

APEC: An Assessment

Merit E. Janow

Discussion Paper No. 3

Merit E. Janow
Professor in the Practice of International Trade
School of International and Public Affairs
Co-Director, APEC Study Center
Columbia University



**Discussion Paper Series
APEC Study Center
Columbia University
January 1997**

APEC: AN ASSESSMENT

Merit E. Janow¹

Introduction

This article examines the Asia-Pacific Economic Conference (APEC) forum as a new institution to promote economic integration in the Asia-Pacific region.² APEC does not lend itself to straightforward definition. It was formed only recently in 1989, currently is comprised of 18 member "economies"³ and is organized around a set of intergovernmental meetings. Its very nomenclature, APEC, lacks a descriptive noun.⁴

At this stage in its development it is not patterned on a formalized free-trade arrangement, such as that embodied in the U.S.-Canada Free Trade Agreement (FTA) or the North America Free Trade Agreement (NAFTA); a policy and discussion forum such as the OECD; or seen as being the first step toward the creation of a European-style common market. It has coined the seemingly oxymoronic term of "open regionalism" to describe its approach to trade and economic issues.

Thus far, APEC members have shown little willingness to formalize APEC by means of binding agreements on a defined set of substantive economic or trade issues, nor have it members sought to create a regional institution with rule-making, interpretative, enforcement or adjudicative powers. Indeed, institutionalization of APEC through binding agreements or through the creation of a regional body with independent interpretive or rule-making powers would meet

¹ Professor in the Practice of International Trade, School of International and Public Affairs (SIPA), Columbia University, co-director APEC Study Center, Columbia University. From 1990-1993, Professor Janow was Deputy Assistant U.S. Trade Representative for Japan and China in the Office of the U.S. Trade Representative, Executive Office of the President, Washington D.C. She teaches international trade law at Columbia Law School and international economic and trade policy at SIPA. She has a J.D. from Columbia Law School and a B.A. from the University of Michigan in Asian Studies.

² This working paper will be published in the Northwestern Journal of International Law and Business in spring, 1997.

³ The 18 members of APEC include: China, Chinese Taipei, Hong Kong, Philippines, Malaysia, Thailand, Singapore, Indonesia, Brunei, Papua New Guinea, Australia, New Zealand, Chile, Mexico, South Korea, Japan, the United States and Canada. The terminology "economies" as distinct from countries was adopted by APEC to overcome the political difficulties associated with APEC's inclusion of China, Taiwan (called Chinese-Taipei for APEC purposes) and Hong Kong.

⁴ This same point was made in: Martin Rudner, Institutional Approaches to Regional Trade and Cooperation in the Asia Pacific Area. 4 *TRANSN'L L. & CONTEMP. PROBS.* 159 (1994). Journalists have put this more crudely. See, A Forest of Acronyms, *ASIaweek*, Nov. 16, 1994 at 29.

with strenuous opposition by many of its members.

Although APEC's future configuration and activities are at this juncture neither fully known nor agreed upon by its members, its goals and activities have become increasingly ambitious and far-ranging. And given the size of the APEC member economies and the economic dynamism of the Asia-Pacific region, its evolving institutional features as well as its substantive trade and economic agenda are matters of global economic significance. A few numbers offer perspective: APEC's 18 current member economies had a combined GDP of US \$16.42 trillion in 1994, representing 53.5 percent of the world's output.⁵

Much of the analytical and scholarly treatments of APEC have been undertaken by economists. Legal scholarship on APEC has been more limited, perhaps because of the circumscribed role of law in the APEC forum.⁶

In recent years, several diverging schools of thought have emerged with regard to APEC's significance for regional economic integration and what it means for the world trading system. Some economists have argued that APEC should not evolve into a regional free-trade agreement (FTA) because of the inherently preferential nature of free-trade arrangements and the deleterious effect that the proliferation of such arrangements could well have on the newly-formed World Trade Organization (WTO)⁷.

Other economists have argued that even though regional arrangements are a second-best

⁵ Central Intelligence Agency, *WORLD FACT BOOK*, 1995

⁶ Notable exceptions in this regard include: Kenneth W. Abbott & Gregory W. Bowman, *Economic Integration for the Asian Century: An Early Look at New Approaches*, 4 *TRANSN'L L. & CONTEMP. PROBS* 187, (1994); Harold Dichter, *Legal Implications of an Asia-Pacific Economic Grouping*, 16 *U. PA. J. INT'L BUS. L.* 99 (1995); Carl J. Green, *APEC and Trans Pacific Dispute Management*, 26 *LAW & POL'Y INT'L BUS.* 719, (1995); David K. Linnan, *APEC Quo Vadis?*, 89 *AM. J. INT'L L.* 824 (1995); Martin Rudner, *supra* note 3; Deborah A. Haas, *Out of Others Shadows: ASEAN Moves Towards Greater Regional Cooperation in the Face of the EC and Nafta*, 9 *AM. U. J. INT'L L. & POL'Y* 809 (1994),

⁷ Professor Jagdish Bhagwati argues that the proliferation of free trade agreements has already created a spaghetti bowl proliferation of preferential trading arrangements that detract from multilateral trade liberalization and the newly formed WTO. He argues that regional free trade arrangements have serious economic drawbacks and are also damaging to institutional arrangements to legitimate the world trading system. Given this perspective, he has urged Asian members of APEC to resist U.S. or internal pressures to evolve into a free trade agreement. Instead, APEC economies should resolve not to evolve into a free trade area, embrace an APEC agenda that includes coordination of policies and positions at the WTO, and help to launch a multilateral trade negotiation to reduce trade barriers on a non-discriminatory basis. See, Jagdish Bhagwati, *U.S. Trade Policy: The Infatuation with Free Trade Areas*, 1-37 in *THE DANGEROUS DRIFT TO PREFERENTIAL TRADE AGREEMENTS*, (Jagdish Bhagwati & Anne O. Krueger, eds., 1995).

alternative to global trade liberalization, concerns about the potentially deleterious effects of regional arrangements are not, in any event, germane to APEC. This perspective holds that the current and any likely future configuration of APEC offers an alternative model of regional economic cooperation, as well as trade and investment liberalization, that will produce gains for participating economies, be consistent with multilateral rules and the WTO, and prove supportive of still further multilateral trade liberalization.⁸

Although neither the Clinton Administration nor the Bush Administration before it concluded that APEC should become a formalized free-trade arrangement, officials have not rejected the proposition that regional and multilateral approaches can in some circumstances prove complementary.⁹

Many economic analyses of APEC focus primarily on its potential to achieve liberalization of trade and investment over the medium and long-term. Given the early stage of the APEC process, this longer term focus is in one sense both understandable and appropriate. A long-

⁸ See, for example, C. Fred Bergsten, *APEC and World Trade: A Force for Worldwide Liberalization*, 73 *FOREIGN AFFAIRS* 20 (1994). In this article, Dr. Bergsten argues that APEC would try to achieve regional agreement on issues that could not yet be resolved at a global issue and will thereby offer a "wholly new model of regional economic cooperation: a steady ratcheting up of trade liberalization between the regional and global levels that would confirm its dedication to 'open regionalism' ". *Id.* at 20.

