574	10.6	6,384	8.2
Communication equipment	236.6	0.1	236.5	80	10.2	2,723	2.9
Semiconductor devices	106.6	0.0	106.6	358	14.1	3,515	9.3
Medical instruments	32.7	2.1	30.6	158	13.8	724	17.9
Total for listed products	178.2	4.7	173.5	7,191	3.6	54,013	11.7

a. Source data, at the item and the commodity level, for this and all tables in this study may be obtained from Hiroki Kawai (see page iv). Figures for sectors and totals for all listed products are value-weighted averages of the product categories they contain using import values or the sum of import and domestic production values as appropriate.

b. The unit value differential for 1989 is defined by equation (1.2) in the text and interpreted as a rough measure of the tariff equivalent of tariffs and nontariff barriers.

c. Realized ad valorem tariff rate.

d. Calculated as the unit value differential minus the realized ad valorem tariff rate.

e. At constant 1985 prices.

f. Defined as: import volume/(domestic production + import volume). No account is taken of exports which are small for most of these products.

Sources: Unit value differentials are from appendix A. All other data are from the Japanese input-output tables (Management and Coordination Agency 1989, and MITI various years).

SOURCE: Sazanami

APPENDIX 5 : Trade Barriers in Japan - Welfare Effects

Calculated welfare effects of removing protection, 1989[a] (billions of 1989 yen unless noted otherwise

Sector and product category	Consumer surplus gain (A + B + C + D)	Producer surplus loss (A)	Tariff revenue decline (B)	Quota rents eliminated (C)	Efficiency gain (D)	Consumer surplus ratio (percentages
Food and beverages	8,058.5	5,963.0	149.8	953.5	992.1	37.8
Wheat	219.4	57.0	0.0	135.2	27.1	67.5
Soybeans	189.2	19.3	0.0	149.7	20.2	77.1
Citrus fruits	109.3	60.7	9.8	34.6	4.2	29.6
Oilseeds other than soybeans	94.5	0.3	0.0	71.4	22.8	113.4
Leaf tobacco	24.2	20.8	0.0	1.7	1.7	17.3
Dressed carcasses (beef, pork, etc.) and poultry	401.2	208.9	77.1	96.1	19.1	15.7
Processed meat products	132.1	110.4	4.7	12.0	5.0	15.3
Dairy products	102.4	31.8	12.4	45.3	13.0	18.1
Milled rice	2,235.6	2,233.0	0.0	1.8	0.8	73.5
Bread	364.0	363.0	0.1	0.8	0.6	36.1
Confectionery goods	758.8	714.0	9.2	30.2	5.5	59.1
Canned or bottled vegetables and fruits	225.6	148.6	14.1	39.7	23.2	47.8
Beer	273.1	253.2	0.4	13.7	5.9	11.8
Whiskey and brandy	272.3	111.1	16.1	124.7	20.4	35.9
Tea and roasted coffee	232.2	192.0	2.0	14.7	23.5	37.6
Sparkling and still beverages	376.1	212.4	3.9	13.9	145.9	15.6
Tobacco products	2,047.7	1,226.6	0.0	167.8	653.2	48.2
Textiles and light industries	1,239.1	461.1	112.0	422.2	243.8	19.5
Cotton yarn	80.4	55.7	4.2	19.6	0.9	19.1
Knit fabrics	85.9	50.9	33.8	0.0	1.1	5.0
Clothing	878.9	221.6	53.3	369.1	234.9	45.8
Plywood	94.8	51.9	16.4	20.8	5.7	8.2
Foreign paper and Japanese paper	92.0	78.2	2.3	10.9	0.5	9.7
Leather footwear	7.1	2.8	1.8	1.9	0.7	3.6
Metal products	712.3	351.3	10.6	301.5	48.8	21.5
Copper ore	172.8	0.5	0.0	160.1	12.3	65.6
Sheet glass	192.0	175.8	0.5	13.8	1.9	27.0
Clay refractories	91.7	57.3	0.1	5.7	28.6	23.2
Ferroalloys	51.3	18.5	6.1	25.5	1.2	12.3
Lead (incl. regenerated)	12.2	10.5	0.3	1.4	0.0	17.2
Regenerated aluminum	108.5	71.3	1.4	34.3	1.4	15.0
Other nonferrous metals	83.9	17.5	2.3	60.8	3.4	11.3
Chemical products	2,139.0	1,168.3	18.6	533.5	418.5	15.9
Natural gas	459.7	16.3	0.0	409.1	34.4	54.2
Nitric fertilizers	8.9	5.3	0.0	2.8	0.9	19.4
Soda ash	12.3	6.6	0.0	3.9	1.7	23.0
Caustic soda	57.0	55.4	0.1	1.0	0.5	29.5
Titanium oxide	16.3	8.6	0.8	4.8	2.2	12.9
Methane derivatives	76.6	37.4	0.9	24.0	14.4	42.1
Industrial oil and fat	17.2	12.9	0.1	3.4	0.8	20.2
Polyethylene	137.2	128.5	1.7	6.3	0.7	9.9
Pharmaceuticals	182.9	151.0	12.9	18.0	0.9	3.1
Cosmetics, toilet preparations	500.6	102.1	1.1	46.4	351.0	56.2
Gasoline	670.3	644.3	1.1	13.8	11.1	18.2
Machinery	2,979.2	1,695.5	3.5	584.2	696.0	17.7
Chemical machinery	142.7	111.7	0.0	22.5	8.4	11.9
Radio and television sets	684.0	409.8	0.0	37.8	236.4	64.2
Electric computing equipment	620.0	334.5	0.0	247.2	38.3	8.9
Communication equipment	389.3	249.3	0.0	56.2	83.8	13.9
Semiconductor devices	1,046.6	538.3	0.1	184.8	323.4	27.1
Medical instruments	96.6	51.9	3.3	35.7	5.7	10.9
Total for listed products	15,128.0	9,639.3	294.5	2,795.0	2,399.1	24.7

a. See appendix C for the methodology used to calculate consumer surplus, producer surplus, tariff revenue, quota rents, and efficienc gains. Quota rents are computed as the value equivalent of nontariff barriers (i.e., the difference, expressed in value terms between uni value differentials and realized ad valorem tariffs). The consumer surplus ratio is defined as the consumer surplus gain divided by th value of imports plus domestic production before liberalization (from table 1.1).

Sources: Authors' estimates based on Japanese input-output tables (Management and Coordination Agency 1989, and MITI, variou years).

SOURCE : Sazanami

APPENDIX 6 : Japanese Business Practices - Cultural Differences

Some Key Japanese Cultural and Business Practices that Differ from Traditional American Practices

Japanese Practices	Contrasting American Behavior
1. Emphasis on process and consensus in decision-making. Inability and unwillingness of top management to force through unpopular decisions.	1. Emphasis on majority decision-making, decisive timing, and strong implementation by management.
2. Style of negotiation: avoidance of direct confrontation; reliance in implicit agreement vs. explicit contractual relationship.	2. Emphasis on direct confrontation in negotiations; reliance on explicit contractual arrangements.
3. Close working relationship with government bureaus.	3. Suspicion and resistance to working with government.
4. Permanent employment system. Internalization of losses if necessary to maintain employment levels; labor a fixed cost; limited mobility in labor market.	4. Labor a variable cost. Levels of employment adjusted to overall profitability and growth of firm. Greater mobility in labor market.
5. Collaborative R&D and design specification between customer and suppliers based on traditional supplier relationships.	5. Emphasis on open bidding, seeking out lowest-cost supplier. Greater open market for most production goods.
6. Emphasis on long-term market growth vs. short-term profitability.	6. Requirement of relatively constant profitability in each new market venture.
7. Reliance on long-term debt vs. equity financing. Stockholders relatively powerless in corporate decison-making. Use of short-term debt vs. cash settlement.	7. Reliance on equity capital for corporate finance. Stockholders and market performance critical factors in corporate policy.
8. Emphasis on "managed" economic growth and competition.	8. Tradition of free-market competition, frequent entry and exit of firms.
9. Emphasis on social responsibilities, obligations, and interdependence among individuals and firms.	9. Emphasis on individualism, creative competition, mobility.
10 Traditional absence of strong political support for consumer interests.	10. Politically potent consumer movement protecting consumer interests vis-a-vis producers.

