THE STRUCTURAL IMPEDIMENTS INITIATIVES: A MODEL FOR DEALING WITH INTERNATIONAL ECONOMIC FRICTIONS*

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I. INTRODUCTION

Societal differences are the motivation for international trade and investment. Were every society identical, no movement of people, goods, or money would occur. The uniqueness of social structure itself is not to be blamed, but advantages in international economic competition derived from the uniqueness are sometimes deemed unfair by the competitors. The structure of society—including legal frameworks—may be a *de facto* export subsidy, unregulated by international treaties. For example, because of a relatively loose antitrust policy in its domestic market, a company may have large profits to spend on the development of new technologies for future export to foreign markets. Societal structure may also cause a *de facto* barrier to investment of foreign capital. For example, regulations on land and house leases that excessively protect existing lessees may block foreign companies that plan on direct investment, since lessors who cannot earn enough from the existing lessees must increase the initial rent for new lessees. These matters traditionally have been deemed domestic matters, into which foreign countries have not intervened. Due to modern international interdependence, however, purely domestic matters no longer exist.

The Structural Impediments Initiative (SII) conducted between Japan and the United States from 1989 to 1990 was a unique opportunity to discuss each society's domestic affairs. Such an approach towards problems in international trade and

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investment is indispensable in this interdependent world. The SII has been analyzed and evaluated from various standpoints, including the political, economic, and diplomatic. While some of these analyses are rather emotional, there are some valuable research papers written in the context of the history of U.S.-Japan trade frictions and the strategic significance of U.S. trade diplomacy, which provide a broad view of the SII.[1] Compared with those analyses given from the standpoint of international political science, a legal analysis of the SII is inevitably limited to confirmation of the fundamental matters.

Given that the methodology of legal analysis on international trade has not yet been established, it is not clear on what basis a legal analysis of the SII should be made. The legal nature of the SII will be examined in section II of this chapter, with attention to the formal aspects of the SII. In section III, its position within the legal framework of international trade will be discussed in consideration of the essential background of the SII. An evaluation will be made from two angles: the negative being the undeniable relation to "Super 301" of the U.S. Trade Act,[2] and the positive being the model for coordination of legislative policies between closely related countries.[3]

1. For example, according to Professor Heizo Takenaka, the SII was a strategy devised by the White House which aimed at the successful conclusion of the GATT Uruguay Round negotiations, checking the protectionists of Congress. Professor Takenaka also explained that the SII was designed to urge Japan to adopt an American-style market mechanism about which the United States became confident through the collapse of Eastern Europe, while restraining the export from Japan of the Japanese-style "philosophy of poverty" which was represented by high land prices and low consumption. HEIZO TAKENAKA, NICHIBEI MASATSU NO KEIZAIGAKU [ECONOMICS OF JAPAN-U.S. TRADE FRICTIONS] at 285 (1991).

See also HIDEO SATO, NICHIBEI KEIZAI MASATSU [JAPAN-U.S. ECONOMIC FRICTIONS], 164 (1991) (a comprehensive summary of the history of the SII); Gary R. Saxonhouse, *Japan, SII and the International Harmonization of Domestic Economic Practices*, 12 MICH. J. INT'L L. 450 (1991) (an economic analysis of the SII).

2. Section 301 of the Trade Act of 1974, *amended by* the Omnibus Trade and Competitiveness Act of 1988, 19 U.S.C.A. §§ 2411 *et seq.* (Supp. 1994).

3. The structural impediments pointed out in the SII were:

Japan:

(1) saving and investment patterns, (2) land policy, (3) distribution system, (4) exclusionary business practices, (5) *Keiretsu* relationships, (6) pricing mechanisms;

United States:

(1) saving and investment patterns, (2) corporate investment and supply capacity, (3) corporate behavior, (4) government regulations, (5) research and development, (6) export promotion, (7) workforce education and training.

This chapter does not intend to study these items in detail. For greater detail, *see* articles in *Nichibei Kōzō Mondai Kyōgi Hōteki Kadai no Kentō* [*Japan-U.S. SII: Study of Legal Issues*] 965 JURISUTO (1990).

