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The Major Projects Arrangements -- Is it a Solution to Japan's Closed Construction Market?

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I. INTRODUCTION

The Major Projects Arrangements[1] (MPA) have been hailed as a significant step in penetrating Japan's construction market, which is the second largest market in the world for public construction projects.[2] However, the condition of the Japanese infrastructure lags far behind that of the U.S. and Europe.[3] It is estimated that the Japanese will invest 6.6 trillion dollars to update and maintain their infrastructure system.[4] Consequently, American contractors have much to gain by penetrating Japan's flourishing construction market.[5]

In 1986, with the news of the Kansai International Airport Project (KIAP), U.S. interest in the traditionally closed Japanese construction market became a political issue of

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1. Major Projects Arrangements, July 31, 1991, U.S.-Japan, U.S. Department of Commerce (on file with the U.S. Department of Commerce, Office of General Counsel) [hereinafter MPA].

2. *Japan: Some Progress Made In U.S.- Japan Talks On Construction, Another Meeting Likely*, 8 Int'l Trade Rep. (BNA) 504 (1991) [hereinafter *Japan Talks*]; *Japan's Edge on U.S. Widens*, ENGINEERING NEWS-RECORD, Sept. 20, 1990, at 16.

3. FUMIO HASEGAWA & THE SHIMIZU GROUP FS, BUILT BY JAPAN: COMPETITIVE STRATEGIES OF THE JAPANESE CONSTRUCTION INDUSTRY 195 (1988).

4. *Id.*

5. *Id.*; *Japan: U.S. Seeks Access To 35 Additional Major Japanese Construction Projects*, 9 Int'l Trade Rep. (BNA) 1377 (1992) [hereinafter *Additional Projects*].

heightened proportions.[6] Officials anticipated that the KIAP would produce 6.7 billion dollars in construction contracts.[7] However, American contractors knew that they could not successfully bid on the KIAP due to Japan's restrictive bidding requirements.[8] As a result, the U.S. began bilateral trade negotiations with Japan aimed at providing American contractors a real opportunity to compete for the KIAP contracts.[9]

On May 25, 1988, Secretary of Commerce C. William Verity, and Japanese Ambassador to the U.S. Nobuo Matsunaga, exchanged a group of letters which memorialized the KIAP negotiations.[10] These letters created what became known as the 1988 Major Projects Arrangements (1988 MPA), which purported to set forth a program whereby Japan would pursue nondiscriminatory procurement policies relating to their public works projects.[11] The 1988 MPA was revised on July 31, 1991 and became known as the 1991 Major Projects Arrangements (MPA).[12]

Part II of this Comment sets forth the historical background and evolution of the MPA.[13] Part III discusses the goals, purposes and important provisions of the MPA, and how they impact Japan's current construction market.[14] Part IV examines the legality of the MPA, and possible solutions to creating a free system of trade for construction services between the U.S. and Japan.[15] Part V analyzes the viability of utilizing the MPA as a bridge to creating a multilateral agreement under the General Agreement on Tariffs and Trade (GATT) for the free trade of construction services in the international construction industry.[16] Finally, the conclusion reviews the progress made as a result of the MPA in penetrating the Japanese construction market.[17]

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6. ELLIS S. KRAUSS, UNDER CONSTRUCTION: U.S.-JAPANESE NEGOTIATIONS TO OPEN JAPAN'S CONSTRUCTION MARKETS TO AMERICAN FIRMS, 1985-1988 6-7 (1988); *Japan: Smart Satisfied With Talks As Progress Seen On Tabasco Trade, Airport Construction*, 3 Int'l Trade Rep. (BNA) 1076 (1986) [hereinafter *Smart*]; SIDNEY M. LEVY, JAPANESE CONSTRUCTION: AN AMERICAN PERSPECTIVE 389 (1990).

7. LEVY, *supra* note 6, at 389-91. The KIAP is situated on a 1262-acre man-made island. *Id.* The island is three miles offshore from Izuisano City on Osaka Bay. *Id.* When completed, it will have the capacity to service 190,000 passengers daily. *Id.*

8. *Id.*

9. *Smart*, *supra* note 6, at 1076. *See infra* notes 68-90 and accompanying text (discussing Japan's restrictive bidding requirements).

10. KRAUSS, *supra* note 6, at 35; *Japan: U.S., Japan Sign Letters of Agreement Aimed at Opening Up Japanese Construction Market*, 5 Int'l Trade Rep. (BNA) 783 (1988) [hereinafter *Letters*]; HASEGAWA & THE SHIMIZU GROUP FS, *supra* note 3, at 195.

11. *Letters*, *supra* note 10, at 783; HASEGAWA & THE SHIMIZU GROUP FS, *supra* note 3, at 195.

12. *Japan: U.S., Japan Sign New Agreement To Increase Access To Construction Market*, 8 Int'l Trade Rep. (BNA) 1171 (1991) [hereinafter *New Agreement*]. The 1991 MPA built on the 1988 agreement by providing, among other things, for more transparency in Japanese bidding procedures, a simplified ranking system for firms to be designated eligible to bid on projects, and an independent procurement review board to handle complaints. *Id.*

13. *See infra* notes 18-67 and accompanying text.

14. *See infra* notes 68-148 and accompanying text.

15. *See infra* notes 149-59 and accompanying text.

16. *See infra* notes 160-72 and accompanying text.

17. *See infra* notes 173-77 and accompanying text.

II. HISTORICAL BACKGROUND OF THE MPA

In 1986, news of the KIAP spurred U.S. officials into bilateral negotiations with Japan in an effort to open the Japanese construction market to U.S. construction companies.[18] U.S. and Japanese officials reached an agreement in which the Kansai International Airport Company promised to implement fair and nondiscriminatory procurement practices, as well as ensure that proper and timely information on procurement be supplied to U.S. construction firms.[19] Further, Japanese officials stated that they would ensure that project owners would provide fair and equal opportunities for foreign firms engaged in bidding on the KIAP.[20]

By early 1987, U.S. officials were angered by the lack of progress U.S. contractors were making in securing KIAP contracts.[21] U.S. officials threatened to retaliate if Japan did not comply with the agreement.[22] The U.S. and Japan attempted to resolve disputes over U.S. construction firms participating in Japan's construction market, but the negotiations broke off in November 1987.[23] Consequently, U.S. officials began to take retaliatory measures.[24] By January 1988, as the result of continued activity in the House and Senate by House Government Operations Committee Chairman Jack Brooks and Senator Frank Murkowski, a U.S. budget law resolution, known as the "Brooks-Murkowski Amendment,"[25] barred Japan from participating in any construction projects funded in whole or in part by the U.S. government during the 1988 fiscal year.[26]

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18. *Smart, supra* note 6, at 1076.