⁹ During the Bush Administration, for example, James Baker, then Secretary of the Treasury, said: "We need to enhance the resiliency of the trading system by promoting liberalization on a number of fronts. While we normally associate a liberal trading system with multilateralism--bilateral or minilateral regimes may also help move the world toward a more open system". James A. Baker, *A New Trade Policy Strategy for the United States*, Address Before the Canadian Importers Association (June 22, 1988), reprinted in 11 *THE WORLD ECONOMY* 215, 216 (1988). Also, Dr. Lawrence Summers, now Under Secretary of the Treasury, argued in 1991 advanced a proposition that he has continued to expound as a Treasury official. Namely, that "economists should maintain a strong, but rebuttable, presumption in favor of all lateral reductions in trade barriers, whether they be multi, uni, bi, tri or plurilateral. Global liberalization maybe best, but regional liberalization is very likely to be good". See, Lawrence H. Summers, *Regionalism and the World Trading System*, in *ASIA PACIFIC REGIONALISM* 194, 195 (Ross Garnaut & Peter Drysdale ed., 1994). This perspective is reflected in many recent speeches by U.S. trade officials. See, for example, the statements of then U.S. Trade Representative Mickey Kantor that "regional arrangements...can prepare developing nations for admittance to the global trading system...and..they can complement global trading and lubricate negotiations." *Global Village Gathers Speed*, *FINANCIAL TIMES*, Oct. 13, 1993, at 11. And, the Acting U.S. Trade Representative, Ambassador Charlene Barshefsky stated recently: "APEC compliments--and bolsters--the World Trade Organization, as do bilateral negotiations". Ambassador Charlene Barshefsky, Acting U.S. Trade Representative, Remarks at the Pacific Basic Economic Conference, (May 21, 1996) available in <http://www.ustr.org>.

term perspective permits scholars and analysts to propose constructive approaches that can contribute to the discussions under way and enhance the possibility that APEC will achieve the ambitious goal it has set for itself of achieving free trade and investment in the Asia-Pacific region by 2020. However, simply focusing on APEC's long-term potential can obscure the very real obstacles that it is experiencing as it strives to implement its trade agenda.

This article provides a comprehensive review and assessment of APEC. A key issue that it addresses is APEC's current and potential future contribution to trade and investment liberalization.

It will argue that APEC's long-term trade policy goals, and the proposed methods of achieving those goals, are objectively ambitious, procedurally unusual, and of practical value to commercial enterprises operating in the region. APEC has also been consistent so far in its support of the multilateral trading system embodied in the rules and principles of the World Trade Organization (WTO).

In these respects and others, the potential long-term contribution of APEC is very great. However, APEC has produced few concrete results in any of its major agenda items and fundamental issues both of process and of substance remain unresolved by its members. Overall, this assessment of APEC therefore advances a largely positive interpretation of APEC as a vehicle for facilitating regional economic integration. It is less optimistic with respect to APEC's role in fostering regional or global trade liberalization. So far, the rhetoric of free trade in the Asia-Pacific has far outpaced the reality.

Organizationally, this article is divided into three sections.

Section I examines the factors that led to APEC's formation and describes its evolution since 1989; its various ministerial and other declarations, which are not legally binding documents but are intended to be statements of serious intent; and its self-identified goals for the future. Section I will provide a basis for evaluating, in Section II, APEC's current and likely future contribution to regional and global trade and investment liberalization and facilitation. Section III then examines a number of the major analytical and policy challenges facing APEC in the years ahead.

Section I: APEC's Evolution

A. Driving Factors

Many observers of APEC have noted that it has developed primarily in response to regional and global economic developments. At least four related factors are important in this regard.

First and foremost, APEC may be seen as a reaction to economic realities. Growing trade and investment in the Asia-Pacific region, and the intra-regional economic integration this implies, is a fairly recent phenomena. Throughout the 1980's, the economies of the Asian members of APEC grew at rates substantially higher than those of Europe and North America. Beginning in 19[86], intra-regional trade and investment came to represent the fastest growing dimension of Asia's trade.¹⁰

¹⁰ See, INTERNATIONAL MONETARY FUND (IMF), DIRECTION OF TRADE: YEARBOOK 1995 (1995).

A second factor that contributed to APEC's formation, and that continues to dominate discussions at APEC meetings, is the shared interest of its members in maintaining an open international trading regime. The developed and developing members of APEC have been major beneficiaries of the open trading system. Most are export-oriented. The importance of access to world markets has been the recurring refrain of APEC member nations.

A third factor that has been a major influence on APEC's development is the widespread anxiety about emerging regional trading arrangements elsewhere in the world. In its early days APEC was seen as a needed alternative initiative in the event that regional arrangements elsewhere became inward-looking trading blocs. Indeed, it is no coincidence that after many years of discussion about the value of fostering an Asia-Pacific initiative in order to facilitate regional cooperation, the APEC forum got off the ground only at a time when NAFTA negotiations were under way, when there were concerns about the potentially exclusionary consequences of EC-92, and there was a distinct possibility that the Uruguay Round would fail.¹¹

A fourth factor that has dominated the attention of APEC's members is a concern about the growing number of trade disputes involving APEC members--especially those between the United States and Japan and China. All four of these factors will become evident when we review APEC's history in section B.

B. A Review of APEC's Development¹²

The following discussion traces APEC's origins and activities up until the current time.

1. The First APEC Ministerial Meeting

The idea of an organization whose purpose it would be to facilitate economic cooperation in the Asia-Pacific region had postwar origins long predating the creation of APEC.¹³ However, APEC

¹¹ In January 1989, Ministers from Australia and Japan discussed the possibility of convening a meeting of industry ministers from about 10 Asia-Pacific governments. The Australian Minister for Industry, Commerce, and Technology was cited in Tokyo saying that there was widespread concerns that the two new trading blocks (E.U. and NAFTA) could develop protectionist characteristics and threaten free trade. "There ought to be a greater degree of cohesion in this region to stand up to that", Senator Button was quoted as saying. Earlier, Japan's Prime Minister Takeshita and Australia's Prime Minister Hawke agreed to jointly study the likely effects of the two blocks on the Asia-Pacific region. See, Australia: Push for New Asia Forum on Trade, THE AGE, Jan. 30, 1989. available in LEXIS, Nexis Library, ASIAPAC File.

¹² A good overview of APEC is presented in David K. Linnan, *supra* note 4.

¹³ Hadi Soesatro argues that the idea of Asia-Pacific cooperation had its postwar origins in three distinct periods: from the early 1960s to around 1967; a second period from 1968 to 1977, and the third period started in 1978, when more serious efforts were made to turn concepts into reality. With respect to the first period, Dr. Soesatro emphasizes the efforts of a Japanese LDP politician name Morinosuke Kajima, as well

itself got off the ground in no small measure because of the efforts of government officials and leaders from Australia and Japan¹⁴.