Source: Arthur D. Little, Inc.
Sarce: Makino

...APPENDIX 7 - The Japanese Horizontal Keiretsu

Member Companies of President Associations of Six Major Industrial Groups (Fiscal, 1987)

Industry	Mitsui (Nimokukai; 24 firms; started in October 1961)	Mitsubishi (Kinyokai; 29 firms; started in c. 1955)	Sumitomo (Hakusuikai; 20 firms; started in April 1951)	Fuyo (Fuji) (Fuyokai; 29 firms; started in February 1967)	Sanwa (Sanwakai; 44 firms; started in February 1967)	Dai Ichi Kangyo (Sankinkai; 47 firms; started in January 1978)
Banking and insurance	Mitsui Bank Mitsui Trust & Banking [1]Mitsui Mutual Life Insurance Taisho Marine and Fire Insurance	Mitsubishi Bank Mitsubishi Trust & Banking [1]Meiji Mutual Life Insurance Tokio Marine & Fire Insurance	Sumitomo Bank Sumitomo Trust & Banking [1]Sumitomo Life Insurance Sumitomo Marine & Fire Insurance	Fuji Bank Yasuda Trust & Banking [1]Yasuda Mutual Life Insurance Yasuda Fire & Marine Insurance	Sanwa Bank Toyo Trust & Banking [1]Nippon Life Insurance	Dai Ichi Kangyo Bank [1]Asahi Mutual Life Insurance [1]Fukoku Mutual Life Insurance Nissan Fire & Marine Insurance Taisei Fire & Marine Insurance
Trading	Mitsui & Co.	Mitsubishi Corp.	Sumitomo Corp.	Marubeni Corp.	Nichimen Corp. Nissho Iwai Corp. Iwatani International	C. Itoh & Co. Kanematsu-Gosho Ltd. Nissho Iwai Corp. Kawasho Corp.
Primary Industries	Mitsui Mining Hokkaido Colliery & Steamship		Sumitomo Forestry Sumitomo Coal Mining			
Construction	Mitsui Construction Sanki Engineering	[1]Mitsubishi Construction	Sumitomo Construction	Taisei Construction	Obbayashi Corp. Zenitaka Corp. Toyo Construction Sekisui House	Shimizu Corp.
Foodstuffs	Nippon Flour Mills	Kirin Brewery		Nisshin Flour Milling Sapporo Breweries Nichirei Corp.	Itoham Foods Suntory Ltd.	
Textiles	Toray Industries	Misubishi Rayon		Nisshinbo Industries Tobo Rayon	Unitika Ltd. Teijin Ltd.	Asahi Chemical Industry
Paper Pulp	Oji Paper	Mitsubishi Paper		Sanyo-Kokusaku Pulp		Honshu Paper
Chemicals	Mitsui Toatsu Chemicals Mitsui Petrochemicals	Mitsubishi Kasei Mitsubishi Gas Chemical Mitsubishi Petrochemical Mitsubishi Plastics [1]Mitsubishi Monsanto Chemical	Sumitomo Chemical Sumitomo Bakelite	Showa Denko Kureha Chemical Nippon Oil & Fats	Tokuyama Soda Sekisui Chemical Ube Industries Hitachi Chemical Tanabe Seiyaku Fujisawa Pharmaceutical Kansai Paint	Denki Kagaku Kogyo Kyowa Hakko Kogyo Nippon Zeon Asahi Denka Kogyo Sankyo Co. Shiseido Co. Lion Corp.
Oil		Mitsubishi Oil		Toa Nenryo Kogyo	Cosmo Oil	Showa Shell Sekiyu
Rubber					Toyo Tire & Rubber	Yokohama Rubber
Glass, Stone, etc.	Onoda Cement	Asahi Glass Mitsubishi Mining & Cement	Nippon Sheet Glass Sumitomo Cement	Nihon Cement	Osaka Cement	Chichibu Cement
Iron and Steel	Japan Steel Works	Mitsubishi Steel	Sumitomo Metal Industries	NKK	Kobe Steel Nisshin Steel Nakayama Steel Works Hitachi Metals	Kawasaki Steel Kobe Steel Japan Metals & Chemicals
Non-ferrous Metals	Mitsui Mining & Smelting	Mitsubishi Metal Mitsubishi Cable Industries [1]Mitsubishi Aluminum	Sumitomo Metal Mining Sumitomo Light Metal Sumitomo Electric Industries		Hitachi Cable	Nippon Light Metal Furukawa Co. Furukawa Electric
Machinery		Mitsubishi Kakoki	Sumitomo Heavy Machinery	Kubota Ltd. Nippon Seiko	NTN Toyo Bearing	Niigata Engineering Iseki & Co. Ebara Corp.
Electric Machinery	Toshia Corp.	Mitsubishi Electric	NEC Corp.	Hitachi Ltd. Oki Electric Industry Yokogawa Electric	Hitachi Ltd. Iwatsu Electric Sharp Corp. Kyocera Corp. Nitto Denki Corp.	Hitachi Ltd. Fuji Electric Yasukawa Electric Works Fujitsu Ltd. Nippon Columbia
Transportation Equipment	Mitsui Engineering & Shipbuilding [2]Toyota Motor	Mitsubishi Heavy Industries Mitsubishi Motors		Nissan Motor	Hitachi Zosen Shin Meiwa Industry Daihatsu Motor	Kawasaki Heavy Industries Ishikawajima-Harima Heavy Industries Isuzu Motors
Precision Machinery		Nikon Corp.		Canon Inc.	Hoya Corp.	Asahi Optical
Retail	Mitsukoshi				Takashimaya Co.	[1]Seibu Department Store
Finance					Orient Leasing	Nippon Kangyo Kakumaru Securities Orient Finance
Real Estate	Mitsui Real Estate Development	Mitsubishi Estate	Sumitomo Realty & Development	Tokyo Tatemono		
Transportation, Communications, etc.	Mitsui-O.S.K. Lines Mitsui Warehouse	Nippon Yusen Mitsubishi Warehouse	Sumitomo Warehouse	Tobu Railway Keihin Electric Express Showa Line	Hankyu Corp. Nippon Express Yamashita-Shinnihon Steamship	Nippon Express Kawasaki Kisen Shibusawa Warehouse
Services						Korkuen Co.

Notes: 1) Unlisted companies.
2) Toyota Motor is an observer, not a full member, in the Mitsui group.

Source: Intimate Links within Japan's Corporate Groups, Tokyo Business Today, January, 1989.