19. *Id.* The Kansai International Airport Company also indicated that it would hold seminars for U.S. contractors to familiarize them with the bidding process. *Id.*

20. *Id.*

21. *Japan: Rudman Weighing Measure To Ban Japanese Construction Companies From U.S. Market*, 4 Int'l Trade Rep. (BNA) 304 (1987) [hereinafter *Rudman*]. Senator Warren Rudman (R-N.H.) threatened to introduce legislation that would ban all Japanese construction firms from the U.S. market unless the Japanese accorded reciprocal access to Japan's market. *Id.* Further, Senator Frank Murkowski (R-Alaska) accused Japan of "stonewalling" U.S. negotiating efforts. *Id.*

22. KRAUSS, *supra* note 6, at 21; *Rudman, supra* note 21 at 304.

23. *Japan: Kansai Talks With U.S. Officials Break Off, Administration Weighs Section 301 Retaliation*, 4 Int'l Trade Rep. (BNA) 1379 (1987).

24. *Japan: Senate Okays Defense Bill Measure Hitting Japanese Construction Bidding Practices*, 4 Int'l Trade Rep. (BNA) 1183 (1987) [hereinafter *Defense Bill*]; *Japan: House Okays Measure To Bar Japanese Firms From U.S. Public Works Construction Market*, 4 Int'l Trade Rep. (BNA) 1526 (1987) [hereinafter *Bar*].

25. LEVY, *supra* note 6, at 24-25.

26. *Japan: U.S. Budget Law Barring Construction Firms From Public Works Projects Hits Only Japan*, 5 Int'l Trade Rep. (BNA) 48 (1988). President Reagan signed the budget law (Pub. L. No. 100-202) on December 22, 1987. *Id.* The resolution, named the "Brooks-Murkowski Amendment" after its sponsors, Representative Jack Brooks (D-Tex.) and Senator Frank Murkowski (R-Alaska), put Japan on a list of countries that maintain unfair trade barriers to U.S. construction products and goods. *Id.* The U.S. Trade Representative (USTR) maintains the list and will only remove Japan from the list after Japan lifts its trade barriers against U.S. contractors and submits to the President of the USTR evidence that such barriers have been removed. *Id.* The USTR is required to investigate and verify that the trade barriers have been removed and submit such findings to the House and Senate 30 days before lifting the restriction. *Id.* The resolution bars the use of funds for "any contract for the construction, alteration, or repair of any public building or public work in the United States or any territory or possession of the United States with any contractor or subcontractor of a foreign country, or any supplier of products of a foreign country, during any period in which such foreign country is listed by the United States Trade Representative. . . ." *Japan; Administration, Japan Resumes Negotiations on U.S. Access to Construction markets*, 5 Int'l Trade Rep. (BNA) 398 (1988) [hereinafter *Japan Resumes*]; *Defense Bill, supra* note 24, at 1183; *Bar, supra* note 24, at 1526.

Negotiations began again in late January 1988 but ended in a stalemate on February 20 when U.S. officials rejected a severely limited Japanese offer to open a small portion of its construction market.[27] Consequently, members of Congress have continued to push for investigation of Japan's construction trade practices pursuant to section 301[28] of the Trade Act of 1974,[29] as amended.[30] If such an investigation was initiated and discriminatory practices found under section 301, the U.S., at the discretion of President Reagan, could have imposed trade sanctions against Japan.[31] Fearing the possibility of a section 301 action, Japan vigorously resumed negotiations in late March 1988.[32] Anticipating a resolution, the Economic Policy Council postponed its section 301 investigation until further negotiations were completed.[33]

On March 29, 1988, U.S. and Japanese officials reached a last-minute accord of a framework designed to enable U.S. firms greater access to certain major Japanese construction projects.[34] On May 25, 1988, the 1988 MPA was formalized when Commerce Secretary Verity and Japanese Ambassador Matsunaga signed letters of agreement aimed at opening Japan's construction market to U.S. firms.[35] The agreement offered U.S. firms the opportunity to bid on seven major public works projects valued at 17 billion dollars.[36] Commerce Secretary Verity stated that "[t]he goal of these special arrangements will be to get enough contracts, for enough American construction companies, on enough different kinds of projects, so that they will have the Japanese experience they need to work on other Japanese government projects in the future."[37]

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27. *Japan: Latest Japanese Offer To Open Construction Markets Rejected By U.S. Officials In Tokyo*, 5 Int'l Trade Rep. (BNA) 234 (1988). Japan offered to open six Japanese public works projects to bidding by foreign contractors. *Id.* However, the offer excluded those portions of the projects in which U.S. firms would be most competitive. *Id.* Official reports stated that such a list could not be accepted because it simply does not allow U.S. firms to compete. *Id.*

28. Trade Act of 1974, Pub. L. No. 93-618 § 301, 88 Stat. (Jan. 3, 1975). "Section 301 authorizes, and in some cases requires, the United States to impose trade sanctions against foreign countries that violate trade agreements or engage in unfair trade practices. Its primary objective is to provide the United States with the necessary leverage to negotiate satisfactory agreements with foreign countries, in order to resolve trade disputes and to open foreign markets to U.S. firms." Jean H. Grier, *The Use of Section 301 to Open Japanese Markets to Foreign Firms*, 17 N. C. J. INT'L. & COM. REG. 1, 2 (1992).

29. KRAUSS, *supra* note 6, at 32; *Japan: Section 301 Complaint Against Construction: Barriers Recommended By Sub-Cabinet Group*, 5 Int'l Trade Rep. (BNA) 277 (1988). The latest recommendation to proceed with a section 301 investigation was made by the sub-Cabinet-level Trade Policy Review Group which unanimously made the recommendation to the Economic Policy Council. *Id.*

30. Trade Act of 1979, Pub. L. No. 96-39 § 901, 93 Stat. 295 (codified at 19 U.S.C. § 2411 (1988)).

31. *Id.*

32. Japan Resumes, supra note 26, at 398.

33. *Id.* As talks reopened, Commerce Secretary C. William Verity was quick to stress the U.S. goals. *Id.* Secretary Verity stated "[t]his means that [Japan] . . . would identify specific, concrete business opportunities. They would be open with fully transparent, competitive procedures like those we are negotiating for the Kansai airport, applying public, private, and third-sector components of these major public works." *Id.*

34. Steven J. Dryden, *Accord Reached on U.S. Access to 14 Major Projects in Japan*, ENGINEERING NEWS RECORD, April 7, 1988, at 12; *Japan: U.S., Japan Reach Last-Minute Accord Opening Japanese Construction Market To U.S. Firms*, 5 Int'l Trade Rep. (BNA) 450 (1988) [hereinafter *Accord Reached*].