An important juncture in APEC's institutional history occurred in late January 1989, when then Australian Prime Minister Bob Hawke proposed the notion of expanded Asia-Pacific economic cooperation in a speech in Seoul, Korea¹⁵. Prime Minister Hawke argued that the OECD could

as academic studies by Japanese economists Saburo Okita and Kiyoshi Kojima. He notes the establishment in the early 1960s of the Japan Economic Research Center (JERC) which issued a report proposing that annual meetings be held among representatives from Australia, Canada, Japan, New Zealand and the United States. This was followed by a 1967 initiative from Japan's Prime Minister Sato, who endorsed the notion of a new Asia Pacific policy for Japan. The second period reflected an internationalization of the concept through academic circles. A series of conferences among Pacific basin economists under an organization called Pacific Trade and Development (PAFTAD) met to actively discuss the pros and cons of a Pacific free trade arrangement among the five developed Pacific countries. In 1972, Japan and Australia co-financed a study project conducted by JERC and Australia National University (ANU), headed by Saburo Okita and Sir John Crawford. The concepts that emerged during this period was a notion of cooperation around a loosely structured arrangement, similar to the OECD. The third period was punctuated by the interest in 1978 of Senator John Glen, Chairman of the Subcommittee on East Asian and Pacific Affairs, Committee on Foreign Relations of the U.S. Senate, which tasked the Congressional Research Service (CRS) to examine the feasibility of a regional economic organization. CRS, in turn, commissioned Professors Hugh Patrick, then of Yale University, and Peter Drysdale of ANU to conduct a study. Also in 1978, Prime Minister Ohira formed a Pacific Basin Cooperation Study Group to examine ways for enhancing regional cooperation in the Pacific. Gradually, through informal discussions among academics, business executives and officials in the region, an organization called PECC was formed in 1980. See, Hadi Soesatro, Pacific Economic Cooperation: The History of an Idea, 77-100 in ASIA PACIFIC REGIONALISM. *supra* note 5.

¹⁴ Officials in both Australia and Japan separately undertook their own internal analyses that focused on the possible contours of an Asia-Pacific economic organization. An important example was a study undertaken by the Government of Japan, notably the Ministry of International Trade and Industry (MITI) on prospects for cooperation in the Asia Pacific. In June, 1988 MITI's International Affairs Division completed its Interim Report, which argued that expanded Asia-Pacific cooperation was needed, possibility through an "Asia-Pacific OECD" along with a "soft cooperation network that will deepen mutual understanding and awareness of interdependent relationships". This network should be used to "facilitate dialogue and research", "promote mutual interest of the participating nations" and "build up gradually advancing cooperation that gives priority to dealing with actual needs". See, Asia Pacific Trade and Development Study Group, Interim Report, Ministry of International Trade and Industry, International Trade Policy Bureau, International Economic Affairs Department, MITI, June 1988.

¹⁵ At a luncheon speech in Seoul, Prime Minister Hawke said that the time had come "for us to substantially to increase our efforts towards building regional cooperation and

provide a useful model, and identified three ways in which the creation of a new institution could prove useful to further closer cooperations: first, by improving the chances of success of the Uruguay Round; second by investigating the scope for the further dismantling of barriers to trade within the region; and third by assisting in identifying broad economic interests shared in common and investigating whether through coordinated policy making regional countries might be able to capitalize on what, in rather hyperbolic fashion, he called the "extraordinary complementarity" of their economies.¹⁶

The Prime Minister's initial proposal did not clearly envision the participation of the United States nor Canada as part of this Asia-Pacific initiative, but rather focused on the importance of expanded efforts at regional cooperation among Australia, New Zealand, South Korea, Japan and the six members of ASEAN.

Officials in Japan greeted the Australian initiative with enthusiasm, but insisted on the inclusion of the United States.¹⁷

The first regional meeting of trade and foreign ministers was convened in November 1989 in Canberra, Australia. Officials from 12 countries were present at that meeting.¹⁸ It produced little in the way of a clearly defined mission, agreement on future membership, or APEC's structure or activities.¹⁹ "meet here today with any hidden agenda to create some form of Pacific trading bloc." Florence Chung, Australia: ASEAN Ministers Broadly Agree on a Common Strategy, BUSINESS TIMES, Nov. 6, 1990, available in LEXIS, Nexis Library, ASIAPAC File. Let us examine each of these dimensions in turn.

seriously to investigate what areas it might focus on and what forms it might take". See, Australia: Hawke Pushes for Regional Economic Body, THE AGE, Feb. 1, 1989, available in LEXIS, Nexis Library, ASIAPAC File.

¹⁶ He argued that "what we are seeking to develop is a capacity for analysis and consultation on economic and social issues, not as an academic exercise but to help inform policy development and by our respective governments". Id.

¹⁷ Press reports indicate that Japan's Prime Minister Takeshita wrote Prime Minister Hawke in March supporting the Seoul plan. In April, Hawke sent a senior Australian diplomat, Dick Woolcott on a series of talks throughout Asia on the proposed grouping and its draft agenda. See, Japan Economic Newsire (Nov 5, 1989) available in LEXIS, Nexis Library, ASIAPAC File; and Yoichi Funabashi, PACIFIC FUSION: JAPAN'S ROLE IN APEC, (1995).

¹⁸ The twelve countries represented included: Australia, New Zealand, Japan, South Korea, the United States, Canada and the Asean members of Indonesia, Thailand, Singapore, Malaysia, The Philippines and Brunei.

¹⁹ Prime Minister Hawke said that the meeting represented an "unprecedented, vital experiment in international consultation", and was an "initial exploratory meeting" taken in order to discuss the challenges faced by the countries represented at the meeting. See, Misuk Woo, Hawke calls for Mechanism for Pacific Co-Prosperity, JAPAN ECONOMIC NEWSWIRE, Nov. 5, 1989, available in LEXIS, Nexis Library, ASIAPAC File. He stressed that "we do not

As to its mission, this first meeting was used primarily to reaffirm the commitment of the ministers to the preservation of the multilateral trading system and the importance of the timely conclusion of the Uruguay Round.²⁰ The ministers also agreed on broad areas that should be the focus of future work programs.²¹

As to structure, prior to the meeting, the members of the Association of Southeast Asian Nations (ASEAN) had opposed Prime Minister Hawke's initial concept of an OECD-type organization in the Asia-Pacific. This notion did not emerge from the meetings.²² ASEAN representatives also were concerned that the forum might undermine ASEAN's role. Senior officials at the meeting stated that APEC was not designed "to launch a new institution but is a process of cooperation."²³ It was agreed that APEC would be characterized as a "process" complementary to, but not competitive with, ASEAN and were able to agree that APEC would be "a nonformal forum for consultation among high-level representatives of significant economies in the Asia-Pacific region."²⁴ It was further agreed that it was "premature to decide upon any particular structure for a Ministerial-level forum...but that while ideas were evolving it was both appropriate and valuable for further consultative meetings to take place and for work to be undertaken on matters of common interest and concern."²⁵

The meeting did not produce agreement on future membership, the key issue at the time being

²⁰ In an interview after the meeting, then-U.S. Trade Representative, Ambassador Hills said "the Ministers, to a person, agreed that their economic success was a result of the open trading system that they had all enjoyed and if there was one thing that came through in the conference it was unanimous support for the Uruguay Round negotiations." See, Steve Burrell, Australia: APEC Nations to Present United Front on Trade Issues, AUSTR. FIN. REV., Nov. 8, 1989, available in LEXIS, Nexis Library, ASIAPAC File.

²¹ The ministers agreed to initiate two projects in the near term on regional trade data and mechanisms so as to facilitate trade, investment, and technology-transfer opportunities in the region. They identified broad areas for future working including economic studies, trade liberalization, investment and sectoral cooperation. See, Chairman's Summary Statement, *supra* note

²² ASEAN officials were quoted as saying: "What we want is a consultation process. We see it as useful to have a larger circle for economic cooperation." See *supra* note 18.

²³ Misuk Woo, APEC to Launch Work Program for Cooperation, JAPAN ECONOMIC NEWSWIRE, Nov. 6, 1989, available in LEXIS, Nexis Library, ASIAPAC File.

²⁴ David Clark Scott, Asia Pacific Economic Organization Takes Shape, THE CHRISTIAN SCIENCE MONITOR, Nov. 9, 1989 available in LEXIS, Nexis Library, ASIAPAC File.