SOURCE : Helou, 131

APPENDIX B - Products Handled by the Trading Arm of a Large Horizontal Keiretsu

Products and Services Handled by ITOCHU

■ **Textile Group**
Textile Group Planning & Coordinating
Textile Group Accounting & Control
Textile Group Information System
Textile Development
Tokyo Textile Development
Textile Affiliates & Credit
Raw Cotton
Cotton Yarn & Fabrics
Wool
Wool Yarn
Man-Made Fibre
Man-Made Fibre & Yarn Trade
Industrial Textiles & Materials
Industrial Textile & Materials Trade
Home Furnishing
Medical & Healthcare
Textile Trade No.1
Textile Trade No.2
Synthetic Filament Yarn & Fabrics
Textile
Silk
Apparel No.1
Apparel No.2
Apparel No.3
Apparel No.4
Apparel Coordination
Apparel No.5
Apparel No.6
Government Supply

■ **Machinery, Aerospace & Electronics Group**
Machinery, Aerospace & Electronics Group Planning & Coordinating
Machinery, Aerospace & Electronics Group Accounting & Control
Machinery International Trade Coordination
Information Systems Machinery Group
Media & Entertainment
Marine
Power Plant & Electric Machinery
Metal & Industrial Project
Chemical Plant
Machinery & General Project
Project & Machinery
Automobile No.1
Automobile No.2
Automobile No.3
Automobile No.4
Automobile No.5
Industrial Machinery No.1
Industrial Machinery No.2
Industrial Machinery No.3
Industrial Machinery No.4
Communications Business
Communications Equipment
Mechatronics Systems & Equipment
Information Systems & Electronics
Aerospace

■ **Basic Industries Group**
Basic Industries Group Planning & Coordinating
Basic Industries Group Accounting & Control
Metal Group New Business Planning & Development
Metal Group Information System
Metal New Investment Promotion
LNG Project
Chemicals & Plastics Group Project Development
Cis & China Coordinating of Chemicals & Plastics Group
Iron Ore
Coal & Coke
Metal Materials
Thermal Coal
Steel Sheet
Steel for Automobile
Speciality Steel & Wire Rods
Steel Plate, Tube & Pipe
Steel Building & Construction Materials
Iron & Steel Project
Osaka Iron & Steel No.1
Osaka Iron & Steel No.2
Osaka Iron & Steel No.3
Iron & Steel International Trade
Steel Tubular Products International Trade
Iron & Steel International Business Development
Non-ferrous Metal & Ore
Precious Metal
Light Metal No.1
Light Metal No.2
Nonferrous & Light Metal Planning & Development
Osaka Non-ferrous & Light Metal
Petroleum Project
Nuclear Energy
Crude Oil
Gas
Energy Domestic Marketing
Petroleum Products Trading No.1
Petroleum Products Trading No.2
Organic Chemicals No.1
Organic Chemicals No.2
Specialty & Functional Chemicals
Osaka Chemicals No.1
Project Planning
Inorganic Chemical
PVC & Synthetic Rubber
Polyolefin
Functional Plastics
Osaka Chemicals No.2

■ **Foods & General Merchandise Group**
Consumer Industries & Real Estate Group Planning & Coordinating
Consumer Industries & Real Estate Group Accounting & Control
Construction Group Accounting & Control
Foods & General Merchandise Group Planning & Development
Construction Material & Equipment Coordination
City Project Promotion
Office for Regional Development
Overseas Realty & Development
Real Estate Investment & Development
Architectural & Civil Engineering Department
Grain & Foodstuff
Coffee & Sugar
Oils & Fats
Feedstuff Materials
Osaka Produce & Provisions
Meat & Livestock
Marine Products
Food Marketing & Distribution No.1
Food Marketing & Distribution No.2
Osaka Provisions
South Sea Log & Products No.1
Soft Wood
Pulp Materials
Woodchip Materials
Pulp & Paper Products
General Merchandise No.1
Ceramics & Minerals
General Merchandise No.2
Construction & Contracting
Construction & Development No.1
Construction & Development No.2
System Construction
Overseas Construction & Realty
Aloha Tower Project Development Department
Osaka Construction & Contracting No.1
Osaka Construction & Contracting No.2
Osaka Construction Development
Osaka Realestate Investment & Development
Osaka South Sea-Port Project Development
Residential Properties Development Department
Urban Redevelopment & Condominium Department
Commercial Building Development Department
Osaka Real Estate Development Department

■ **Administration Group**
Auditing
Office of Political & Economic Research
Secretariat
Corporate Planning & Administration
Research
Corporate Communications
Trade & Security Policy Coordination
Preparatory Office for Training Center
Domestic Administration & Planning
Investment Banking
Global Environments
Overseas Administration & Planning No.1
Overseas Administration & Planning No.2
China
Project Development
New Business Promotion
New Technology
Personnel
Human Resources Development & Training
General Affairs
Health Administration
Affiliates Administration
Business Consulting
Logistics Management & Traffic
Logistics Business Development
General Accounting Control
Tax
Legal
Credit
Information & Telecommunication Systems Planning
Information Systems Development
Corporate Planning Information Strategy
Finance, Insurance & Control Groups Planning & Coordinating
Finance
Forex & Capital Markets & Insurance Control
Forex & Capital Markets Planning
Forex & Capital Markets
International Finance
Insurance
Kansai Business Promotion
Kansai Project

As of October 1, 1992

SOURCE : MITI

APPENDIX 8 - Conflicting Views of the Japanese Distribution System

JAPANESE AND WESTERN PERSPECTIVES ON JAPAN'S DISTRIBUTION SYSTEM

Variables	Mainstream Japanese School (Logic/Justification)	Mainstream Western School (Conventional Wisdom)
Theoretical Foundation	Japan is an island nation; it needs multi-layered wholesalers and retailers; massive trade surplus is a result of stronger yen.	Japan is no longer a developing country; should modernize its markets; most of the barriers are intact and patronized by the government and businesses.
Distribution Structure	Systematic and regulated by tradition; serves the consumers and dictated by the infrastructure.	Based on regulatory and market distortions; hampers efficiency and impedes productivity.
Large-Scale Retail Store Law (LSRSL) or *Dai-ten Ho*	Protects mom-and-pop stores; provides welfare and social service.	Blocks/discourages big/chain stores; time-consuming and protects local monopolies.
Keiretsu System	Stable and productive system for the Japanese companies; helps to seek long-term efficiency aiming at market share.	Breeds cross-share holdings and hinders open competition resulting in unfair trade practices and distribution networks.
Productivity/Efficiency Criteria	Western distribution/retail productivity/efficiency standards are irrelevant in Japan, and should not be applied at arm's length.	Japan is an economic power; should apply Western standards to achieve distribution productivity and efficiency.
Socio-political System	Societal and political system is compatible with the distribution system; consumers prefer small neighborhood stores.	Socio-political system is politicized and often protects big business groups.
Business/Trading Practices	Long-term contracts, rebates, various return policies, sales support, pricing policies are necessary.	Long-term contracts, rebates, various return policies are unnecessary; hinder efficiency standards.
Retailers'/Wholesalers' Gross Margin (RGM/WGM), Cost of Distribution (CD), Distributive Gross Margin (DGM)	In most cases, high RGM, WGM, CD, and DGM are due to multi-layered distribution system; justified on the basis of convenience.	Higher RGM, WGM, CD, DGM are a result of multi-layered system.
Wholesale/Retail (W/R) Sales Ratio	High W/R is a result of small mom-and-pop businesses; their survival, in some sectors, is imperative.	High W/R is a result of multitude of wholesale operations and small retailers.
Hurdles in Distribution	Consumption and eating patterns; lesser space available to households; infrastructural problems.	Government regulations and powerful local R/W and corporate lobbying.