35. KRAUSS, *supra* note 6, at 35; *Accord Reached, supra* note 34, at 450.

36. *Id.* U.S. Trade Representative Michael Smith emphasized that the agreement was bilateral and negotiated for the benefit of the U.S. *Id.* However, it became clearly apparent that other countries would benefit as well when four major Korean contractors received licenses shortly after the agreement was made. *See* LEVY, *supra* note 6, at 388-89.

37. *Letters, supra* note 10, at 783.

Although the agreement was hailed as a substantial first step, not all were optimistic.[38] The International Engineering and Construction Industries Council (IECIC), representing U.S. engineers, contractors, and architects, stated that the agreement "consists of procedural reforms only and does not address the formidable industry and cultural barriers which have contributed to precluding American firms from entering the design and construction market."[39] The IECIC continued to advocate that the only way to effectively break into the Japanese construction market is through a section 301 investigation, or, at the very least, through monitoring of the agreement by a formal congressional committee.[40]

In fact, the 1988 MPA got off to a difficult start.[41] On November 21, 1988, the office of the United States Trade Representative (USTR) initiated an investigation against Japan under section 301 of the Trade Act of 1974.[42] In support of the investigation, the IECIC submitted a statement to the USTR indicating that U.S. design and construction firms were precluded from entering the Japanese construction market, and requested a public hearing to voice its concerns.[43] As the threat of section 301 trade sanctions became a reality,[44] and the disparity between the U.S. and Japanese construction markets grew, U.S. and Japanese officials resumed their negotiations in an effort to improve the 1988 MPA.[45]

With negotiations progressing, the USTR decided not to employ trade sanctions against Japan under section 301.[46] But USTR officials made it clear that they felt that Japan was still engaging in discriminatory practices aimed at making it difficult for U.S. firms to participate in the Japanese construction market.[47] As such, May 25, 1990, which marked the second anniversary of the 1988 MPA, became the new deadline for retaliatory action under section 301.[48]

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38. *Id.*

39. *Id.*

40. *Id.*

41. *Japan: USTR Initiates Unfair Trade Investigation Against Japan's Barriers to U.S. Builders*, 5 Int'l Trade Rep. (BNA) 1523, 1524 (1988).

42. *Id.* The investigation was mandated by the Trade Act of 1988. *Id.* The investigation resulted from complaints by U.S. firms of continued difficulty, despite the 1988 MPA, in penetrating the Japanese construction market. *Id.*

43. *Japan: U.S. Builders Tell USTR They are Barred From Japanese Design, Construction Market*, 6 Int'l Trade Rep. (BNA) 11 (1989) [hereinafter *Design*]. In its statement, the IECIC argued that Japanese government barriers shut the doors to U.S. construction firms while Japanese firms enjoy free access to the U.S. market. *Id.* In support of this statement, the IECIC provided statistics which showed that the Japanese market share in the U.S. construction industry shot up from 50 million dollars in 1982 to 2.2 billion dollars in 1987. *Id.* On the other hand, U.S. firms have spent more money trying to break into the Japanese construction market than they have received in contracts. *Id.*

44. *Japan: U.S. Acknowledges Some Japanese Progress, But Construction Talks Yield Little Else*, 6 Int'l Trade Rep. (BNA) 1476 (1989). U.S. officials had until November 21, 1989 to decide whether to assess trade sanctions against Japan for violations of section 301. *Id.* However, U.S. officials stated that such retaliatory measures would not be instigated if a satisfactory agreement came out of the negotiations. *Id.*

45. *Design, supra* note 43, at 11. The U.S. maintains that the 1988 MPA had failed to meet its objectives. *Id.*

46. *Japan: U.S. Delays Retaliation Against Japan's Alleged Barriers to U.S. Construction Firms*, 6 Int'l Trade Rep. (BNA) 1548 (1989).

47. *Id.* U.S. officials considered the following Japanese practices to be unreasonable: 1) inadequate measures to deter collusive bidding practices; 2) limitations on the designated bidder system, which promotes bid-rigging; 3) the exclusion of foreign firms from public projects unless they have prior experience in Japan; and 4) discrimination in providing project information to foreign firms. *Id.*

48. *Id.* Although the U.S. construction industry felt that postponing retaliation under section 301 was soft, officials were optimistic that the move would revitalize current negotiations. *Id.*

In response to the suspension of plans to retaliate, Japanese officials implemented new measures aimed at banning bid-rigging in public works projects.[49] As talks continued, Senator Frank Murkowski presented another amendment (Murkowski Amendment) which would bar Japanese construction firms from participating in U.S. public works projects.[50] Senator Murkowski proposed the amendment largely to protest the Japanese government's decision to award the first major contract of the KIAP—the people mover (automated sidewalk) contract—to a Japanese contractor with little experience in the construction of people movers over AEG Westinghouse Transportation Systems, Inc., which had constructed fourteen of the eighteen people movers in operation at airports worldwide.[51] Additionally, as in 1988, Senator Murkowski intended to use the proposed amendment as leverage to motivate Japan to commit to genuine reform of its construction industry.[52]

USTR officials set May 1, 1991 as the deadline for completing the review of the 1988 MPA.[53] In order to avoid implementation of the Murkowski Amendment and section 301 sanctions, it was necessary for the Japanese construction market to be open to U.S. contractors by the deadline.[54] Specifically, Japan needed to make more projects applicable to the 1988 MPA,[55] as well as make their bidding procedures more transparent.[56] With the impending formulation of section 301 sanctions, U.S. and Japanese negotiators reached an agreement on June 1, 1991, which more than doubled the applicable projects under the 1988 MPA.[57] Although U.S. and Japanese negotiators were deadlocked, Japanese Prime Minister Toshiki Kaifu intervened to make the final decision "in consideration of overall Japan-U.S. relations."[58]

The U.S. and Japan signed the 1991 Major Projects Arrangements Agreement (MPA) on July 31, 1991.[59] The MPA adds seventeen government approved projects and six planned projects to the 1988 MPA, worth an estimated 26.7 billion dollars over the next ten

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49. *Japan: Construction Ministry Imposing New Measures Aimed at Banning Bid-Rigging in Public Works*, 7 Int'l Trade Rep. (BNA) 64 (1990).