²⁵ Chairman's Summary Statement, APEC MINISTERIAL MEETING JOINT STATEMENT (Nov. 6, 1989) available in [http:// www.apec.org.](http://www.apec.org), [hereinafter Chairman's Summary Statement].

the representation from the People's Republic of China (PRC), Taiwan and Hong Kong²⁶, but the Ministers agreed to hold further meetings and to re-examine the issue of membership.²⁷ Although the results were modest, the participants were enthusiastic about the group's prospects.²⁸

2. The Singapore Ministerial

The second meeting of APEC members occurred on July 29-31, 1990 in Singapore. Here again the chief focus of the meeting was on the Uruguay Round.²⁹ The Singapore Ministerial also agreed to undertake a number of work projects, and to "keep under review" the question of additional members being added to the APEC process.³⁰

3. The Seoul Ministerial

The third meeting of the APEC ministers that occurred in Seoul, Korea in November 1991, was important in three respects. First, as to the issue of membership, the Minister's agreed that participation in APEC should "be open in principle", and that future participants would be decided upon by consensus.

Moreover, due in significant measure to the efforts of Korea, this meeting of APEC included the PRC, Hong Kong and Taiwan (called Chinese-Taipei) as members of APEC, thus becoming the first international governmental forum at which all three entities were included as participants.

Second, with respect to APEC's goals and mission, the ministers issued the "Seoul Declaration" which represented the clearest articulation as of that time of the goals for the APEC forum.³¹ It

²⁶ Preceding the meeting there was some discussion of including the PRC, Hong Kong and Taiwan at some point in the process but not at the initial meeting.

²⁷ A second meeting was to be held in Singapore in 1990, and a third in South Korea in 1991, which were to be preceded by meetings of senior officials. See, Chairman's Summary Statement, *supra* note 20.

²⁸ Secretary of State Baker said that the meeting produced a "very clear and substantial step forward toward the improvement of international economic relations generally." See, *Asia Pacific Economic Organization Takes Shape*, *supra* note 23.

²⁹ The Ministerial Declaration from Singapore stated that "the primary objective of APEC this year was to ensure a successful conclusion of the Uruguay Round". See, *APEC Ministerial Joint Statement (July 1990)* available in <http://www.apec.org>. at para 16.

³⁰ The projects included a review of trade and investment data, trade promotion, expansion of investment and technology transfer in the Asia-pacific region, human resource development initiative, regional energy cooperation, marine resource conservation and telecommunications. *Id.*

³¹ The Declaration stated that the objectives of APEC should be fourfold: "to sustain the growth and development of the region...; to enhance the positive gains resulting from increasing economic inter-dependence...; to develop and strengthen the open multilateral trading system...; to reduce barriers to trade in goods and services and investment among participants in a manner consistent with GATT principles, where

was at the Seoul meetings that a core concept of APEC, namely the idea of "open regionalism" began to take shape.

Third, the Seoul meetings took a few steps forward in institutionalizing the APEC forum.³² To this end the ministers agreed to formalize the APEC process through annual ministerial meetings, to task senior officials to meet at various intervals between ministerial meetings in order to develop the APEC process, and to further develop working groups to undertake each identified work program. Three additional work projects on fisheries, transportation and tourism were added, thereby bringing the total to ten projects. The Ministers also considered the option of inviting a group of eminent persons to "consider the likely shape of trade in the Asia-Pacific over the medium term, and to identify constraints and issues that would need to be addressed by governments in order to realize the potential for trade in the region."³³

As in Singapore, the ministers issued a separate statement on the importance of the Uruguay Round.³⁴

4. The Bangkok Ministerial

The fourth APEC Ministerial was held in Bangkok in September 1992. The United States was in the midst of a presidential election and did not send any ministerial-level officials to the meeting. The Japanese and Canadian foreign ministers also did not attend.³⁵ Nonetheless, at the Bangkok meeting the members agreed to create agreed to expand the membership from 15 to 17 by including Mexico and Papua New Guinea. It also was agreed that APEC should create a permanent, albeit slim, permanent secretariat in Singapore, with a U.S. \$2 million a year annual budget that would be financed proportionally by APEC members. The activities and authority of the secretariat were defined very narrowly. It had no central decision-making powers. The Bangkok Ministerial also advanced certain programmatic features of the APEC process.³⁶

applicable, and without detriment to other economies." See, APEC Ministerial Meeting Seoul Declaration, Ministerial Meeting, (Nov. 14, 1991) available in <http://www.apecsec.org.sg>

³² President Roh Tae Woo, in his keynote address to the ministers emphasized that APEC had "reached a stage where an institutional base should be established in order to represent the common economic interests of the region and to promote the intra-regional trade and economic cooperation." See, APEC Ministerial Meeting Joint Statement (Nov. 14, 1991) reprinted in Text of Joint Statement at APEC Meeting, JAPAN ECON. NEWSWIRE, Nov. 14, 1991, available in LEXIS, Nexis Library, ASIAPAC File.

³³ Id. at para 17.

³⁴ Id. at Annex C.

³⁵ See, Y. Funabashi, *supra* note 16 at 77.

³⁶ The 1992 APEC Ministerial documents also officially called for the establishment of an Eminent Persons Group (EPG), comprised of prominent individuals from each of the APEC member economies. The initial concept of the EPG was that it should develop a "vision for trade in the Asia Pacific region to the year 2000, identify constraints and

Once again, the ministers issued a separate statement on the importance of a successful conclusion to the Uruguay Round.

5. The Seattle APEC Meetings

The first report of the Eminent Persons Group (EPG) preceded the Seattle APEC Ministerial.³⁷ This 1993 EPG Report and its two subsequent reports became important vehicles for the debate and articulation of different concepts and approaches to regional economic cooperation.

The first EPG Report contained recommendations in four areas.

First, with respect to trade liberalization, the 1993 EPG Report recommended both global and regional initiatives. With respect to global trade liberalization it endorsed the successful completion of the Uruguay Round by the end of 1993; urged APEC members to seek agreement by the GATT contracting parties to launch the next major global negotiation by the end of 1995; argued that the GATT should create a wise-persons group to recommend a specific course of action for the next round of multilateral trade negotiations; and called for the tightening of rules governing regional arrangements.

With respect to regional trade liberalization, it argued that APEC should set a goal of free trade in the Asia-Pacific inclusive of some areas not fully covered by GATT disciplines--e.g., with respect to issues such as the environment, competition policy, and services. It called upon the APEC members to agree in 1996 on the target date and timetable for the achievement of free trade in the region, and to thereby create "a true Asia-Pacific Economic community."³⁸

Second, in an effort to kick-off the process of achieving these broad goals, the 1993 EPG Report recommended that the members launch a vigorous trade and investment facilitation program.³⁹

issues which should be considered by APEC" and report to the next ministerial. It also issued progress reports on the work underway in the various work programs and tasked the Senior Officials to identify ways to engage the private sector more fully into the APEC Work Projects". Supra note 31.

³⁷ See, REPORT OF THE EMINENT PERSONS GROUP, A VISION FOR APEC: TOWARDS AN ASIA PACIFIC ECONOMIC COMMUNITY, at 8 APEC Doc. No. 93-EP-01 (Oct. 1993) [hereinafter 1993 EPG Report]

³⁸ Id. at 8.