SOURCE : Anwar

RETAIL/WHOLESALE PRODUCTIVITY AND EFFICIENCY DATA: JAPAN, UNITED STATES, UNITED KINGDOM AND WEST GERMANY

		Japan	United States	United Kingdom	West Germany
I.	*Retail/Wholesale Outlets Profile*				
	No. of Retail Stores (thousands)	1,620	1,509	242	407
		(1988)	(1982)	(1984)	(1985)
	No. of Wholesale Stores (thousands)	437	376	105	119
		(1988)	(1982)	(1984)	(1985)
	Retail Stores/1,000 inhabitants (1992)	12.8	6.1	6.0	n.a.
	Wholesale Stores/1,000 inhabitants (1992)	3.8	1.8	2.0	n.a.
	No. of Retailers/1,000 km. sq.	4,311	205	1,406	1,636
		(1985)	(1982)	(1984)	(1985)
	No. of Wholesalers/1,000 km sq.	1,093	44	n.a.	505
		(1985)	(1982)		(1985)
	No. of Workers/Retailers	3.9	7.5	6.8	5.8
		(1985)	(1982)	(1984)	(1985)
	No. of Workers/Wholesalers	9.7	12.6	n.a.	7.0
		(1985)	(1982)		(1985)
II.	*Retail Stores/Employees* (%)				
	1–2	54.0	40.0	n.a.	14.7
		(1988)	(1982)		(1988)
	3–9	39.3	40.5	n.a.	62.8
		(1988)	(1982)		(1988)
	10–19	4.3	10.4	n.a.	14.7
		(1988)	(1982)		(1988)
	20–49	1.9	6.5	n.a.	5.7
		(1988)	(1982)		(1988)
	50–99	0.3	1.9	n.a.	1.2
		(1988)	(1982)		(1988)
	100–over	0.1	0.7	n.a.	0.9
		(1988)	(1982)		(1988)
III.	*Wholesale/Retail (W/R) Ratio* (1985)				
	W/R in Sales	3.44	0.97	n.a.	1.80
	W/R for Inventories	1.55	0.85	n.a.	1.7
IV.	*Proportion of Wholesale Sales by Class of Customers* (%)				
	Other Wholesalers	41.9	24.8	n.a.	16.2
		(1982)	(1982)		(1986)
	Retailers and Repair Shops	24.0	28.0	n.a.	30.0
		(1982)	(1982)		(1986)
	Export	7.4	9.8	n.a.	14.9
		(1982)	(1982)		(1986)
	Households and Individuals	0.6	1.6	n.a.	2.8
		(1982)	(1982)		(1986)
	Industrial Users, Manufacturing & Mining	n.a.	15.0	n.a.	26.8
			(1982)		(1986)
	Other	26.1	20.8	n.a.	9.2
		(1982)	(1982)		(1986)
V.	*Productivity Criteria*				
	Relative Productivity of Wholesale/Retail Sector (1989)	0.55	0.70	0.97	0.79
	Wholesale Sales/Worker (1985)	448.7	n.a.	n.a.	299.8
	Retail Sales/Worker (1985)	72.4	n.a.	n.a.	80.3
	Wholesale Sales/Company (1985)	4,219.4	n.a.	n.a.	2,870.8
	Retail Sales/Company (1985)	281.3	n.a.	n.a.	465.8
VI.	*Ratio of Value Added/Worker* (1985)				
	Distribution sector Industry Total	0.76	0.70	n.a.	0.68
	Manufacturing Sector Industry Total	1.19	1.12	n.a.	0.95
	Distribution Sector Manufacturing Sector	0.64	0.63	n.a.	0.71
VII.	*Gross Profit Margin Ratio* (1986)				
	Wholesale	11.2	19.4	n.a.	12.6
	Retail	27.1	31.0	n.a.	34.2
VIII.	*Distribution Margin*				
	Aggregate Margin, Distribution Sales	15.5 (1986)	25.3 (1986)	n.a.	n.a.
	Aggregate Margin, Retail Sales	57.6 (1985)	49.7 (1985)	n.a.	n.a.
IX.	*Consumer Prices/Index*				
	Annual Percentage Change (1992)	2.2	3.1	3.8	4.9
X.	*Cost of Living Index* (London = 100, 1991)				
	Tokyo	134.4	–	–	–
	Osaka	131.1	–	–	–
	Frankfurt	–	–	–	100.7
	London	–	–	100	–
	New York	95.7	–	–	–

Source: Financial Times, 1991 and 1992b; Goldman, 1992; Itoh, T., 1992; Ito and Maruyama, 1991; [illegible] M., 1991; The Economist, 1993b; United States Bureau of the Census, 1992; United States International Trade Commission, 1990a.

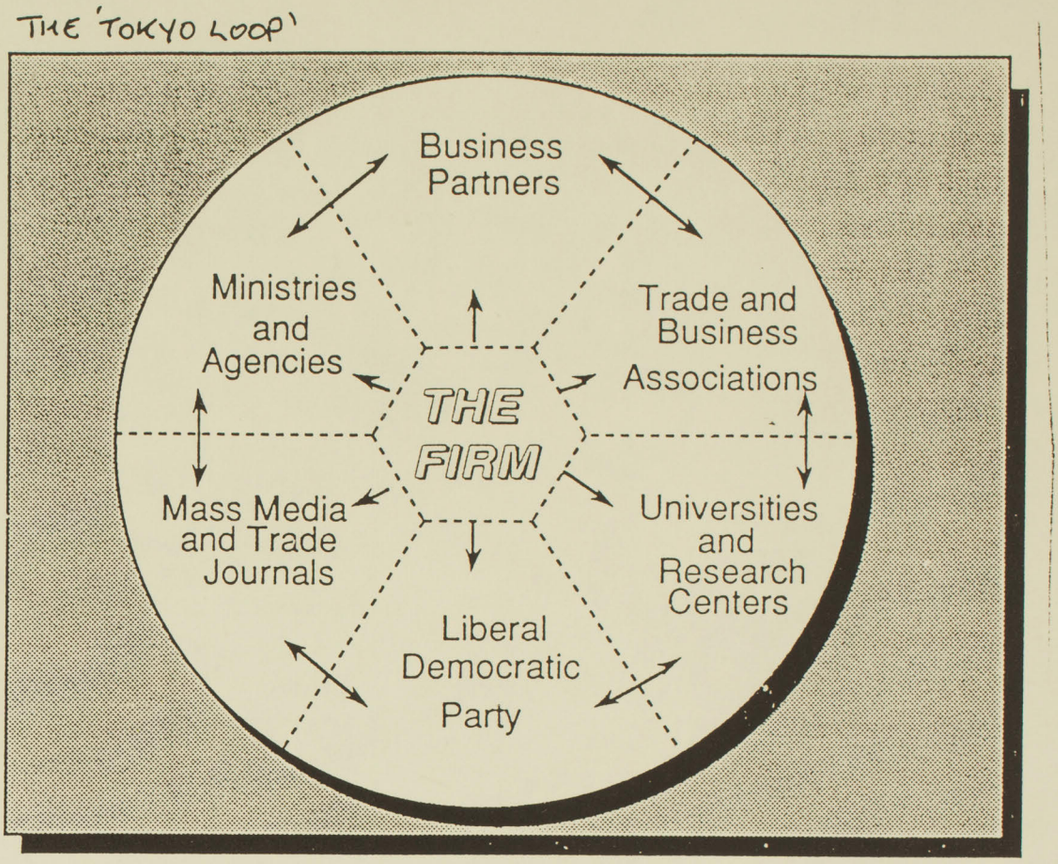
Note: n.a. not available.