50. *Japan: Murkowski Likely to Drop Construction Amendment if Talks a Success, Aide Says*, 7 Int'l Trade Rep. (BNA) 1295 (1990). The 1990 amendment was identical to the Brooks-Murkowski Amendment, which was implemented in 1988 and served as a catalyst for the formation of the 1988 MPA. *Id.*

51. *Id.* The Japanese contractor's (Niigata) bid was some 20 million dollars less that AEG's bid of 53 million dollars. *Id.* This indicated to AEG that Niigata was dumping (buying the job for well under what it can be done for in reality). *Id.* Therefore, AEG argued that Niigata should have been disqualified because their bid was too low to perform the contract and they had no experience in people-mover construction. *Id.*

52. *Id.* In fact, Murkowski was expected to drop the amendment if the present negotiations regarding the review and revision of the 1988 MPA were successful. *Id.*

53. *Japan: Japan, U.S. Agree to Hold Another Meeting on Dispute Over Public Works Construction*, 8 Int'l Trade Rep. (BNA) 276 (1991) [hereinafter *Public Works*].

54. *Id.*

55. *Id.* U.S. officials stated that they would not rest until the entire Japanese construction market was open to U.S. firm participation, but Japanese officials categorically rejected expanding the agreement to include a completely open market, even though that is exactly what the Japanese enjoy in America. *Id.*; *Japan Talks*, *supra* note 2, at 504.

56. *Public Works*, *supra* note 53, at 276. A more transparent bidding system, possibly without a prequalified bidders list, would make it very difficult, if not impossible, for Japanese contractors to engage in bid-rigging and blackballing of subcontractors. *Id.*

57. *Japan: Construction Negotiations Go Down to Wire as Japan Agrees to Open More Public Projects*, 8 Int'l Trade Rep. (BNA) 846 (1991).

58. *Id.*

59. *New Agreement*, *supra* note 12, at 1171. The MPA was signed by U.S. Commerce Secretary Robert A. Mosbacher and Japan's Ambassador Ryohei Murata. *Id.*

to fifteen years.[60] Additionally, the MPA provides for greater transparency in Japanese bidding procedures, a simplified ranking system for designating potential bidders, and a procurement review board to handle complaints.[61] Further, the MPA was subject to review after one year,[62] whereby section 301 sanctions could still be initiated if the USTR felt that Japan was still discriminating against U.S. construction companies.[63]

In early 1992, USTR officials stated that gains under the MPA had been marginal.[64] Consequently, the U.S. is seeking to add thirty-five projects to the MPA in an effort to make it easier for U.S. firms to win Japanese public construction contracts.[65] Those projects, if included in the MPA, would be subject to the MPA's more transparent bidding procedures. Japan's position is that the purpose of the MPA is to give U.S. firms a chance to familiarize themselves with the Japanese construction industry and that after this initial period, the MPA will no longer be necessary because U.S. firms will then be established in Japan.[66] However, U.S. officials believe that without serious changes in Japan's current construction law, U.S. contractors would be completely shut out of the Japanese construction market if the MPA is not maintained in full and continuous force.[67]

III. THE GOALS AND PURPOSES OF THE MPA

A. Japan's Construction Market and the Need for the MPA

In order to understand the MPA, it is vital to be aware of the construction practices in Japan which created its closed construction market.[68] U.S. interest in the Japanese construction industry has been heightened by the huge trade surplus that Japan has had in recent years.[69] As a result, the U.S. Department of Commerce began negotiating with the Japanese in an effort to break down the barriers caused by their closed construction industry.[70] In particular, U.S. officials wanted Japan to ease its licensing requirements and create a more transparent bidding system,[71] which would foster a more competitive

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60. *Id.*

61. *Id.* The MPA also adds a new "track IV" for procurement of design and consulting services, in addition to the three tracks already covered: Track I, procurement of goods; track II, procurement of construction services; and track III, procurement of architectural design and consulting services. *Id.*

62. *Id.* U.S. Commerce Secretary Mosbacher stated that "[a]nything short of [a completely open Japanese public construction market] is disappointing, but the [MPA] is a very large step in that direction . . . ." Further, he added that "[w]e will not be satisfied until [Japan's public construction market] is completely open just as our public procurement is <open> in this country to Japanese or any foreign firm." *Id.*

63. *Id.*

64. *Japan: U.S. Seeks Access*, *supra* note 5, at 1377.

65. *Id.*

66. *Id.* at 1377-78.

67. Telephone Interview with Jack Randolph, International Construction Industry Expert, U.S. Department of Commerce (Feb. 4, 1993) [hereinafter Randolph Interview]. This point is further supported by the fact that U.S. contractors who are trying to participate in projects which are not designated under the MPA are being barred by the commissioning entities solely for that reason. *Id.*

68. LEVY, *supra* note 6, at 388.

69. *Id.*

70. *Id.*

71. KRAUSS, *supra* note 6, at 5. By creating a more transparent bidding system which precludes bid-rigging, U.S. contractors will be able to bid on equal footing with established Japanese contractors, and thereby have an equal opportunity to be awarded contracts.

atmosphere and give U.S. contractors an opportunity to be awarded construction contracts.[72] Although a detailed discussion regarding the Japanese construction industry is beyond the scope of this Comment, a brief description of the Japanese construction procurement system is necessary to illustrate how U.S. and foreign contractors have been shut out of Japan's construction market.[73]

Prior to the MPA, foreign contractors attempting to procure a construction license in Japan faced formidable obstacles.[74] In particular, contractors had to show "the ownership of a minimum amount of property and the employment of a minimum number of qualified engineers in Japan."[75] Further, contractors had to show past experience on similar projects, as well as prove that their engineers were not only Japanese but had achieved a certain level of expertise and experience.[76] These requirements proved to be overly burdensome to U.S. contractors.[77]

Even if U.S. contractors could obtain a construction license, they would still have to be prequalified to bid.[78] Under Japan's bidding law, the Ministry of Construction ranks contractors in order to determine projects in which they would be qualified to participate.[79] A contractor's experience is of primary importance in obtaining a good ranking, and, until recently, only experience in Japan counted towards a contractor's ranking.[80] Although new Japanese contractors could obtain adequate rankings for small projects, such projects were financially impossible for large U.S. contractors to undertake.[81] Consequently, it proved to be a true catch-22 for foreign contractors in Japan, because in order to be ranked high enough to qualify for a large project, large project experience in Japan was needed, and in order to gain large project experience in Japan, a high ranking was necessary.[82] This ranking system effectively acted as a complete bar to large U.S. contractors.[83]

While this system of prequalification appears to result in a simplified bidding process, in practice, "it has permitted the practice of collusive bidding, pre-bid consultation and price

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72. *New Agreement, supra* note 12, at 1171.