³⁹ Specific proposals focused on the creation of an APEC investment code; a new dispute-settlement mechanism for the region; the initiation of regular meetings of officials responsible for macroeconomic and monetary policies; expanded cooperation on competition policy and environmental policy, and harmonization or mutual recognition of standards in key sectors such as telecommunications and air transport. The specific elements of the facilitation program identified by the EPG included: the adoption of an Asia Pacific Investment Code, develop an effective dispute settlement mechanism, hold regular meetings between ministers and officials responsible for macroeconomic and monetary policy; assess alternative approaches to competition

Third, the Report urged the members to undertake an expanded program aimed at expanding technical cooperation.⁴⁰ And fourth, it called for further, albeit "modest" steps to institutionalize the APEC process.⁴¹

The Seattle meetings of APEC occurred just days after the prolonged and difficult vote in the United States on NAFTA, some 25 days before the deadline for the conclusion of the Uruguay Round, and at a time of difficult bilateral tensions between the United States and China and the United States and Japan.⁴² These meetings were a milestone in APEC's history.

Most importantly, the Seattle meetings served to elevate APEC meetings to the highest level. President Clinton invited all 17 APEC leaders to Blake Island, Washington for an informal Asia-Pacific summit following upon the heels of the APEC Ministerial. Although China insisted that Taiwan's President not be invited and Malaysia's Prime Minister Mahathir refused to attend,⁴³ 15 heads of government were in attendance. The informal summit was the first such meeting of all of the Asia-Pacific leaders.⁴⁴

policy; adopt a medium term objective of mutual recognition of product standards and mutually acceptable domestic testing and monitoring procedures for standards in selected priority industries such as telecommunications and aviation safety; consult on environmental policies, address rules of origin and consult to find ways of preventing rules of origin from becoming new sources of uncertainty. Id.

⁴⁰ In the area of technical cooperation, the 1993 EPG Report recommended further development of public infrastructure such as higher education, transportation and telecommunication networks and energy facilities. Id.

⁴¹ On this point, the 1993 Report argued that the process required the even more active involvement of economic, finance, trade and industry ministers; hold regular informal leaders meetings, support the institutional structure of the APEC Secretariat and take on collective financial responsibility in recruiting and paying for its substantive staff. Id. In the summary remarks of the Chairman of the EPG, he stressed that the report was proposing the creation neither of another European Community nor the creation of an Asia-Pacific free trade area. See, C. Fred Bergsten, Summary of the Report of the Eminent Persons Group, APEC Fifth Ministerial Meeting, Nov. 18, 1993.

⁴² The House vote approving NAFTA was on November 17, 1993, the Senate vote occurred on November 20, 1993. The APEC Ministerial meetings were held on November 17-19, 1993 and the Leader's meeting occurred on November 20, 1993. The final deadline for the Uruguay Round was December 15, 1993.

⁴³ Malaysia's Prime Minister Mahathir boycotted the meetings, doubtless unhappy with the negative response of the U.S. Government to his idea of creating a separate group, the East Asian Economic Group (EAEG) which excluded the United States and Canada. He allegedly saw this U.S. opposition as part of a U.S. plot to dominate the APEC process. See, Clay Chandler, Trade Focus Shifting from Europe to Asia, WASHINGTON POST, Nov. 17, 1993 at 1.

⁴⁴ Many of the Asian participants were concerned that the U.S. would dominate the proceedings and announce a trade liberalization initiative at APEC without sufficient

The Clinton initiative started a pattern of Leader's Meetings, which have since accompanied every subsequent APEC Ministerial.⁴⁵ As a result the undertakings made in APEC have come to be directly associated with the heads of government and particularly with the leader hosting the meeting. Although U.S. officials stressed that the "meeting was the message"⁴⁶, the Seattle meetings were not, however, entirely devoid of substance. For one thing, Papua New Guinea and Mexico were added as members to APEC. More importantly, President Clinton, echoing a theme in the 1993 EPG report, called for the creation of a "community" of Asia-Pacific economies.

Neither the Leader's statements nor the Ministerial releases picked up on the recommendation contained in the 1993 EPG Report that the APEC Ministers agree on a specific timetable for achieving free trade in the region.⁴⁷

Once again, the ministers issued a declaration on the Uruguay Round. This declaration contained more specificity than earlier statements and was more important, coming as it did on the eve of the final deadline of the Uruguay Round.⁴⁸ It identified numerous tariff items where APEC members committed to undertake additional actions. This initiative by APEC often is credited with giving a much-needed boost to the Uruguay Round.

Other additions to the APEC agenda were fairly limited and largely programmatic.⁴⁹

vetting or agreement among the Asian participants before the initiative was announced. As it turned out, no such U.S. initiative was unveiled at the meetings. President Clinton seemed to go out of his way to stress that the APEC Leaders Meeting was focused on "getting acquainted and on sharing perspectives". See, President Bill Clinton, Remarks to Seattle APEC Host Committee, (Nov. 19, 1993).

⁴⁵ The terminology of "Leader's Meetings" as against summits was selected to accommodate the different status of representatives from the PRC, Hong Kong and Taiwan.

⁴⁶ A senior U.S. official, Robert R. Rubin, was quoted as saying that the "meeting is the message". R.W. Apple Jr., Godfather to Pacific Era, NEW YORK TIMES, Nov. 21, 1993 at A1.

⁴⁷ See, APEC Leaders Economic Vision Statement, (Nov. 20, 1993) available in <http://www.apecsec.org.sg>; APEC Minister's Joint Statement on Ministerial Meeting, (Nov. 20, 1993), available in <http://www.apecsec.org.sg>

⁴⁸ For example, the statement on the Uruguay Round supported the GATT Director General's draft "Final Act" as the basis for the final agreement, agreed to match commitments made by the Quad countries, move further on non tariff barriers, and accelerate work in bilateral negotiations. A detailed statement was released by APEC members itemizing the sectors where they were prepared to offer additional commitments. See, Statement by APEC Members Participating in the Uruguay Round, November 1993. Press Release

⁴⁹ The U.S. Government called for and reached support among the participants for

6. The Jakarta Ministerial and Bogor Leader's Meeting

Prior to the APEC meetings in Indonesia, the EPG issued its second report.⁵⁰ This report warrants attention because it brought to the surface the underlying tensions within APEC regarding the nature of and methodology for achieving liberalization of trade within the region.

In terms of broad goals, the 1994 EPG Report recommended the goal of 2020 as the target date for full trade liberalization in the region.

The 1994 EPG Report also tried to more fully explicate the concept of "open regionalism." As noted above, APEC Ministers had consistently argued that although the APEC process was a regional initiative it should not develop the inward-looking and trade diverting features negatively associated with regional arrangements. Instead, APEC should maintain its principle of "open regionalism," and ensure that whatever occurred within the APEC context would be made available not only to the APEC members but to the global economy.⁵¹

Broad agreement on that point withstanding, the 1993 EPG Report as well as the preceding APEC declarations had left unanswered how the process should unfold and how open regionalism should be operationalized.

The 1994 EPG report offered an approach to trade liberalization in the region that essentially left all options open to participating members. Specifically, it proposed four non-mutually exclusive

meetings between finance ministers; the formation of an Asia Pacific business roundtable; and the establishment of an Asia Pacific Education Foundation. In addition, the APEC work program expanded and an APEC Trade and Investment Committee was established to explore ways that APEC members could improve the flow of goods, services, investment and technology across the region. The work program of the Trade and Investment Committee included: trade policy dialogue, customs simplification and harmonization efforts, examination of investment environment, a regional tariff data base and manual, examination of administrative measures affecting trade in the region, defining APEC's possible roles in standards, examination of the issues affecting small and medium size enterprises; review the results of the Uruguay Round for the region, and addressed certain other issues recommended by the EPG. See, APEC Minister's Joint Statement, *supra* note 46.