SOURCE: Anwar

APPENDIX 9 : The Inefficiency of the Japanese Retail Distribution System

APPENDIX 10 – The 'Tokyo Loop' / The Principles of GATT Law

THE 'TOKYO LOOP'



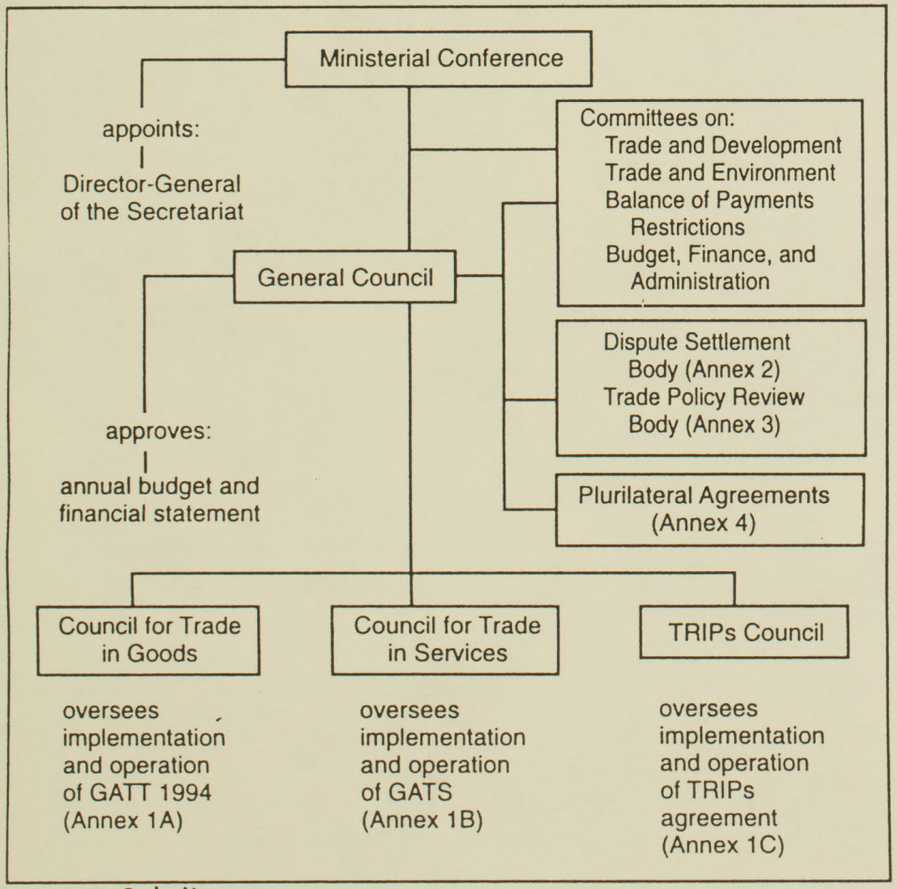
Source : Henry

FUNCTIONS AND PRINCIPLES OF GATT-LAW

GATT: As a Framework Agreement (constitutional functions: code of conduct)	GATT: As a Trade Organization (administrative and dispute settlement functions)	GATT: As a Forum of Negotiations (legislative functions)
1. The Principle of Sovereignty (i.e. Articles II, III, VI, XVI, XVII to XXI and XXVIII *bis*).	1. CONTRACTING PARTIES (Articles XXV, plenary assembly).	1. 1947 Geneva Round on tariff reductions (23 countries, 45,000 tariff concessions).
2. The Principle of Market Opening (e.g. Articles II, III, XI, XV, XXVIII and XXVIII *bis*).	2. GATT Council (Executive Body).	2. 1949 Annecy Round (33 countries, 5,000 tariff concessions, accession negotiations).
3. The Principle of Non-Discrimination (i.e. Articles I, III, XIII and XVII to XX).	3. GATT Secretariat.	3. 1950/51 Torquay Round (34 countries, 8,700 tariff concessions, accession negotiations).
4. The Principle of Undistorted Competition (i.e. Articles VI, XVI, XVII and XXIII).	4. Functional Committees (e.g. permanent Committees on Trade and Development, Balance of Payments, Tariff Concessions, Safeguards, Budget and Administration).	4. 1955/56 Geneva Round (35 countries, modest tariff reductions, GATT Amendments including Article XXVIII *bis*).
5. Rule of Law and Rule-Oriented Dispute Settlement (i.e. Article X, XIII: 3(b) and XXIII).	5. Working Parties and Technical Groups (e.g. temporary Accession Working Parties and Article XXIV Working Parties, Technical Group on Non-Tariff Measures).	5. 1960/61 Dillon Round (42 countries, 4,400 tariff reductions; Short-Term Cotton Arrangement).
6. Non-Reciprocal and Preferential Treatment of Less-Developed Countries (i.e. Articles XVIII, XXXVI to XXXVIII and the "enabling clause").	6. Article XXIII Dispute Settlement Panels, Code Panels and Textiles Surveillance Body.	6. 1964/67 Kennedy Round (72 countries, 35 per cent average tariff cuts for 60,000 industrial products, sectoral negotiations, Antidumping Code).
	7. Committees and Councils under GATT Codes and other GATT Agreements (e.g. Textiles Committee, Codes Committee).	7. 1973/79 Tokyo Round (85 countries, across-the-border tariff reductions by one-third, 12 Agreements on NTBs, Dispute Settlement Understanding).
		8. 1986/93 Uruguay Round (more than 120 countries, Agreement on MTO integrating some 30 Agreements on GATT, GATT Codes, TRIPS and GATS).

SOURCE : Petersmann

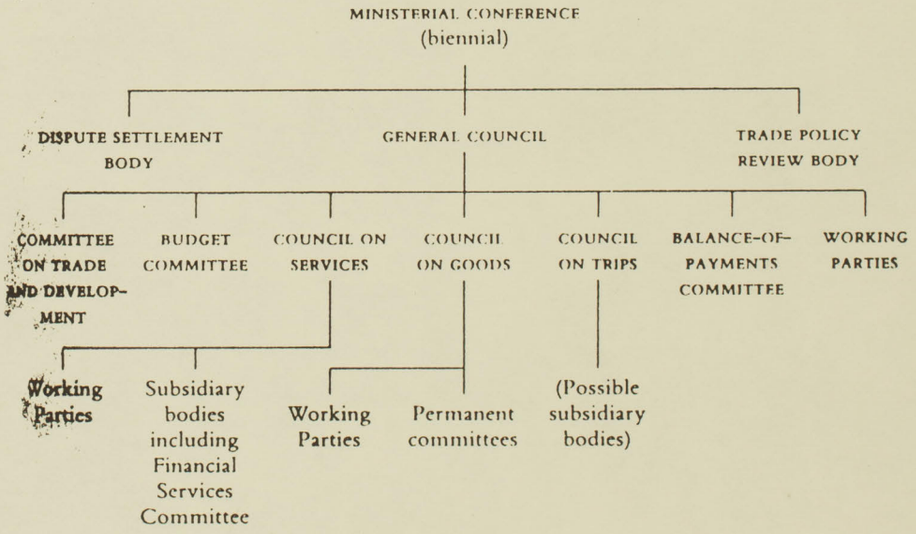
Structure of the World Trade Organization



SOURCE: Schott

1993 URUGUAY ROUND DRAFT AGREEMENT ESTABLISHING THE MULTILATERAL TRADE ORGANIZATION (MTO)

I. MTO ORGANIGRAMME



II. MULTILATERAL TRADE AGREEMENTS AND PLURILATERAL TRADE AGREEMENTS

included in the Annex to the MTO Agreement as integral parts of this Agreement:

Annex 1

*Texts to be included in Annex 1A**

1. The General Agreement on Tariffs and Trade dated 1993, including its associated legal instruments, which comprises:

...