II. THE LEGAL NATURE OF THE JOINT FINAL REPORT OF THE SII

a. A Superficial History of the SII

The formal aspects of the SII are decisive in identifying its legal nature and therefore a brief history of the SII will first be presented. In May 1989 President Bush proposed "negotiations" with Japan concerning the structural problems in the Japanese economy, including Japanese practices that impede fair competition in Japanese markets.[4] Japan responded that it would not "negotiate" its domestic affairs with any foreign country but would welcome "talks" on mutual structural problems.[5] "Negotiations" are different from "talks": in the former, the aim is to reach promises by one country to another concerning matters discussed; in the latter, each country presents its idea and discusses the problems of both countries, but then decides by itself what shall be done about its particular problems.

Talks on the SII formerly began according to the following agreement reached between two countries at the time of the Arche Economic Summit[6] in July 1989:

> Both Heads of Government agree to complement the economic policy coordination efforts which have been hitherto made, by launching the Structural Impediments Initiative to identify and solve structural problems in both countries that stand as impediments to trade and to balance of payments adjustments, with the goal of contributing to the reduction of payment imbalances. Both Heads agree to set up a working group consisting of officials representing various governmental agencies from each Government in order to start talks between two countries. Both Heads appointed three joint chairmen respectively. The joint chairmen will preside over the conference on a vice-minister level.
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> These talks will take place outside Section 301 of the United States Trade Act. An interim report will be issued in spring 1990 and a joint final report will be submitted within a year.[7]

4. This proposal was made on the initiative of the Treasury Department. [1989] Facts on File Y.B. at 397. It is important to note that the SII was proposed simultaneously with the announcement of the identification of Japan as a foreign priority country under Super 301, but the United States made it clear that the SII had nothing to do with Super 301. *See* Gaiko Seisho [Diplomatic Blue Paper] 190 (1990).

5. *See* Mitoji Yabunaka, *Nichibei Kōzō Mondai Kyōgi: Sono Konnichiteki Igi, Tokushoku oyobi Hōteki Ichizuke* [*Japan-U.S. SII: Its Significance, Characteristics and Legal Standing*] 965 JURISUTO, 46 (1990).

6. This summit meeting was held in Arche, Paris among the heads of seven industrial countries to discuss matters such as macroeconomic policies, international trade, and global environmental problems.

7. Joint communiqué by President Bush and Prime Minister Uno on economic problems of July 14, 1985.

Thereafter, five plenary sessions of the Working Group were held between September 1989 and June 1990, under the joint chairmanship of the representatives of the Ministries of Foreign Affairs, Finance, and International Trade and Industry on the Japanese side, and those of the Departments of State and Treasury, and the United States Trade Representative (USTR) on the American side, and with the participation of representatives of various governmental agencies on both sides. An Interim Report on the progress of the SII talks was issued on April 5, 1990, and a Joint Final Report was submitted on June 28, 1990.[8] It is worthy of note that the report was submitted to Prime Minister Kaifu and President Bush from the chairmen of both governments.[9] On the cover letter of the Final Report was the following:

> Pursuant to the decision made by the U.S. and Japanese Heads of Government at the Economic Summit in July 1989, the U.S.-Japan Working Group on the Structural Impediments Initiative (SII) presents herein the attached Final Report on the SII talks.

This indicates that the SII were not "negotiations" but from beginning to end merely "talks." In the Final Report, the SII Working Group agreed to meet three times in the first year and twice a year thereafter to review progress achieved in regard to issues identified in the Final Report; to discuss matters relevant to problem areas already identified in the SII and the need for action to address them; and to produce in the spring of each year a written report on the progress made by each country toward solving structural problems. The aim was to reduce external imbalances, review reports together, and issue reports with a joint press release. It was also agreed that the SII Working Group would review follow-up progress after three years, taking into account measures in the Final Report that extend beyond three years. The follow-up talks were held as scheduled based on this agreement.

b. Legal Appraisal

As delineated above, the Final Report of the SII was not designed to describe agreements between Japan and the United States. Nor was it a treaty or administrative or other kind of agreement between the two countries.[10] It was merely a study report on the policies made by the officials of each government to aid heads of government in making decisions. In essence it was nothing more than a public expression of intention by the respective governments.[11] Since the Working Group was formed by a Heads Conference, and the results of the study by the Working Group were adopted by the respective governments as their own policies, the SII practices could never constitute an infringement on the sovereignty of each country or an interference in domestic affairs. The SII talks were instructive opportunities for government officials in charge of domestic affairs to hear opinions of closely related countries and to understand that even a nation's decisions on domestic matters can significantly affect conditions in another country.