⁵⁰ cf. APEC EMINENT PERSONS GROUP, *ACHIEVING THE APEC VISION; FREE AND OPEN TRADE IN THE ASIA PACIFIC*, 54-55 (APEC Doc. 94-EP-01-1994) [hereinafter the 1994 EPG Report].

⁵¹ As noted by Robert Z. Lawrence, to the degree that outsiders would be permitted to gain from any preferential arrangements so long as they were prepared to join on the same basis as those participating in the arrangement, this would provide outsiders "with a ready means for mitigating any trade diversion". See, Robert Z. Lawrence, *Regionalism and the WTO: Should the Rules be Changes?* (June 24, 1996) (unpublished paper prepared for the Institute for International Economics Conference on "The World Trading System: Challenges Ahead", on file with M. Janow).

approaches. First, the pursuit of unilateral trade liberalization that countries might chose to pursue on their own. Second, a commitment to the lowering of trade and investment barriers to non-APEC countries. Third, the ability of APEC members to extend any benefits of liberalization to nonmembers who were willing to accept similar obligations toward APEC member--i.e., on a mutually reciprocal basis. And fourth, the extension of liberalization to nonmembers on either a conditional (through free trade arrangements) or an unconditional basis (to all nonmembers on an most favored nation (MFN) basis).⁵²

Of these options, the fourth option is especially controversial in that it preserved the possibility that APEC would evolve into a formal trading arrangement within the meaning of Article 24 of the GATT or otherwise it would violate GATT's MFN principle⁵³. This menu of options reflects the lack of consensus within the EPG itself as well as APEC, about the precise manner in which countries should liberalize in the years ahead.

The Leader's Meeting, hosted by Indonesia's President Suharto, produced an important declaration with respect to the long-term goal of the APEC process.⁵⁴ In the "APEC Economic Leader's Declaration of Common Resolve in Bogor" (dubbed the "Bogor Declaration"), the leaders agreed to "adopt the long-term goal of free and open trade and investment in Asia Pacific."⁵⁵

The Bogor Declaration stated that this goal "will be pursued promptly by further reducing barriers to trade and investment and by promoting the free flow of goods, services and capital among our economies" through Gatt-consistent steps. It was agreed that free trade and investment in the Asia Pacific should be achieved by "no later than 2020."⁵⁶ A variable-speed approach to implementation of this objective was adopted in order to " take into account the differing levels of economic development among APEC economies, with the industrialized economies achieving the goal of free and open trade and investment no later than the year

⁵² The MFN principle contained in Article 1 of the GATT is a basic non-discrimination principle that provides that any concession made by one country to another must be extended unconditionally and immediately to like products originating from other Contracting parties.

⁵³ Article 24 of the GATT, customs unions and free trade area agreements are permitted an exception to the principle of non-discrimination because " it is recognized that such agreements have the potential to further economic integration without necessarily adversely affecting the interests of third countries". See, WORLD TRADE ORGANIZATION, REGIONALISM AND THE WORLD TRADING SYSTEM, (1995) at 8.

⁵⁴ Trade and Foreign Ministers from APEC met on November 11-12 in Jakarta, followed by a Leaders meeting on November 15th in Bogor, this time with Prime Minister Mahathir in attendance.

⁵⁵ APEC Economic Leaders' Declaration of Common Resolve, Nov. 15, 1994 at para 6, available in <http://www.apecsec.org.sg> [hereinafter Bogor Declaration].

⁵⁶ Id. at para 6.

2010 and developing economies no later than the year 2020."⁵⁷

Here again, and importantly, the goal was not to achieve a free trade agreement by a certain date but rather to achieve free trade itself in the region by no later than 2020 for one group of countries and 2010 for another. The Bogor Declaration did not identify which countries fit into each category. It was assumed generally that the industrial countries expected to meet the 2010 timeline included the United States, Japan, Canada, Australia and New Zealand. Later, both Singapore and Taiwan volunteered to meet the 2010 deadline. It was generally assumed that China, Thailand, the Philippines, Indonesia, and Malaysia would be held to the 2020 standard.⁵⁸

As in the case of the EPG Report, the Bogor Declaration did not identify how this broad goal would be operationalized, nor did it clarify how non-APEC members would be treated. The former issue was tasked to the subsequent Osaka meeting, the latter remains unresolved. In this sense, the operational issues that surfaced in the 1994 EPG Report were largely papered over in the subsequent APEC meetings.

Despite these unanswered questions, a second defining feature of the Bogor Declaration was the fairly unequivocal language in the Declaration that committed the leaders to liberalization in a manner that would strengthen global trade and investment liberalization. Thus the Bogor Declaration states that "the outcome of trade and investment liberalization in Asia Pacific will not only be the actual reduction of barriers among APEC economies but also between APEC economies and non-APEC economies".⁵⁹

The self-defined mission of the APEC forum was not limited to trade liberalization alone; the Leader's placed "co-equal emphasis" on trade facilitation, cooperation, and liberalization. To this end, the Bogor Declaration called upon APEC ministers to submit facilitation proposals on APEC arrangements on "customs, standards, investment principles and administrative barriers to market access"⁶⁰; and to expand cooperative activities in the areas of human resource development, cooperation in science and technology, the development of APEC study centers, measures to promote small and medium scale enterprises, and steps to improve economic infrastructure such as energy, transportation, information, telecommunications, and tourism.⁶¹

⁵⁷ Id.

⁵⁸ Malaysia's Prime Minister initially asserted that he did not consider the timetable binding, since the proposal was delivered to the leaders without proper vetting at the level of senior officials. He later introduced the caveat that it was unclear where Malaysia would fit by 2020. See, Jane Khanna, *Asia Pacific Economic Cooperation and Challenges for Political Leadership*, 19 WASH Q. 1 (1996) at 255. Some trade analysts have questioned whether it is fully appropriate to include all of China in the 2020 timetable. They note that some parts of China, such as Guangzhou and Shanghai, will be industrial areas in 2010. Gary C. Hufbauer & Jeffrey J. Schott, *Toward Free Trade and Investment in the Asia-Pacific*, 10 WASH Q. 37 (1995).

⁵⁹ Id. at para 6.

⁶⁰ Id at para 7.

⁶¹ Id. at para 8.

The leaders directed their ministers to begin preparing detailed proposals for implementing these broad decisions.⁶²

A final product of the APEC Ministerial meeting was a set of non-binding investment principles that had been developed by the APEC Committee on Trade and Investment (CTI).⁶³ The United States initially pressed the APEC members to agree on binding principles; however, it failed to achieve consensus within APEC on this point. The principles announced in Indonesia were strictly non-binding, and thus were designed not to prejudice existing international instruments such as bilateral investment treaties or other multilateral instruments such as the investment related provisions in the General Agreement on Trade in Services (GATS) accord.⁶⁴

7. The Osaka Ministerial and Leader's Meeting

The Seventh APEC Ministerial and the Third Leader's meeting was hosted in Osaka, Japan on November 16-19, 1995. Following the Bogor Declaration and its ambitious statement regarding APEC's long term goal of free trade in the region, Japan as the host of the meetings was under considerable pressure to produce an architecture or blue print detailing the steps that APEC members would need to take if free trade in the region was to become a reality.