2. Agreement on Safeguards.
3. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1993.
4. Agreement on Subsidies and Countervailing Measures.
5. Agreement on Trade-Related Aspects of Investment Measures.
6. Agreement on Import Licensing Procedures 1993.
7. Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1993.
8. Agreement on Preshipment Inspection.
9. Agreement on Rules of Origin.
10. Agreement on Technical Barriers to Trade 1993.
11. Agreement on Application Sanitary and Phytosanitary Measures.
12. Agreement on Agriculture (except for concessions to be included in the Uruguay Round Protocol).
13. Agreement on Textiles and Clothing.

SOURCE: Petersmann

APPENDIX II - Structure of the World Trade Organisation

Dispute settlement procedures and deadlines under the WTO

	Deadline	Total elapsed time (months)
Consultations	60 days	2
Request for a panel	25–60 days	3–4
Establishment of panel	30 days	4–5
Issuance of panel report	6–9 months	10–14
Adoption of panel report	60 days	12–16
if appealed:		
Decision of Appellate Body	60–90 days	14–19
Adoption of appellate report	30 days	15–20
Comply with ruling or negotiate mutually satisfactory compensation	"Reasonable" time	
if failure to comply or compensate:		
Request for retaliation	20 days	
Retaliation authorized	30 days	
Final arbitration	60 days	

SOURCE: Schott

Overview of a Simple Panel Procedure

Initiation of consultation phase: Member must reply to request within ten days, and enter into consultations within thirty days (unless mutually agreed otherwise).

Member does not respond within ten days or does not enter into consultations within thirty days: complainant may request a panel.

Negotiations for sixty days (unless parties agree the consultations failed). If no settlement, the complainant may request a panel.

Good offices, conciliation and mediation if the parties agree.

A panel is established by the DSB, at latest at the meeting following the one in which the request first appeared on the agenda (unless DSB decides by consensus not to establish a panel).

If they so choose, parties have ten days to agree on a five-member panel.

Within twenty days of establishment of the panel, the terms of reference are determined. If there is no agreement on the panelists, the Director-General will determine the panelists in consultation with the DSB Chairman and the Council/Committee Chairman.

The panel decides its deadline within one week after composition/terms of reference have been settled.

Period from the date the composition/terms of reference have been decided until issuance of the report should normally not take longer than six months. The period from the *establishment* of the panel until the report's circulation should not exceed nine months.

A party to the dispute notifies the DSB to appeal within sixty days after the report's circulation (or the DSB decides by consensus not to adopt the report).

From the date the appeal is formally notified, the appellate proceedings shall, in principle, not last more than sixty days, and, in any case, not more than ninety days.

The DSB will not consider reports until twenty days after their circulation to Members. Objecting Members will have at least ten days to explain their objections prior to the DSB meeting. The report shall be adopted by the DSB within sixty days (for appellate reports: thirty days) after the circulation (unless the DSB decides negatively).

Within thirty days, the party concerned informs the DSB of its intentions. If the party does not comply with the recommendation it will have to negotiate with the complainant. Twenty days after the reasonable period expires, retaliations may be authorized.

Source: Compiled by the authors.

SOURCE : Vermulst

... APPENDIX 12 - Dispute Settlement Under the WTO

APPENDIX 13 - GATT Panel Cases Involving Japan

Dispute settlement under GATT Article XXIII and MTN agreements involving Japan, 1955-92

	Description of case	Complaint by	Year	Results	Reference
A.	Complaints against Japan				
1.	Import restriction on thrown silk yarn	United States	1977	Panel report, adopted in May 1978 notes that parties arrived at a bilateral solution.	BISD, 25S/10
2.	Restraints on imports of leather	United States	1978	Panel report, adopted in November 1979, notes bilateral settlement and withdrawal of complaint.	26S/320
3.	Restrictions on imports of leather	Canada	1979	Panel report, adopted in November 1980, notes that parties agreed on a solution to the matter.	27S/118
4.	Restraints on imports of manufactured tobacco	United States	1980	Panel report, adopted in June 1981, notes bilateral settlement and withdrawl of complaint.	28S/100
5.	Measures on imports of leather	United States	1983	Panel report, adopted in May 1984, found that the Japanese import restrictions were inconsistent with with Article XI.	31S/94
6.	Nullification or impairment of benefits and impediment to the attainment of GATT objectives	EEC	1983	Article XXIII:1 consultations. Request for a GATT Working Party not pursued.	L/5479
7.	Restrictions on imports of leather footwear	United States	1985	Panel was set up, but the matter was not pursued as parties agreed on a bilateral solution.	L/5826 + Add.1
8.	Restrictions on imports of certain agricultural products	United States	1986	Panel report, adopted in March 1988, found that Japanese measures for a large part of the products concerned were inconsistent with Article XI:1.	36S/163
9.	Customs duties, taxes and labelling practices on imported wines and alcoholic beverages	EEC	1986	Panel report, adopted in November 1987, found that Japanese taxes on certain imported alcoholic beverages were inconsistent with Article III:2.	34S/83
10.	Restrictions on imports of herring, pollock and surimi	United States	1986	Bilateral solution was reached, and a Panel, though requested, was not established.	L/6070
11.	Trade in semi-conductors	EEC	1987	Panel report, adopted in June 1988, found that Japanese measures on third-country monitoring were inconsistent with Article XI:1. However, measures to improve access to its market for US products were not found to be discriminatory.	35S/116
12.	Tariffs on imports of spruce, pine and fir dimension lumber	Canada	1987	Penel Report, adopted in July 1989, found that Japanese tariffs on dimension lumber were not inconsistent with Article I:1.	36S/167
13.	Copper trading practices in Japan	EEC	1987	Conciliation by Director-General under 1979 understanding was requested by both parties. Good offices report by Personal Representative of Director-General was submitted to the Council in January 1989.	L/6456
14.	Restrictions on imports of beef and citrus products	United States	1988	Panel was set up, but the complaint was withdrawn in July 1988 following Japan's market-opening measures.	L/6322/Add.1 L/6370
15.	Restrictions on imports of beef	Australia	1988	Panel was set up, but the complaint was withdrawn following Japan's market-opening measures.	L/6333 & Add.
16.	Restrictions on imports of beef	New Zealand	1988	Article XXIII:1 consultations Complaint was withdrawn following Japan's market-opening measures.	L/6355/Add.1 L/6370
B.	Complaints by Japan				
1.	Imports of parts and components: anti-dumping measures by the EC	Japan	1988	Panel report, adopted in May 1990, concluded that anti-dumping measures and undertakings by firms in EC member states were inconsistent with Article III:2 and III:4 and not justified by Article XX(d).	37S/132
2.	EC refunds of anti-dumping duties	Japan	1992	Consultations requested under Article 15:2 of the Anti-Dumping Code.	ADP/78
3.	EC anti-dumping proceedings on audio-tapes and cassettes	Japan	1992	Conciliation requested under Article 15:3 of the Anti-Dumping Code.	ADP/79

Note: The list contains complaints under both Article XXIII:1 (consultations among parties concerned) and Article XXIII:2 (normally recourse to panels). Since GATT contracting parties are obliged to notify requests for Article XXIIII consultations only as of 1 May 1989, the list may not be complete.