With respect to the commitment given to the contents of the report, it was important to note that the measures to be taken on Japanese problems contained in the Report were approved by the Japanese Cabinet. The Report otherwise would have merely been an elaborate statement of the study results by those in charge of making policy. The commitment of the Japanese government was made by Cabinet approval on its own initiative to implement the measures contained in the report.

This commitment would be by and large politically significant. If the government did not sufficiently implement the measures contained in the report, it would lead to a serious diplomatic problem. This, however, would never constitute breach of treaty under international law. The policies in the Report would not have a binding effect on the Diet of Japan under Japanese law, since they were simply policies determined by administrative power. Accordingly, it is possible that the budget plan to implement the policies stated in the SII Report could be rejected by the Diet.[12]

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8. TSŪSHŌ SANGYŌ CHŌSAKAI ED., NICHIBEI KŌZŌ MONDAI KYŌGI SAISHŪ HŌKOKUSHO [FINAL REPORT OF THE STRUCTURAL IMPEDIMENTS INITIATIVES] (1990) (contains the Japanese text and the English text of the final report and other related documents).

Incidentally, measures to be taken by the Japanese government which were contained in the Interim Report were approved by the Cabinet on Apr. 4, 1990. On June 28 the Cabinet also gave its approval to those measures incorporated in the Final Report, declaring that "the Government of Japan will steadily implement those measures."

9. On the Japanese side was the Deputy Minister for Foreign Affairs, the Vice Minister for International Affairs, the Minister of Finance, and the Vice Minister for International Affairs, Ministry of International Trade and Industry; on the U.S. side was the Under Secretary of State, the Assistant Secretary of the Treasury, and the Deputy U.S. Trade Representative.

10. The word "treaty" is defined in Article 2(1)(a) of the Vienna Convention on the Law of Treaties of 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679.

11. *See* Mitoji Yabunaka, *supra* note 5, at 49. Note, *International Trade: Joint Report of the United States–Japan Working Group on the Structural Impediments Initiative, June 28, 1990*, 32 HARV. INT'L L.J. 245, 247 (1991).

12. For instance, with respect to the Japanese "commitment" to the public investment of ¥430 trillion over a decade from FY 1991 to FY 2000, there was a difference in understanding as to its meaning between Japan and the United States right after the Final Report was issued. The Japanese government understood it as a "guideline," while the United States seemed to have deemed it to be a "firm commitment" instead of a mere blueprint. 7 INT'L TRADE REP. (BNA) at 982 (July 4, 1990).

The Final Report stated that "the Government of Japan has newly launched the 'Basic Plan for Public Investment,' which serves *as guiding principles* for steady accumulation of the social overhead capital toward the twenty-first century," and further stated that "the Plan includes the aggregate investment expenditure of about 430 trillion yen for the decade." (Emphasis added) In any case, it would not be meaningless to contest the interpretation of the plan because it was not a promise between two countries. Even if this plan were a firm commitment to the public by the Government of Japan, the Diet would not necessarily approve the implementation of the commitment.

The SII has outwardly had no connection with Section 301 of the Trade Act, as both the joint communiqué made in July 1989 at the Heads Conference and the SII Final Report of June 1990 clearly state that the SII talks took place outside the ambit of Section 301 of the U.S. Trade Act.[13]

III. SIGNIFICANCE OF THE SII: LEGISLATIVE POLICY COORDINATION IN AN INTERDEPENDENT AGE

The previous section examined the legal character of the SII in terms of its formal aspects. This section will provide an appraisal of the SII by taking its background into account. First, the relationship of the SII with Super 301 of the Trade Act will be examined; second, the policy coordination of the two countries will be evaluated.

a. Background

The SII talks appears to have been conducted outside the scope of Section 301 of the Trade Act, but it goes without saying that the United States placed emphasis on Japanese unfair practices as a target for remedying external payment imbalances, as a huge trade imbalance existed between the two countries. The essential link between the SII talks and Super 301 of the Trade Act cannot be disregarded.