The 1995 EPG Report which once again preceded the APEC meetings stressed that the APEC economies should provide a "downpayment" at Osaka that would demonstrate their commitment to implement the Bogor Declaration on free trade and investment. To this end, it argued that acceleration of Uruguay Round commitments would represent an important form of a downpayment that should be made on an most-favored nation (MFN) basis and subject to what it called a "fifty percent rule."⁶⁵

⁶² The Bogor Declaration also called for certain limited institutional developments. Specifically, the Leaders agreed "to examine the possibility of a voluntary consultative dispute mediation service to supplement the WTO dispute settlement mechanism". Id. at para 9. And, the Leaders asked the two outside advisory groups in the form of the EPG and the PBF to continue for another year and to review the relationship between APEC and existing subregional arrangements. Id. at para 11 .

⁶³ U.S. Trade Representative Mickey Kantor characterized the non-binding principles as an "initial step" which would require additional improvement especially with respect to national treatment, performance and repatriation. See, Secretary of State Warren Christopher, Secretary of Commerce Ron Brown and Trade Representative Mickey Kantor, Press Conference at the Jakarta Convention Center, (Nov. 12, 1994) (Transcript available in Press Conference U.S. Department of State, Office of the Spokesman.)

⁶⁴ See, Bijit Bora & Monty Graham, Non-binding Investment Principles in APEC, in PRIORITY ISSUES IN TRADE AND INVESTMENT LIBERALIZATION: IMPLICATIONS FOR THE ASIA-PACIFIC 176-189 (Bijit Bora and Mari Pangestu ed., 1996)

⁶⁵ APEC EMINENT PERSONS GROUP, IMPLEMENTING THE APEC VISION, (1995), available in <http://www.apecsec.org> [hereinafter the 1995 EPG Report].

As to this point, the 1995 EPG Report emphasized that APEC members should "reduce by half the transition period for implementing trade liberalization and rule-making reforms that they have already committed to in the Uruguay Round."⁶⁶ Most of the other areas of the 1995 EPG Report argued for movement on steps identified in previous EPG reports⁶⁷.

The Osaka Ministerial and Leader's meetings lacked some of the prominence of the Bogor and Seattle meetings that had preceded them. This is not wholly surprising, given that the challenge at Osaka was not to design a visionary framework for APEC's future but rather to produce a workable framework to guide the implementation of the Bogor Declaration on free trade in the region by 2010/2020. In addition there was an unexpected development that probably had some impact on the meetings. At the last moment President Clinton was unable to attend the meetings because of a budgetary impasse in United States.⁶⁸

The Osaka APEC meetings produced a document containing an "Action Agenda" designed to implement the Bogor Declaration.⁶⁹ It again emphasized the three "co-equal" pillars of liberalization, facilitation, and cooperation.⁷⁰ This represents not only the various components of

⁶⁶ Id. at 9. The 1995 EPG Report suggested that industrialized countries accelerate their commitments in the three areas of tariffs, agriculture, and textiles. Developing economies should "commit to gradually reduce the gap between their bound tariff rates and their currently applied rates," and to reduce transition periods with respect to nontariff items such as those featured in the Trade Related Intellectual Property (TRIPS), Trade Related Investment Measures (TRIMs) and subsidy areas. Id. at 10.

⁶⁷ Examples include: addressing problems associated with abuse of antidumping policies; cooperation between member economy authorities in implementing their present competition policies; strengthening nonbinding investment principles and applying them in practice; adopting a multifaceted program for product standards and testing; concentrating governmental efforts on working out Mutual Recognition Agreements on acceptance of test data and product certification in major regulated sectors; installing an APEC dispute mediation service to cover those disputes not covered by the WTO or other international arrangements; pursuing further liberalization of subregional trading arrangements only within the principles of open regionalism; deepening its cooperation on monetary and macroeconomic issues. Id.

⁶⁸ See, Jurek Martin, No Time for Clinton to Quit Budget Barricades, FINANCIAL TIMES, November 17, 1995 at 4 available in LEXIS, Nexis Library, CURNWS file. This article quotes President Clinton as saying: " if people who work for the federal government aren't working and the people who need the services of our government aren't getting them, its going to be difficult to see my way through taking this trip." Id.

⁶⁹ The two major documents that came out of the Osaka meetings were: APEC Economic Leaders' Declaration for Action, Nov. 19, 1995 and APEC Ministerial Meeting Joint Statement, The Action Agenda, Nov. 16-17, 1995. [hereinafter the Action Agenda]

⁷⁰ Id.

the APEC agenda but the now long-embedded tension between the APEC members as to whether APEC should be viewed as a consultative forum or a negotiating forum for addressing trade liberalizing measures.

The Action Agenda laid out principles that are to guide APEC as it strives to achieve free trade and investment in the region by 2020/2010, an overall agenda for subsequent implementation, a timetable for action, a unique modality for advancing the APEC process and an initial set of unilateral measures intended to serve as the Osaka "downpayment."

The Action Agenda also identified those substantive areas that would be the subject of future liberalization--some fifteen of them.⁷¹ Some of these are familiar subjects that have been addressed to varying degrees in multilateral rounds of trade negotiations--e.g., tariffs and non-tariff measures.

Other areas of identified liberalization are only marginally covered by multilateral disciplines, or in some instances not subject to any established multilateral rules. Notable examples of the former include services and investment: of the latter deregulation and competition policy.

The Action Agenda identified 13 areas in which APEC members would pursue economic and technical cooperation.⁷² It also advanced a unique modality for implementing the Bogor vision through so-called "concerted unilateral" and "collective actions."⁷³ Certain collective actions and the first set of "Individual Action Plans" (IAPs) were contained in the document, with the understanding that more substantial IAPs were to be submitted at the 1996 APEC meetings the Philippines, with implementation to begin in January 1997.

8. The Manila Ministerial and Leader's Meetings

The main tasks of the Eighth APEC Ministerial and the Fourth Leader's meetings held in Manila in November 1996 were twofold: first, to produce individual and collective action plans that demonstrated the commitment of the APEC members to the Bogor free trade vision; and second, to provide substantive momentum for further global trade liberalization on the eve of the December 1996 meeting of the first WTO Ministerial in Singapore.

The tone of the meetings in Manila were very positive but overall, the meetings produced only

⁷¹ These included: tariffs, non-tariff measures (NTBs), services (notably transportation, telecommunications, energy and tourism), investment, standards and conformance, customs procedures, intellectual property rights, competition policy, government procurement, deregulation, rules of origin, dispute mediation, mobility of business persons, implementation of Uruguay Round outcomes and information gathering and analysis. See, *Id.* at Part One, Section C.

⁷² These included: human resource development; industrial science and technology; small and medium enterprises; economic infrastructure; energy; transportation; telecommunications and information infrastructure; tourism; trade and investment data; trade promotion; marine resource conservation; fisheries and agricultural technology. See, *Id.* at Section B.