"BISD..S/..." or "..S/..." refers to documents published in the regular Supplements of GATT, Basic Instruments and Related Documents.

Source: GATT Secretariat.

APPENDIX 14 - The Structural Impediments Initiative

STRUCTURAL IMPEDIMENTS INITIATIVE (SII): FRAMEWORK, PRINCIPAL ITEMS CONCLUDED AND AREAS OF FRICTION

SII—Framework (September 1989)

U.S. Demands and Agenda

— Eliminate discriminatory business practices.
— Encourage more foreign direct investment.
— Increase public spending for comprehensive infrastructure (homes, roads, bridges and airports).
— Reduce *Keiretsu* structure and corporate cross-shareholding.
— Reform the antimonopoly law.
— Reform land pricing and land taxation.
— Reform Large Scale Retail Store Law (LSRSL).
— Provide more public facilities in the areas of 24-hour automatic-teller machines and collect telephone calls.

Japanese Demands and Agendas

— Reduce Federal budget deficit.
— Eliminate/reduce export control regulations.
— Increase research and development spending.
— Reform tax system.
— Regulate junk bond market.
— Increase savings rate.
— Encourage long-term corporate behavior to increase competitiveness and productivity.
— Impose gasoline tax.
— Place restrictions on the supply of credit cards.
— Adopt the metric system.

SII—Principal Items Concluded (June 1990)

Japan

— Increase in public spending and social overhead capital, $2.8 trillion between 1991–2000 (e.g. roads, bridges and airports).
— Reforms of land pricing by relaxing zoning limits.
— Reforms of Large Scale Retail Store Law (LSRSL).
— Reforms of distribution system and import procedures.
— Promise of toughening the antimonopoly law.
— Reforms of the patent system (from 37 months to 24 months).
— Reforms of the *Keiretsu* system (e.g. anti-competitive practices, group boycotts and preferential transactions between two corporations).
— New guidelines for the Fair Trade Commission.
— Greater transparency under official administrative guidance.

SII—Principal Items Concluded (June 1990)

United States

— Gradual reduction in the Federal budget deficit.
— Encouragement of private savings.
— Reduction in the cost of capital to businesses.
— Increase in the Federal funding for research and development and science and mathematics.
— Provide non-discriminatory treatment to Japanese investment in the United States.
— Reduction of export controls for COCOM.

SII—Areas of Friction (1992–1996)

— Japan may not abide by its commitments.
— U.S. federal deficit may not decrease.
— U.S.–Japan trade deficit.
— Changes in the Japanese distribution system may not be implemented.
— Rice trade may not be resolved.
— Restructuring of the *Keiretsu* system may take another ten years.
— Areas of construction, financial services, semi-conductors, and computers may sabotage the SII.
— Possible sector-specific imbalances and microeconomic problems.

Source: U.S. International Trade Commission; Financial Times; The Wall Street Journal; The Economist.

SOURCE : Anwar

SPEECH BY AMBASSADOR TANIGUCHI : AGM OF JAPAN - NZ BUSINESS COUNCIL

17 MARCH 1994

I thank you warmly for your welcome. It is an honour for me to join you and address such a distinguished gathering this evening.

Despite my relatively short time in New Zealand, I have been trying to travel within this country as extensively as possible, almost from North Cape to the Bluff, and I have tried to meet as many Kiwis from as many walks of life as possible.

Everyone I have met, without a single exception, has always been kind and friendly towards me in the discharge of my public duties as ambassador, or in the conduct of my private life, be it golf or bungy jumping. It is quite disarming to feel so at home!

Our two countries are far apart from each other, separated not only by the Pacific geographically, but also culturally, ethically and religiously.

As people, however, we share many attributes: our curiosity about new knowledge, our respect for tradition, even our love of gardens and predilection to drive on the left. But, perhaps, we share in particular a temperament that may be hesitant to show affection, but which has a capacity for deep feeling.

In so saying, I do not pretend to be a sociologist nor a psychologist. But as a diplomat, there is one thing I am sure of, and that is that I feel more relaxed and at home in New Zealand than anywhere else I have served in the past. Informality and casualness seem to be the key in New Zealand, and I, for one who have had to indulge in diplomatic platitudes and clichés whenever occasions so dictate, am second in none in appreciation of the Kiwi common touch.

Be that as it may, I look around the audience this evening. You are all so elegantly dressed in business suits. I'm glad I recently read a newspaper article about Speaker Peter Tapsell of Parliament, and came here today at least with my jacket on.

Now gentlemen, in a more serious vein, I should like to make a few remarks on how I view our economic and trade relations with New Zealand, and, time permitting, to briefly touch on the present economic state of affairs with the United States. I am sure you are as concerned from your professional viewpoint, as we are, since these affairs are bound to affect our otherwise cordial bilateral trade relations.

In the wake of the successful conclusion of the GATT Uruguay Round, Japan and New Zealand, as trading nations, should have ample room before us for further expansion of our bilateral trade relations. After all, these have been in the past, and will be in the future, the bedrock of relations between our two countries. There is a win-win prospect for both of us, give an innovative and entrepreneurial approach. We have everything to gain from closer business, commercial and even financial links with each other.

With that in mind, and based on my own findings as a result of various contacts with both Japanese and New Zealanders who engage in Japan-related business activities within New Zealand, I have several personal and concrete suggestions to make to this Council. It will be by no means a display of high sounding abstract philosophy, but a very practicable suggestion of a day-to-day nature. In point of fact, Mr McLaughlan has asked me in his courteous letter if I would care to speak on current economic and trade issues impacting on Japan/New Zealand trade. However, I do not intend to bore you with cumbersome statistics and figures which you yourselves are already familiar with. Instead of trying to carry coals to Newcastle, I thought I would rather say a few words about the role of your Council as seen by an outside amateur like me.

Firstly, let me address the question of complaint management as a possible additional function of your Council. The more our mutual activities and closer economic relations develop, the more various problems and difficulties in the actual day-to-day business transactions will inevitably arise. These are not necessarily limited to the trade relationship alone. As you know, for instance, there are already all kind of problems with taxation, investment, distribution, accounting, legal system, real estate transactions, labour relations, working visas and residency.

I am given to understand that at the annual meeting between our Councils, the attendants engage themselves in reviewing the macro economic situation and the overall economic prospects of both countries. Even in the corridors outside the plenary, they would be occupied with the general economic trend rather than tackling individual details in business.

However, I would suggest to you today that there is an additional area to which the Japan-New Zealand Business Council should address itself. It should set up a new institutional mechanism to deal with these concrete yet micro problems. What about an Ombudsman system or a complaint management committee with impartial eyes? Once some sort of framework is established, business people could directly submit problems, and suitable information

could be exchanged to enable them to solve the particular issues.