(1) Super 301

After the U.S.-Japan trade friction regarding semiconductors,[14] the United States amended the Trade Act of 1974 in August 1988,[15] in which the so-called

13. Though the official understanding on the administrative level is that the SII had no relation to Section 301, the relationship between the SII and Section 301 or Super 301 could not be denied from the standpoint of the Trade Act because the results of the SII were to be subject to evaluation under the Trade Act. In fact, the progress of the SII was referred to in the annual report under Super 301 submitted by the USTR to Congress on Apr. 27, 1990. 55 Fed. Reg. 18693 (1990).

14. In June 1985 the United States Semiconductor Industry Association filed a petition under Section 301 alleging that Japan was restricting access to the domestic semiconductor market for United States producers. In September 1986 Japan and the United States formally concluded an Arrangement concerning Trade in Semiconductor Products. In March 1987 the United States imposed a sanction on the exports of Japanese products to the United States. In June 1991, both countries entered into a renewed agreement, and upon initiation of the agreement in August the unilateral retaliatory duties were withdrawn.

15. Omnibus Trade and Competitiveness Act of 1988. *See generally*, Mitsuo Matsushita, *1998 nen Hōkatsu Bōeki Kyōsōryoku Kyokahō no Kenkyū* [*Study of Omnibus Trade and Competitiveness Act of 1988*] 16 KOKUSAI SHŌJIHŌMU, No. 10, at 835 and No.11, at 957 (1988).

"Super 301" was stipulated in addition to an amendment to Section 301 of the Trade Act aimed at coping with unfair trade practices ("Super 301" was in force only for a limited period during 1989 and 1990).

Super 301 is the provision of Article 310 of the Trade Act[16] entitled "Identification of Trade Liberalization Priorities." The USTR has submitted to Congress an annual report on the trade barriers of foreign countries known as the National Trade Estimates (NTE) Report every year since 1988.[17] According to Section 310, during the two-year period from 1989 to 1990 the USTR is required to identify U.S. trade liberalization priorities on the basis of the report within thirty days following submission of the annual report to Congress. A Report submitted to Congress[18] includes priority practices[19] and priority foreign countries, taking into account various factors,[20] and an estimation of the total amount by which United States exports of goods and services to each country so identified would have increased during the preceding calendar year had the priority practices of such countries not existed.

Further, within twenty-one days following submission of this report to Congress, the USTR shall initiate investigations with respect to all of those priority practices identified for each of the priority foreign countries.[21] In connection with these investigations, the USTR shall request consultations with the priority foreign country.[22] In this consultation the USTR shall seek to negotiate an agreement that provides for the "elimination of, or compensation for, the priority practices" within three years following the initiation of the investigation, and "the reduction of such practices over a three-year period with the expectation that United States exports to the foreign country will, as a result, increase incrementally during each year within such three-year period."[23] If such agreement is entered into with the foreign country before a prescribed date, the investigation will be suspended.[24] Otherwise,

16. 19 U.S.C. § 2420.

17. *Id.*, § 181.

18. *Id.*, § 301(a)(1)(D).

19. Section 310(a)(1)(A) reads, "priority practices, including major barriers and trade distorting practices, the elimination of which are likely to have the most significant potential to increase United States exports, either directly or through the establishment of a beneficial precedent."

20. *Id.*, § 310(a)(2) and (3).

21. *Id.*, § 302(b)(1); § 310(b).

22. *Id.*, § 303(a).

23. *Id.*, § 310(c)(1).