73. For a more detailed description of Japan's construction practices, see LEVY, *supra* note 6 *passim*; HASEGAWA & THE SHIMIZU GROUP FS, *supra* note 3, at 195; KAREL VAN WOLFEREN, THE ENIGMA OF JAPANESE POWER 114-20 (1989); David L. Richter, *Legal Barriers to U.S. Firm Participation in the Japanese Construction Industry*, 12 U. PA. J. INT'L BUS. L. 755, 760 (1991).

74. Richter, *supra* note 73, at 760.

75. HASEGAWA & THE SHIMIZU GROUP FS, *supra* note 3, at 6.

76. LEVY, *supra* note 6, at 70.

77. *See Japan: Top Japanese Construction Official Says U.S. Firms Must Work Harder to Tap Market*, 5 Int'l Trade Rep. (BNA) 162 (1988) [hereinafter *Top Market*]. U.S. officials felt that given the amount of subjectivity in the Japanese licensing system, even if a U.S. contractor could obtain the requisite qualified engineers, the Japanese official would simply hold that the contractor did not have sufficient experience to warrant the award of a construction license. *Id.* In fact, one industry spokesman believed that the Japanese bidding system was a catch-22 because, regardless of the laws, if a construction company did not have experience in Japan, a license would not be issued. *Id.*

78. LEVY, *supra* note 6, at 71-72.

79. Richter, *supra* note 73, at 762.

80. *Id. See* LEVY, *supra* note 6, at 72. Additional factors Japan considers in ranking contractors include: annual sales volume of similar projects; number of employees in the company; owned capital; ratio of current assets to current liabilities; ratio of fixed assets to capital; ratio of net profit to total liabilities and net worth; number of years in business; work history; safety record; and record of labor relations. *Id.*

81. *See* KRAUSS, *supra* note 6, at 3-6 (discussing the Japanese bidding system in general).

82. Richter, *supra* note 73, at 762.

83. *Japan: Latest Japanese Offer To Open Construction Markets Rejected By U.S. Officials In Tokyo*, 5 Int'l Trade Rep. (BNA) 234 (1988).

adjustment between the fraternity of large contractors on the invited bidders list."[84] This system of bid-rigging and collusion is known as *Dango*.[85] U.S. officials contend that the Japanese bidding system must become more transparent[86] in order for foreign contractors to have a fair opportunity to successfully bid on Japanese construction projects.[87]

The combination of these aspects of the vast and rich Japanese construction system resulted in a construction market which was closed to U.S. contractors.[88] This conflict formed the basis of negotiations between U.S. and Japanese officials.[89] The goal of the U.S. was to have Japan adopt a nondiscriminatory procurement policy for all public works projects performed in Japan.[90]

B. Policies of the MPA

Part I of the MPA sets forth certain policies to be followed by both the U.S. and Japanese governments in an effort to implement and improve upon the MPA.[91] In particular, the government of Japan promises to "maintain open, transparent, competitive and nondiscriminatory procedures in the procurement of public works, and to treat foreign firms no less favorably than domestic firms, including providing information in a nondiscriminatory manner."[92] Further, the government of Japan will "welcome foreign firms into the Japanese market and will... undertake positive steps to promote and facilitate the entry of foreign firms into the Japanese construction market."[93]

With respect to continued improvement of the Japanese procurement system, the Japanese Government is committed to ongoing negotiations with the private construction industry in Japan in an effort to develop a uniform system of procurement that will "further enhance and facilitate international competition in Japan's construction market."[94] In fact, Japan is currently involved in discussions in the GATT, "which are aimed at formulating international rules concerning the procurement system for public works, that would serve as the basis for reforms of national procurement systems of the GATT contracting parties."[95]

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84. LEVY, *supra* note 6, at 72-73. The invited bidders list is a list of contractors that have been approved by a commissioning agency to bid on a particular project. *Id.*

85. *Id.* at 195-96. *Dango* is a system in which the prequalified bidders consult among themselves and determine whose turn it is to win the contract. *Id.* Additionally, an appropriate political individual was given a large kickback to ensure the continuance of the illegal process. *Id.* Although *Dango* is illegal under Japan's anti-monopoly law, it is an acknowledged practice that many consider a leveling device to keep the market forces in check. *Id.* However, this practice is deadly to foreign contractors who are locked out of the fraternity. *Id.*

86. In the U.S., there is no prequalified bidders list on public projects. Therefore, there is no opportunity for bidders to get together and determine who is going to win the next bid, or pool in money to pay a government official to ensure that the intended contractor is awarded the project.

87. *Top Market, supra* note 77, at 162.

88. *See supra* notes 68-72 and accompanying text (discussing Japan's closed construction industry).

89. LEVY, *supra* note 6, at 388-98.

90. *Id.*

91. MPA, *supra* note 1, app. II, pt. I, § I.

92. *Id.*

93. *Id.*

94. *Id.* app. II, pt. I, § III. It is clear in the statement of policies, although the agreement is bilateral in nature, that it is the intent of the parties to have the MPA apply to all foreign contractors, not just U.S. contractors. *Id.*

95. *Id.* app. II, pt. I, § IV.

One recent article advanced that the GATT negotiations have made considerable progress in encouraging international trade in services.[96]

The government of Japan will also strive to eliminate bid-rigging from their construction industry.[97] In particular, Japanese officials will strictly enforce the provisions of the Antimonopoly and Fair Trade Maintenance Act (Antimonopoly Act).[98] Further, the MPA sets out specific provisions for dealing with the problem of *Dango*.[99] The success of the MPA depends upon the good-faith implementation of these policies.

C. *Specific Provisions of the MPA*

1. *Construction Tracks*

Because construction procurement contracts come in many forms, the MPA established four "tracks" in order to implement specific regulations when necessary. Track I specifies special measures[100] for the procurement of goods.[101] Track II specifies special measures for the procurement of construction services.[102] Track III specifies special measures for procurement of design and consulting services.[103] Track IV specifies special measures for procurement of a combination of design and consulting services with the supply, manufacturing and/or installation of goods.[104] Additionally, track I and track IV will be implemented in conjunction with the GATT Agreement on Government Procurement of Goods.[105]

The primary purpose of the special measures is to specify certain administrative requirements which apply to each track.[106] Requirements include particular procurement procedures, such as where information can be found regarding the procurement of a particular project, the time period between notice and bidding, notification of designated participants, how and when bidding will be initiated and the contract will be awarded, and any special meetings that are required to explain preliminary specifications for construction.[107]

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96. Russel Watson et al., *An 'October Surprise'?*, NEWSWEEK, October 26, 1992, at 47. The implication is that a government procurement code for services would be established that is similar in purpose and effect to the government procurement code for goods. *Id.*