Secondly, with a view to encouraging such systems, it would make sense that your Council extend membership to smaller-sized companies which recently started business in new niche markets in both countries, in addition to the present members which are relatively large scale companies with long experience. Even if these smaller companies were not necessarily accepted as full regular members, there could be an associate membership system or provision for their submissions on an ad hoc basis.

Thirdly, the need for closer co-ordination between government and the business sector. I know well that since the 1980's leaving business in the hands of the private sector has been the cornerstone of New Zealand economic reform. Likewise in Japan at the time, the Hosokawa administration is making deregulation a main pillar of its economic policy. However, I do not believe this automatically means that Government no longer has a role to play. Both Government and business, ought to know what is going on outside their respective areas of responsibility. On the contrary, I believe there are areas left in which Government should be involved to promote closer relations with the business sector, for example, harmonisation of the tax system, quarantine, and standards, etc. I believe there is reason to deepen the co-ordinative and co-operative relations.

So much for our bilateral economic relations. I now wish to move onto our economic relations in a wider context.

As world wide traders, our two countries have a strong commercial interest in the development of multilateral economic relations.

In particular, New Zealand is now perceiving itself as an Asia-Pacific country and rapidly expanding its economic relationship with East Asia, the Japan-New Zealand experience which your Council has achieved so far, will be an effective tool for developing new co-operative business in Asia/Pacific countries from now into the 21st century. I hope that your Council will play a leading role in breaking into the new stage of business relationships in the Asia-Pacific. As a prerequisite, we hope and believe that stability and prosperity based on a free and unhindered market system will prevail in the months to come throughout the Asia and Pacific region in which we live.

As a further step beyond the economic relationship, we should broaden our co-operative relationship into politics, culture, education, etc, as well. From that standpoint, there are many other prospective areas I wish I could touch on today. Alas, however, due to limited time available, I must leave them for another opportunity.

But I would like to talk a little about Japan-US relations which I am sure you are all greatly interested in. Before proceeding, I should point out that what I am about to tell you is largely my own personal interpretation of events based on reports I have been receiving from Tokyo on the current impasse.

Now, as you all know, the meeting between Prime Minister Hosokawa and President Clinton in Washington in February failed to reach an agreement. Some say that the situation between both countries is similar to that which prevailed immediately prior to World War 2. In addition, learning the decision last week by president Clinton to reinstate the Super 301 clause to allow unilateral sanctions against Japan, some reports even say that a trade war between the two countries has begun.

These are all sweeping assumptions by the mass media and bound to lead to a gross misunderstanding.

For your convenience, let me define the scope of my talk. Firstly I would like to talk as briefly as possible about what has happened in Washington, what was agreed and what was not agreed by the two leaders. Secondly, I will put forward our judgement of the current situation, followed by our expectations and intentions in the near future.

First, what happened at the Framework Talks last month. No doubt, it is a matter of great disappointment and regret to my Government, and perhaps to the United States as well, that we were unable to reach an agreement in Washington.

In retrospect, there were three main pillars of vital concern on the table. Firstly, macro-economies; secondly, the so-called sectorial "basket", and thirdly, global co-operation. Unfortunately the second issue, (the sectorial basket), had loomed too large at the sacrifice of two other equally, if not more, important issues in the eyes of the world community.

Actually, the first pillar of the three, (macro-economies), is the most important. In July last year, both Governments agreed to co-ordinate their macro-economic policy in the in the medium term. The Japanese Government pledged to make its market more open and to encourage domestic market-oriented economic growth in order to meaningfully reduce the current account surplus. In the same way, the US Government promised reduction of its financial deficit, promoting saving rates and strengthening international competitiveness.

In line with her pledge, the Japanese Government introduced the Comprehensive Package of Economic

Measures last February. This Package, presumably not up to US expectations in their view, nevertheless represents the largest economic stimulus package ever undertaken with a total value of ¥15 trillion (NZ$250 billion) including approximately ¥6 trillion (NZ$90 billion) in income tax reduction.

Regarding the third pillar, (global policy co-operation), leaders of both Governments reached complete agreement in Washington on such specific areas as assisting the population and AIDS problems of developing countries, co-operation with forest projects in the Asia region, and additional financing of environmental projects in Central and Eastern Europe.

You can see therefore, that two of the three pillars were going well. Only on the sectorial issue, notably Government procedure, insurance and automobiles, could both sides not reach agreement. In our view, the heart of the problem is that the US Government is determined to establish concrete numerical targets as the "objective criteria" in dealing with the sectorial issue.

To the Americans it seems the logical corollary of the objective criteria are numerical targets. In our view, accepting numerical targets as "objective criteria" is not only inconsistent with the main economic policy of the Hosokawa Government, which is shooting for deregulation and an open society, but also endangers the world free trade system as succumbing to a managed trade system.

I am sure that New Zealanders, as strong proponents of the market economy and free trade system, will understand this point.

So much for what has happened in Washington, I now come to my second point, namely, how Japan judges the current situation in the wake of the failure.

We are of a very strong view that today's Japan/US relationship is not based exclusively on economics and trade. A deep-rooted interdependence exists in the areas of politics and security as well.

Both countries are strongly committed to stability in the total Japan/US relationship. Furthermore, both countries, as the two largest economies in the world, should be aware of their special responsibility for the prosperity of the world economy as a whole.

Accordingly, we are at one in our recognition that the failure of agreement on the economic front would not, and should not, undermine the overall relationship between the two countries. In this sense, we must not lose sight by focusing only on the economic sphere.

Keeping this in mind, what is it going to be like, and what does Japan intend to do? My third point.

This is a "period for reflection" for both countries. The Government of Japan reaffirms its intention to advance voluntary measures towards further market opening, deregulation, promotion of import and investment, competitive policy, government procurement reform, etc., as much as possible.

Also, along with the previously mentioned ¥15 trillion economic package, we expect expansion of imports from not only the US, but the EU, and the Asia/Pacific including, of course New Zealand.

At this juncture, I must emphasise one important point. As we are accelerating on these voluntary measures, all the more we are unable to let one-sided accusations nor unilateral sanctionary action remain unchallenged. They are not productive or constructive, certainly not conducive to a solution. The US seems to be of the view that Japan is not complying with her commitment, (her pledge to meaningfully reduce the surplus to the current balance and substantial increase US and global importation of goods and services), while the US adheres to the promised reduction of her financial deficit. The US has also made a one-sided decision for the reinstatement of the Super 101, which in our view is not in accordance with the GATT Uruguay Round.

The unfortunate thing is that from the beginning there was a discrepancy in perceptions as to the root cause of the trade imbalance and the appropriate solution for it. The US insists on a numerical target because they regard the sectorial agreement as a direct measure to improve overall trade imbalance.

On the other hand, however, we believe that the main reason for trade imbalance stems from macro-economic factors. For example, Japan is a high saving country in contrast to the US which is an overspending country. And Japan is in deep recession right now while the US is on the way to recovery. Anyway, the difference in perception is the greatest cause underlying our disagreement.

Gentlemen, in conclusion, I would say that we, Japan and the US, are at the threshold of working in a co-ordinated fashion to a solution.

[*Pays tribute to previous chairman*]

Once again, many thanks for inviting me to join you this evening and may I conclude by expressing my hopes and beliefs that the friendship which today binds Japanese and New Zealand together will endure and be strengthened.

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