24. *Id.*, § 310(c)(2). According to § 310(c)(3), if the USTR determines that the foreign country is not in compliance with such an agreement, the USTR shall continue the investigation that was suspended by reason of such agreement as though such an investigation had not been suspended.

the USTR shall determine whether the foreign practices are fair within twelve months following the initiation of the investigation.[25]

If the practices of the foreign country are determined to be unfair, the USTR shall take action under Section 301, which is so devised as to affect the goods or services of the foreign country to an amount equivalent in value to the burden being imposed by that country on United States commerce. For the purpose of retaliation, the USTR is authorized to suspend or withdraw trade benefits, to impose duties or other import restrictions on goods and services, or to carry out such actions as the USTR determines to be appropriate.[26] The USTR is also required to monitor increased U.S. exports to foreign countries with which an agreement entered into has been concluded, and to submit a report on such progress for a period from the submission of the annual report identifying priority foreign countries up to at least 1993.[27]

(2) Identification of Japan as a Priority Country under Super 301 and Japan's Response

In April 1989 the USTR made an annual report in which trade barriers in thirty-four countries and two regional groups were listed. As for Japan, thirty-four trade barriers were enumerated including communication, supercomputers, semiconductors, construction, agriculture, automobile parts, and distribution systems. On May 25, 1989, the USTR identified Japan as a priority foreign country under the Super 301, together with Brazil (for restrictions on imports) and India (for restrictions on trade related to investment and insurance market practices), and identified as priority practices such items as government procurement of supercomputers and satellites, and technical barriers related to forestry products.[28]

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25. *Id.*, § 304(a)(2)(B). According to § 304 (a)(2)(A), in the case of an investigation involving a trade agreement, the USTR shall determine whether the foreign practices are fair on or before (1) the date that is 30 days after the date on which the dispute settlement procedure is concluded, or (2) the date that is 18 months after the date on which the investigation is initiated. Further, according to § 304 (a)(3)(A), in the case of an investigation involving alleged infringement of intellectual property rights, the USTR shall make such determinations no later than the date that is six months after the date on which such investigation is initiated.

26. Section 301(a)(2) provides for cases in which the taking of retaliatory actions are not required.

27. *Id.*, § 310(d).

28. For an annual report under Section 310(a)(1)(D), *see* 54 Federal Register, No.108, at 24438 (1989). According to this annual report, there is not enough information to make an estimation of the amount by which United States' exports to the identified priority foreign country would have increased if the priority practices did not exist.

Taiwan was excluded from identification as a priority country by making a commitment to increase domestic demand from 86.3% of its GNP to 93.7% by 1992; Korea was also excluded from identification by making a commitment that it would implement before 1993 such measures as the liberalization of foreign investment into Korea, the lifting of restrictions on imports of pharmaceutical and cosmetics, the lifting of restrictions on activities of foreign travel agents and advertising agents, and the opening of the market to bean oils and other agricultural products. *See* Note, *International Trade—the Implementation of 'Super 301,' Omnibus Trade and Competitiveness Act, sec.301, 19 U.S.C. 2411 (Supp. VII 1989)*, 31 HARV. INT'L L.J. 359, 362 (1990).

Japan expressed regret at such unilateral identification as a priority country with priority practices, and made it clear that Japan would not comply with the U.S. request for negotiations on the basis of potential invocation of unilateral sanctions.[29] Japan argued, at the GATT Council meeting in June 1989, that such unilateral measures as those under Super 301 were inconsistent with the GATT dispute settlement mechanism based upon mutual equality of the contracting parties.[30]

Since the USTR was required to initiate investigations with respect to identified priority practices of priority foreign countries within twenty-one days following submission of its annual report to Congress, the investigation under section 302(b)(1) commenced on June 16, the twenty-first day from the date of submission of the annual report.[31] Although Japan refused to negotiate under Super 301, negotiations were conducted on the basis of "talks without anticipating any sanctions."[32] Eventually this investigation as to the three priority practices of Japan was suspended on June 15.[33]

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29. *See Talk of Foreign Minister*, Gaiko Seisho [Diplomatic Blue Paper] 189 (1990); Keizai Hakusho [Economic White Paper], 241 (1989); 6 Int'l Trade Rep. (BNA) at 686–87 (May 31, 1989). Brazil and India also raised objections against the United States unilateral actions. The EC also criticized the United States, saying that such unilateral actions would impair the world free trade system. *See supra* note 28, at 362–363. Japan expressed objections to unilateralism as seen in Super 301 at the meeting of the OECD Ministerial Council in May 1990 and at the Arche Economic Summit in July 1990 (*see supra* note 6). Finally, in a communiqué of the OECD, it was clearly stated that unilateralism as shown in the Super 301 clause would hinder the multilateral trade framework and ruin the GATT Uruguay Round negotiations.