97. MPA, *supra* note 1, app. II, pt. I, § V.

98. Antimonopoly and Fair Trade Maintenance Act, Law No. 54 (1947) (Japan). The purpose of the Antimonopoly Act is to prevent undue restraint of trade and unfair business practices, thereby promoting free and fair competition in business activities. 3 DOING BUSINESS IN JAPAN § 6.04[4][b] (Zentaro Kitagana ed., 1990). While the Antimonopoly Act addresses some of the same concerns as the MPA, due to corrupt practices, it has rarely been enforced. *Id. Dango* is covered by the Antimonopoly Act. *Id.* § 6.04[4][b][i]. The Japan Fair Trade Commission enforces the Antimonopoly Act through various measures such as cease and desist orders or divestment of business privileges. *Id.*

99. MPA, *supra* note 1, annex A, Measures to Prevent Bid-Rigging.

100. *See generally id.* app. II, pt. II, § VI(1)-(4) (discussing tracks I-IV generally). The special measures refer to rules which are specific to a certain track. *Id.* Because there are slight differences in each track, some special rules were necessary. *Id.*

101. *Id.* app. II, pt. II, § VI(1).

102. *Id.* app. II, pt. II, § VI(2).

103. *Id.* app. II, pt. II, § VI(3).

104. *Id.* app. II, pt. II, § VI(4).

105. *Id.* app. II, pt. II, § VI(1).

106. *Id.* app. II, pt. II, § VI(1)-(4).

107. *Id.*

2. *Licensing*

Under the MPA, contractors, architects, and engineers must be licensed by the Ministry of Construction before engaging in any procurement process in Japan.[108] However, contracting parties do not need a license in order to provide consulting services or to supply goods.[109] Prior to the MPA, obtaining a construction license was one of the most difficult hurdles to entering the Japanese construction market.[110]

The most important change in Japan's licensing requirements is that contractors no longer need prior experience in Japan.[111] Further, "[o]n receiving applications for authorization of foreign managerial and technical qualifications and/or experience, the Ministry of Construction will assess the foreign qualifications and/or experience on an individual basis.... [and] there will be no unfavorable treatment for foreign qualifications or experience."[112] Additionally, "foreign companies will be given no less advantageous treatment than Japanese companies except for the period necessary for authorization processing."[113] The processing period for foreign companies will be two to four months for licenses issued by the Ministry of Construction and one to two months for licenses issued by a Perfectural Governor.[114] If a company does not receive its license after ninety days from the date the application was submitted, the company may request and receive an explanation from the Ministry of Construction.[115]

3. *Ranking Contractors*

Once a construction company obtains a license, the MPA still requires that it obtain a sufficiently high ranking to bid on large public works projects.[116] This has proven to be very difficult for foreign contractors who have little or no experience in the Japanese construction market.[117] In response to this problem, the MPA provides that "[i]n evaluating a foreign firm for purposes of ranking,... commissioning entities will treat the results of an inquiry into the firm's experience and technical competence acquired in a foreign country as equivalent to experience and technical competence acquired in Japan."[118] In addition, the MPA sets forth a comprehensive list of factors which are used by commissioning entities in ranking companies, as well as formulas to determine the weight that each factor is allocated.[119]

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108. *Id.*; Special Brief on MPA (Draft No. 2, Feb. 10, 1992), U.S. Department of Commerce, at 3-19 [hereinafter Special Brief on MPA].

109. *Id.*

110. *See supra* notes 74-77 and accompanying text (discussing pre-MPA licensing requirements in Japan).

111. MPA, *supra* note 1, app. II, pt. II, § X(5).

112. *Id.* app. II, pt. II, § X(1).

113. *Id.* app. II, pt. II, § X(2).

114. *Id.* app. II, pt. II, § X(4).

115. *Id.*

116. *See supra* notes 78-83 and accompanying text (discussing pre-MPA ranking requirements in Japan).

117. *Id.*

118. MPA, *supra* note 1, app. II, pt. II, § XI.

119. *Id.* app. II, annex D. Factors include: (1) average annual value of completed projects in a related field; (2) net worth; (3) number of staff members engaged in the construction business; (4) general business condition of the company, such as profitability and liquidity; (5) number of technical staff members; (6) number of years in business; (7) construction performance history; (8) experience in special construction; (9) safety record; and (10) state of labor welfare. *Id.*

4. Measures to Prevent Bid-Rigging (Dango)

Once a company has met the requisite licensing and ranking requirements, it is still necessary to get past the problem of collusive bidding and other illegal bid-rigging practices which are pervasive in the Japanese construction industry.[120] In response to such problems, the MPA includes special measures aimed at eliminating bid-rigging in Japan.[121] The measures require that increased vigilance and stiffer penalties be imposed by the agencies[122] responsible for investigating alleged bid-rigging.[123] Additionally, such agencies are required to report relevant information about bid-rigging or suspected bid-rigging to the Japan Fair Trade Commission (JFTC).[124] The JFTC will strictly enforce the Antimonopoly Act[125] against all companies which have participated in illegal bid-rigging practices.[126]

Not only will the government of Japan enforce the Antimonopoly Act more vigorously, but it will also impose stricter penalties on violators.[127] In particular, Japan may double designation suspensions[128] and expand the geographic area that the suspension covers to include the whole country instead of a limited area.[129] To effectively prevent bid-rigging, the government of Japan ensures that all bidders are aware that Antimonopoly Act violations will be vigorously prosecuted, that successful bids which result from bid-rigging will be declared invalid, and that all bidders will be required to state that their bids were produced in compliance with all applicable laws and not as the result of any collusive bidding practices.[130]

5. Complaints Mechanism

In case of disputes, the MPA includes a comprehensive complaints mechanism.[131] The government of Japan established the Procurement Review Board (PRB),[132] consisting of neutral third parties[133] "who have knowledge and experience related to public sector procurement."[134] The PRB renders findings of fact to determine whether any of the special

120. *See supra* notes 84-87 and accompanying text (discussing bid-rigging in Japan).

121. MPA, *supra* note 1, app. II, Annex A.

122. *Id.* The two primary agencies responsible for implementing the measures to prevent bid-rigging are the National Coordinating Committee for Implementation of Public Works Contracts Procedures (NCC) and the Procurement Review Board (PRB). *Id.* § 2.

123. *Id.* app. II, annex A, §§ 1-2.

124. *Id.* § 2.

125. *See supra* note 98 and accompanying text (discussing the Antimonopoly Act).

126. MPA, *supra* note 1, app. II, annex A, § 3. The JFTC will make public any actions that are taken against companies engaging in bid-rigging, as well as the names of the offenders, the nature of the offense, and the surroungind circumstances. *Id.* The JFTC may also make warnings in public. *Id.*

127. *Id.* § 4.