30. At the meeting of the GATT Council, Canada, Mexico, Argentina and the Scandinavian countries also criticized the Super 301. *See* Note, *supra* note 28, at 363.

31. *See* 54 Fed. Reg. No. 118, at 26136–8 (1989).

32. While the Japanese Diplomatic Blue Paper of 1990 described "talks without anticipating any sanctions (at 190), the report of the USTR submitted to Congress regarding the suspension of an investigation under Section 302 stated that the USTR conducted negotiations with Japan under Section 310(c)(1) and would monitor Japan's compliance with the agreement. 55 Federal Register No. 121 at 25761–6 (1990). The report further stated that if the USTR determined Japan is not in compliance with the agreement, the USTR would resume the investigation. In addition, a report dated Apr. 27, 1990 stated measures accepted by Japan to remedy the identified three priority practices "as Super 301 Results." 55 Fed. Reg. No. 86 at 18693 (1990).

33. According to the report submitted by the USTR to Congress on the suspension of an investigation under Section 302 with regard to Japanese three priority practices (Federal Register, Vol. 55, No. 121, at 25761–6), the exchange note with Japan dated June 15, 1990 was regarded as an "agreement" under Section 310. *See also*, Tsūshō Hakusho [White Paper

In the annual report prepared by the USTR in March 1990 regarding Japan, amorphous metals, intellectual property rights, and automobile parts were identified as fields with existing trade barriers. On April 27 the USTR submitted to Congress the annual report identifying U.S. trade liberalization priorities for 1990.[34] In this report the USTR pointed out that it was a "key trade priority" for the world economy that the Japanese economy—which was the second largest in the world—should operate on the basis of an open and truly competitive market system. The USTR also conducted a survey of the progress of trade issues relating to Japan, referring to the Interim Report of the SII dated April 5, 1990; furthermore, it excluded Japan from its list of identified foreign priority countries, stating that a satisfactory solution was reached with respect to the three priority practices.[35]

(3) Relationship between Super 301 and the SII

Concurrent with the identification of Japan as a priority country, the United States proposed the SII to Japan, but clarified, as stated previously, that the talks under the SII took place outside Section 301 of the Trade Act.[36] It cannot be denied, however, that there was a substantial relationship between Super 301 and the SII. First, Super 301 was primarily aimed at enabling the USTR to proceed with necessary procedures automatically based on authorization by Congress, which has power over international trade under the U.S. Constitution.[37] The president is thereby precluded from intervening in an invocation of Section 301 through use of the presidential diplomatic power[38] and thus does not have authority to suspend a Super 301 procedure at his discretion. Second, the date of issue of an Interim Report of the SII, which showed the substantial results of the SII, coincided with the requirement of Section 304(a)(2)(B) that the USTR must determine the fairness of foreign practices within twelve months following the initiation of an investigation. Moreover, the Interim Report was issued only two months before the Final Report of the SII during the talks of the Working Group, which spanned one year. Third, the agreement in the Final Report of the SII that the Working Group review the follow-up progress of the measures after three years coincided with the requirement under Section 310(d) that the USTR monitor increased U.S. exports to each of the

on International Trade] at 76 (1990).

34. *See* 55 Fed. Reg. No. 86, at 18693.

35. India was again identified as a foreign priority country.

36. *See supra* note 4.

37. Article I, Section 8 (3) of the Constitution of the United States provides that the Congress has the power "(t)o regulate Commerce with foreign Nations, and among the several States. . . ."

38. As to the history of the establishment and power of the USTR, *see* Kiyoshi Aoki, *Beikoku no Tsusho Soshiki Taisei to USTR [U.S. Trade Organization and the USTR] in* KOKUSAI TORIHIKI TO HŌ [INTERNATIONAL TRANSACTIONS AND LAW] at 27 (Yoshio Matsui, et al., eds., 1988).

foreign countries through the submission of an annual report on the identification of foreign priority countries until at least 1993.[39]

Since the impediments pointed out in the SII were not regarded as priority practices identified by the USTR, the talks under the SII appear to have taken place outside the scope of Super 301. It is also true that the word "initiative" of the SII represented the intention of the U.S. administration to conduct talks of its own volition without any instruction from Congress. However, that was merely the intention of the administration. From the viewpoint of Congress, the SII would likely have appeared to have been conducted essentially along the lines of Super 301. It may have at any rate been necessary for the USTR to have arranged the content and schedule of the SII in such a manner as to convince Congress.[40]

(4) Unilateral Sanctions

Unilateral sanctions provided for in Section 301 of the Trade Act are not consistent with the dispute settlement procedure of the GATT, to which both the United States and Japan are Contracting Parties.[41] Should the United States invoke sanctions against Japan based on Section 301 despite the adoption by the Contracting Parties to the GATT of the panel report to the effect that U.S. allegations of unfair trade practices by Japan are groundless, such unilateral sanctions would be considered a breach of the GATT.[42] Before invoking Section 301 however, the United States cannot be deemed to have violated the provisions of the GATT.[43] Considering the aforementioned legal character of the SII as merely an exchange of views for information on making decisions on respective

39. The fact that Taiwan and Korea which were excluded from identification as priority countries (*see, supra* note 18) and promised to lift trade barriers by 1992 and 1993 also coincides with this three year monitoring requirement.

40. According to Professor Kazunori Ishiguro, the SII was described as a "procedure" by which the United States determined that Japan was an unfair country with respect to international trade. Kazunori Ishiguro, *Nichibei Bōeki Masatsu heno Hikakuhō Bunkateki Shiten, [Comparative Legal and Cultural Aspects of Japan-U.S. SII]* BŌEKI-TO-KANZEI, 22 (January 1992).

41. *See* Ichiro Komatsu, *GATT no Funsō Shōri Tetsuzuki to Ippōteki Sochi [GATT Dispute Settlement Procedure and Unilateral Measures]* 89 KOKUSAIHŌ-GAIKŌ-ZASSHI, Nos.3&4, at 37 (1990).

42. Section 301(a)(2)(A) provides that the USTR is not required to take such action if the Contracting Parties to the GATT have determined that foreign practice is not a violation of, or inconsistent with, the rights of the United States and so on.

43. On May 26 the Foreign Minister of Japan spoke on the identification by the United States of priority practices, and it was stated that Japan sincerely hoped the United States would not take any action in violation of the rules of GATT. This seems to have indicated the view of the Japanese government that mere identification of priority practices did not constitute a violation of the GATT. *Talk of the Foreign Minister, supra* note 29, at 189.

policies at an administrative level, the SII is essentially irrelevant to the issue of unilateral sanctions.

b. Coordination in Legislative Policy in an Interdependent Age

From a positive approach, the SII can be deemed to have disclosed new dimensions of international trade law. In light of the interdependent relationship between Japan and the United States, those in charge of policymaking in both governments ought to share a common view that one country cannot independently determine its domestic legislation regarding not only trade but also almost all other aspects. Indeed, although legislation *per se* is a part of the exercise of independent sovereign power, it is always necessary to consider the effect of such legislation on another country.[44] The White Paper on International Trade by the Ministry of International Trade and Investment (MITI) described the SII talks as an "exchange of ideas between friendly nations" based upon the mutual understanding that those policy decisions can be made respectively.[45]

This kind of trend has of course already been seen. Border issues were the focus of discussion for many years following the end of World War II. With the progress of reductions in tariffs since approximately the time of the GATT Tokyo Round negotiations of 1974, world attention gradually shifted to issues of dumping, export subsidies, government procurement, standards, and certification. The Uruguay Round negotiations has extended the subject matter of the negotiations to include services and intellectual property rights.[46] The scope of the GATT is primarily limited to the field of trade, but if the adjectival phrase "trade-related" is added, various issues could be treated in its framework. In this so-called globally borderless age in which countries are closely interwoven, it may not be inconceivable to append this phrase to almost all issues. In the next round of WTO negotiations, in fact, such issues as antitrust policy and trade-related environmental protection policy will be taken up as part of the formal agenda.