128. Randolph Interview, *supra* note 67. A designation suspension occurs when a company has violated the bid-rigging laws and its right to be designated to bid on projects has consequently been rejected. *Id.*

129. MPA, *supra* note 1, app. II, annex A, § 4.

130. *Id.* app. II, annex A, § 5.

131. *Id.* app. II, pt. II, § VII. The MPA negotiators consider the complaints mechanism vital to secure fair and open competition and to ensure compliance with the terms of the agreement. *Id.* § 1.

132. *Id.* app. II, pt. II, § VII(2).

133. *Id.* No member of the PRB will participate in the review process if there exists a conflict of interest between said member and a party in the complaint. *Id.*

134. *Id.*

measures are violated.[135] In the case of a pre-award complaint,[136] the PRB may require that the procurement process be suspended until the resolution of the complaint.[137] In the case of a post-award complaint,[138] the PRB may require that the contract performance be suspended pending the resolution of the complaint.[139] In either case, the commissioning agency[140] must comply with the suspension requirement unless "urgent and compelling circumstances" exist, in which case the commissioning entity will inform the PRB in writing why it cannot comply with its request.[141] If the PRB finds in favor of the complaining party, it will recommend a remedy[142] to the appropriate enforcement authority.[143]

The complaints mechanism has never been utilized by a contractor to settle a grievance under the MPA.[144] However, a similar complaints mechanism is contained in the U.S.-Japan 1987 Supercomputer Agreement,[145] which is currently being utilized by one U.S. firm.[146] Although the initial result of this action was not in favor of the U.S. firm, the review process appeared to be neutral and detached.[147] Ultimately, U.S. contractors must utilize the MPA complaints mechanism to determine whether the PRB will act as a neutral third party, and whether the complaints mechanism is a useful deterrent against Japan's collusive bidding practices.[148]

IV. THE LEGALITY OF THE MPA

The MPA should be distinguished from other voluntary export restraints[149] between the U.S. and Japan over the past decade, in which Japanese exporters unilaterally and independently imposed export quotas on themselves.[150] Typically, voluntary export restraints are not supported by any formal agreement between the U.S. and Japan, even

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135. *Id.*

136. Randolph Interview, *supra* note 67. A pre-award complaint is one that is filed alleging illegal bid-rigging practices before the contract has been awarded. *Id.*

137. MPA, *supra* note 1, app. II, pt. II, § VII(4).

138. Randolph Interview, *supra* note 67. A post-award complaint alleges illegal bid-rigging practices and is filed after the contract has been awarded. *Id.*

139. MPA, *supra* note 1, app. II, pt. II, § VII(4).

140. Randolph Interview, *supra* note 67. The commissioning agency is in charge of procuring the particular project in question. *Id.* Examples of commissioning agencies include the Corps of Engineers and state governments. *Id.*

141. MPA, *supra* note 1, app. II, pt. II, § VII(4).

142. *Id.* app. II, pt. II, § VII(5). Examples of recommendations include: issuing a new solicitation package; seeking new bids; re-evaluating offers; awarding the contract to another party; or terminating the contract. *Id.*

143. *Id.*

144. Telephone Interview with Jean Heilman Grier, Senior Counsel for Trade Agreements, U.S. Department of Commerce (Feb. 4, 1993) [hereinafter Grier Interview].

145. Supercomputer Agreement (Aug. 7, 1987) (on file with the U.S. Department of Commerce, Office of General Counsel).

146. Grier Interview, *supra* note 144.

147. *Id.* The use of the complaints mechanism in the Supercomputer Agreement has given U.S. officials an opportunity to gauge the complaint mechanism's effectiveness. *Id.*

148. *Id.*

149. *See* Kojo Yelpaala, *The Lomé Conventions and the Political Economy of the African-Caribbean-Pacific Countries: A Critical Analysis of the Trade Provisions*, 13 N.Y.U. J. INT'L L. & POL. 807, 842-45 (1981) (discussing voluntary export restraints). *See also* 6 ANDREAS F. LOWENFELD, PUBLIC CONTROLS ON INTERNATIONAL TRADE 195-251 (1983) (discussing voluntary restraints generally).

150. *See* Yelpaala, *supra* note 149, at 845 (noting that voluntary export restraints are some of the most important and commonly used nontariff restrictions).

though the basis for the action may be the result of U.S. pressure.[151] Therefore, it could be argued that there was no agreement at all but merely unilateral action by Japan.[152]

In the case of the MPA, there is little doubt that there are at least two parties to the agreement, the U.S. and Japan. Although one cannot immediately conclude that the MPA is an agreement, the use of the phraseology "acceptable to our two governments,"[153] "[t]he Government of Japan will implement the measures,"[154] and "[t]he adjustments . . . will enable our governments to resolve procedural questions"[155] is merely a camouflage of what actually took place between the U.S. and Japan.

The U.S. and Japan recognized that there was no international agreement on construction procurement and, therefore, negotiated a bilateral agreement to apply to Japan's closed construction market.[156] The language of the arrangement and correspondence between the U.S. and Japan strongly suggest that the parties intended to agree on establishing a procedure to deal with government procurement problems in the Japanese construction industry. Therefore, it would appear that not withstanding the absence of the use of the word "agreement," the MPA is nothing short of an international agreement between the U.S. and Japan.

Although the MPA was not entered into with the usual formalities of a treaty, the legality of the agreement between the U.S. and Japan cannot hinge on the finding that it is a treaty. It is a contract, pure and simple, and like every contract its legality or binding effect depends upon the intentions of the parties. Everything surrounding the MPA suggests that the parties intended for it to be legally binding.[157] This is further borne out by the fact that the MPA contains a complaints mechanism by which grievances can be addressed.[158]

The incorporation of a complaints mechanism into the MPA indicates that both the U.S. and Japan intend for the MPA to be a legally binding agreement. The PRB is comprised of Japanese officials. Although there is no reason to believe that the PRB will not act as a fair and neutral body, there is a fear that, if faced with conflicting U.S. and Japanese interests, the PRB may have difficulty acting as a truly disinterested review board. In fact, some would consider the PRB an interested body by definition, and incapable of acting neutrally when U.S. interests compete with Japanese interests. Further, in the event that an American contractor becomes disgruntled with the outcome of an action, because of the belief that the PRB ruled against him based on the Japanese interest involved, what remedies are left which will not threaten the integrity and existence of the MPA itself?

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151. *Id.* at 844-45. Exporting countries unilaterally impose voluntary export restraints upon themselves to avoid the implementation of trade sanctions by importing countries. *Id. See* JOHN H. JACKSON & WILLIAM J. DAVEY, LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS 609-22 (1986) (discussing voluntary restraints generally).

152. *See* Malcolm D.H. Smith, *Voluntary Export Quotas and U.S. Trade Policy–A New Nontariff Barrier?*, 5 LAW & POL'Y INT'L BUS. 10 (1973) (discussing the affect of voluntary export restraints).

153. Letter from Ryohei Murata, Ambassador of Japan, to Robert A. Mosbacher, Secretary of Commerce (July 31, 1991) (on file with the U.S. Department of Commerce, Office of General Counsel) [hereinafter Murata Letter].

154. *Id.*

155. Letter from Robert A. Mosbacher, Secretary of Commerce, to Ryohei Murata, Ambassador of Japan (July 31, 1991) (on file with the U.S. Department of Commerce, Office of General Counsel).

156. Murata Letter, *supra* note 153.

157. *See supra* notes 18-67 and accompanying text (discussing the development of the MPA).

158. *See supra* notes 131-48 and accompanying text (discussing the complaints mechanism).

As the MPA is written, there is no appeals process whereby an unsatisfied claimant can seek review of a PRB decision. The only tool available to U.S. contractors at this point is the threat of section 301 sanctions,[159] but only U.S. officials have the authority to exercise such action. However, section 301 is only a threat, and as such, it places the existence of the MPA at risk because it creates confusion as to how the problem will ultimately be resolved.

In an effort to make the MPA legally binding without risking the agreement itself, the U.S. and Japan should add a second layer to the complaints mechanism. The appeals process should allow a party who is unsatisfied with the ruling of the PRB to appeal to an international board of arbitrators located in a neutral country and made up of construction experts and attorneys from neutral countries. This system would guarantee disinterested review of challenged decisions under the PRB, which will not be subject to attack on the basis that the ruling authority has an interest in the outcome of the action.

V. MPA AS A BASIS FOR A MULTILATERAL AGREEMENT UNDER THE GATT

Incorporating the policies of the MPA into a multilateral agreement within the international community would be the ultimate result of U.S. negotiations with Japan.[160] Although the MPA is written in neutral language to support its adoption by other nations,[161] U.S. officials cannot negotiate on behalf of other nations without their involvement.[162] Consequently, it is crucial to the forwarding of a multilateral construction procurement agreement that all nations within the international construction community actively negotiate with Japan. Such an agreement should not only focus on Japan becoming an open market, but on opening the markets of other countries as well. Under the MPA, the government of Japan will pursue multilateral discussions in the GATT aimed at formulating international rules which will govern the national procurement systems of the GATT contracting parties.[163] In fact, pursuant to the policies of the MPA, the GATT Government Procurement of Goods Code (GPGC)[164] has been incorporated into tracks I and IV of the MPA, which involve the procurement of construction goods.[165] If combined, the MPA and the GPGC could serve as a model for developing a GATT code which covers the government procurement of both construction goods and services.

GATT officials have criticized Japan for its involvement in bilateral agreements, such as the MPA, despite Japan's stated support for multilateral agreements.[166] GATT officials argue that Japan should become more active in pursuing multilateral agreements under the GATT for its own benefit, "including long-run economic competitiveness," instead of remedying trade imbalances with individual countries through bilateral agreements.[167]

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159. *See supra* note 28 (discussing section 301).

160. Randolph Interview, *supra* note 67.

161. *See supra* note 91-99 and accompanying text (discussing the policies of the MPA).

162. Randolph Interview, *supra* note 67.

163. MPA, *supra* note 1, app. II, pt. I, § IV.

164. General Agreement on Tariffs and Trade Multilateral Negotiations: Agreement on Government Procurement, April 11, 1979, 55 U.N.T.S. 187. The GPGC governs the procurement of goods between member nations. *Id.* It does not regulate the procurement of services. *Id.*

165. *See* Grier, *supra* note 28, at 29-30 (discussing the role of GATT in the MPA).

166. *Japan Plays Bilateral Game Behind Multilateral Mask*, FIN. TIMES, Oct. 14, 1992, at 8.

167. *Id.*

Japan's involvement in bilateral agreements creates the impression in the global economic community that Japan is not willing to become a true player in the inevitable globalization of the economic arena.[168] As a result, Japan's reputation could be seriously hampered in the future as the global economic community becomes more of a reality.[169]

During recent GATT trade talks, Japan showed interest in pursuing the development of multilateral agreements in service industries[170] such as construction.[171] GATT negotiators are hopeful that Japan's recent interest will trigger progress in the area of government procurement.[172] The MPA and GPGC could serve as a valuable starting point for a multilateral agreement covering construction procurement in today's global construction industry.

VI. CONCLUSION

The MPA has made significant progress in opening up Japan's historically closed construction market to U.S. and other foreign contractors. In fact, since July of 1991, thirty-two U.S. companies had construction business licenses in Japan and eight U.S. design firms had registered as First Class Architect Firms.[173] Increased and continuous negotiating by U.S. officials has resulted in less stringent licensing requirements, as well as more transparent bidding procedures. However, U.S. officials are not satisfied that Japan's construction market is sufficiently open.[174] U.S. officials will continue to work towards creating a completely open Japanese construction market for U.S. contractors, just as Japanese contractors enjoy in America.[175] However, the entire Japanese construction industry, which has developed primarily since World War II, cannot be expected to transform to meet U.S. needs overnight.[176]

In the meantime, it is necessary that both U.S. and other foreign officials continue to exert pressure on the Japanese Government in an effort to ensure that a completely open Japanese construction market is realized one day.[177] The benefits of pursuing a multilateral agreement with Japan, which follows the guidelines set forth in the MPA, are too great to ignore. Such an agreement would make great strides towards a global construction market, which would benefit all countries involved.

R. Allen Ennis, Jr.

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168. *Id.*

169. *See id.* (discussing the ramifications of Japan's attitude towards bilateral and multilateral agreements).

170. *Eastern Promise on GATT*, INT'L FIN. L. REV., Jan. 1993, at 3.

171. *GATT: Japan Proposes Measures on Services to Help Conclude Uruguay Round Talks*, 10 Int'l Trade Rep. (BNA) 15 (1993).

172. *GATT: GATT Negotiators Focus on Market Access in an Attempt to Reach a Breakthrough*, 10 Int'l Trade Rep. (BNA) 51 (1991).

173. MPA, *supra* note 1, app. I.

174. Telephone Interview with Jack Randolph, International Construction Industry Expert, U.S. Department of Commerce (Jan. 14, 1993).

175. *Id.*

176. Richter, *supra* note 73, at 775.

177. *Id.*