Despite the official position that the issues raised in the SII were only matters for each party to deal with by itself, substantially significant talks were conducted

44. *See* Yabunaka, *supra* note 5, at 47–8. As to coordination of legislative policy in the age of interdependence, *see generally*, Masato Dogauchi, *Sōgoizon, Kokusaika to Hōkisei: Hō no Ikigaitekiyō to Gaijinhō* [*Interdependency, Internationalization and Legal Regulation—Extraterritorial Application of Law and Law Concerning Foreigners*] *in* SŌGOIZON JIDAI NO KOKUSAI MASATSU [INTERNATIONAL FRICTION IN THE AGE OF INTERDEPENDENCY] 75 (Susumu Yamakage ed., 1988).

45. White Paper on International Trade, at 281 (1990).

46. *See* Mitsuo Matsushita, *Nichibei Kōzō Mondai Kyōgi to Keizai Seido Chōsei* [*Japan-U.S. SII and Economic System Adjustment*] 965 JURISUTO 15 (1990) (discussion of the significance of the SII in comparison to the GATT multilateral system, the Regional Adjustment System of EC and the U.S.-Canada Free Trade Agreement). *See also* Matsushita, *The Structural Impediments Initiative: an Example of Bilateral Trade Negotiation*, 12 MICH. J. INT'L L. 436 (1991).

under circumstances where the opposing country's issues had a direct effect on each country. These kinds of bilateral talks are expected to increase, and more substantially significant talks with respect to legislative policy coordination are expected to take place even more frequently in the future. In this age of interdependence, close coordination is necessary between Japan and the United States in many fields of legislative policy. A positive and affirmative view of such talks between the two countries must thus be cultivated.[47]

IV. CONCLUSION

This chapter has attempted to make a legal evaluation of the SII. Its conclusion is quite simple. First, from the viewpoint of international law, the Final Report of the SII is not an agreement between two countries, but only a statement of each country's own policies. Second, from the viewpoint of domestic law, the measures written in the Final Report are not binding on the parliament. Third, accordingly, there could arise cases in which the measures written in the Final Report would not be implemented by the parliament. This could lead to political complications, but it would not cause any legal problems. Fourth, the essential relationship between Section 301 of the Trade Act and the SII is an undeniable fact, but it would be difficult to argue this point legally. Fifth, such bilateral talks as seen in the case of the SII are a necessary means for coordinating legislative policy between countries in this interdependent age. Therefore, such talks will be expected not only with the United States but also with other nations, including Canada, in the future. Thus, it is necessary to view such bilateral talks positively as an essential means to promote coordination between countries.

Finally, it seems necessary to mention more recent negotiations between Japan and the United States. After the SII, Japan and the United States began the "Framework" consultations. According to the Joint Statement on a Framework for a New Economic Partnership in July 1993, "Japan and the United States will engage in *negotiations and consultations* to expand international trade and investment flows and to remove sectoral and structural impediments that affect them." Further, "[t]he two Governments are committed to implement faithfully and expeditiously all *agreed on* measures taken pursuant to this Framework." (Emphasis added.) This means that in the Framework certain measures regarding some sectors are negotiated to be agreed upon. The difference between "talks" with a foreign country in the process of making up its own policy and "negotiations" to conclude" an agreement between countries is important. Such negotiations in areas of such deeply rooted social structures inevitably cause great difficulty, and in reality the Framework did cause great conflict between the two countries. It seems that

47. It is necessary to consider from this standpoint the meaning of the *Unfair Trade Policy Report: Trade Barriers in the United States, EC and Canada and GATT Rules* by the Fair Trade Center (1990), which is the report of the study on trade barriers to be remedied existing in countries from the Japanese perspectives.

bilateral talks such as the SII are more appropriate for coordinating domestic policies among interdependent countries.

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