⁷³ See, *Id.*

small steps forward on both of two main tasks referenced above. Indeed, the high points of the 1996 APEC meetings centered around several prominent bilateral meetings between President Clinton and leaders from South Korea, the PRC and Japan. With respect to regional initiatives, the Manila meetings produced a lengthy Action Plan for APEC 1996 (dubbed MAPA'96), which details collective and individual actions plans. This document contains few major new liberalization initiatives. And although there were some procedural improvements in the format of the individual action plans, the diverse and non-uniform nature of the undertakings contained in the action plans makes a precise overall comparative assessment of the plans difficult.⁷⁴

The Ministerial Declaration announced at APEC acknowledged the contribution of the action plans as a "credible beginning to the process of liberalization"⁷⁵. The Ministerial Declaration also referenced the work underway in the various working groups or joint activities, reaffirmed the commitment of the Ministers to achieving the Bogor goals, and stressed the importance of the upcoming WTO Ministerial. And, although the APEC Economic Leaders' Declaration suggests that much was accomplished at the meetings, like the Ministerial Declaration, it contains few additional specific undertakings.⁷⁶

As discussed in greater detail below in our assessment of APEC, with respect to global trade liberalization, the Leader's Declaration contained a broad reference to the conclusion of an Information Technology Agreement at the WTO. The significance of the ITA reference in the context of the APEC meetings was far from clear at the time it was announced since it was almost immediately undermined by open disagreement among the APEC countries about the

⁷⁴ Indeed, improving the methodology of the IAPs themselves to facilitate comparisons across economies is itself an important task that APEC members need to consider more fully. Acting U.S. Trade Representative, Charlene Barshefsky commended Indonesia's plan for containing commitments to further reduce its tariffs in a number of sectors of interest to the United States--e.g., in scientific equipment, pulp and paper products. She also applauded certain business facilitation efforts such as expanded Internet access to various customs and other tariff data bases within the Collective Action Plans. See, Joint Press Availability with U.S. Secretary of State Warren Christopher, U.S. Secretary of Commerce Mickey Kantor and Ambassador Charlene Barshefsky. U.S. Department of State, Office of the Spokesman, November 23, 1996, available in <http://www.whitehouse.gov/WH/html/briefroom.html>

⁷⁵ See, Ministerial Joint Statement, Asia-Pacific Economic Cooperation (November 22-23, 1996) available in <http://www.apecsec.org.sg> at para 11.

⁷⁶ The Leader's Declaration states that this process has "...launched the implementation phase of our free and open trade and investment agenda, delivered business facilitation measures, agreed to advance common goals in the World Trade Organization, developed ways to strengthen economic and technical cooperation, and engaged the business sector as a full partner in the APEC process". See, APEC Economic Leaders' Declaration: From Vision to Action, Subic Philippines, November 25, 1996 at para 3 available in <http://www.apec.sec.org>. Specific commitments referenced in the Leader's Declaration included a 1997 review of the IAPs, an CAP undertaking to harmonize tariff nomenclature by the end of the year and customs clearance procedures by 1998, and intensification of work in 1997 on customs clearance procedures and other business facilitation measures Id at para 9.

meaning of the reference. However, several weeks later at the December meeting of the WTO an information technology agreement was ultimately announced and it appears that the APEC endorsement was helpful to this process.

II. An Early Assessment of APEC

This section offers an interim assessment of the APEC forum. It is intended to highlight APEC's accomplishments and to identify its limitations. Specifically, this discussion examines APEC's contribution to global and regional trade liberalization (in sections A, B & C below); reviews APEC's efforts in the area of trade facilitation (in section D); and then assesses broader aspects of APEC's institutional future and potential contribution to regional economic integration and policy coordination (in sections E and F).

A. APEC as a Forum for Global Trade Liberalization

The APEC forum repeatedly has emphasized the importance that it attaches to multilateral trade liberalization and WTO-consistent liberalization. Here, three specific areas are considered to examine whether this rhetorical emphasis has been borne out in APEC's actual trade initiatives: first, commitments within the APEC to implement or accelerate Uruguay Round liberalization commitments in general, and reductions in tariff bindings in particular; second, the negotiating positions of APEC countries with regard to multilateral negotiations on liberalization of services, notably basic telecommunication services; and third, APEC's position on the Information Technology Agreement.

Tariff reductions are reviewed because steps taken or not taken in this area are concrete and well understood; this is the standard grist for the trade negotiator's mill. The second area, services, represent frontier issues in multilateral trade negotiations. The Uruguay Round is the first multilateral trade negotiation to introduce any disciplines on services, and these were only modest. The third and most recent development that offers a perspective on APEC's role in promoting further global trade liberalization is the information technology agreement, which was a major priority for the U.S. government at the APEC meetings in Manila and then the WTO.

1. Acceleration of Uruguay Round Commitments and Tariff Reductions

As noted in the Section I above, every APEC Ministerial or Leader's Meeting has placed its highest emphasis on ensuring global access to markets and on the preservation and enhancement of the WTO system. At the Seattle Summit, APEC's support for multilateral trade liberalization was converted into a concrete boost to the Uruguay Round negotiations, as APEC members identified those areas in which they were prepared to undertake additional tariff concessions. Such undertakings have been credited with successfully widening the scope of the tariff commitments offered in the final days of the Uruguay Round and thereby serving to jolt the Europeans into taking those additional steps that helped to bring the Round to a close.⁷⁷

⁷⁷ Indeed, following the Seattle summit, European leaders became concerned that APEC had the potential to become a regional trade arrangement excluding them. One analysis has said that the upgrading of the APEC meetings at Seattle was "a cheap way of reassuring the Asia Pacific countries that the Untied States intended to remain engaged in the region, while simultaneously signalling to the Europeans that if they continued to allow French farmers to hold up the Uruguay Round, other countries might be prepared to proceed with increased economic integration without them". See, APEC and Regional Trading Arrangements in the Pacific, Jeffrey A. Frankel with Shang-jin

Further, all of the APEC countries that were members of the GATT had ratified the Uruguay Round Final Act by December of 1994.⁷⁸

Since the Uruguay Round was concluded, the emphasis on multilateralism and WTO-consistency within APEC has remained strong.⁷⁹

The very concept of "open regionalism" hinges on the notion that APEC undertakings will be consistent with multilateral rules. And the Action Agenda went further than mere consistency with WTO disciplines. Officials endorsed the notion of acceleration of Uruguay Round commitments. This approach also has been stressed by APEC's various advisory groups such as the EPG and the Pacific Business Forum.

Concrete measures by APEC members to accelerate the implementation of Uruguay Round commitments are still at an early stage. The initial Individual Action Plans announced at Osaka contain a number of initial commitments to accelerate Uruguay Round Commitments.⁸⁰Library

Wei and Ernesto Stein. Working Paper Series, Asia Pacific Economic Cooperation. Number 94-1, (1994).

⁷⁸ This amounts to 15 APEC members; China, Chinese Taipei and Papua New Guinea were not members of the GATT and thus not founding members of the WTO.

⁷⁹ Singapore vigorously campaigned to host the first post-Uruguay Round meeting of trade ministers, which will be held in December, 1996. And the Asian members of APEC endorsed the Korean candidate, Dr. Kim Chulsu, who was proposed as one of the candidates to head of the newly formed World Trade Organization. He later became one of the WTO's Deputy Director Generals.

⁸⁰

Although a number of countries included proposals to accelerate their Uruguay Round undertakings in a number of areas, the patchwork of undertakings comprising the initial IAP's are difficult to evaluate. There is little uniformity in areas covered and no benchmark against which to evaluate country offers. This makes comparisons of proposals across countries difficult. A few examples are illustrative. Australia committed to accelerate by one year its tariff bindings on some 2800 tariff lines. It also agreed to add certain services to GATS coverage. Canada stated its intention to extend and expand on its duty free tariffs for LDCs. Chile indicated its intention to accelerate implementation of tariff commitments across the board. Japan listed a number of tariff areas where it intended to accelerate its UR implementation, but most of these were areas where it was already applying lower rates that had yet to be bound in the WTO. Japan also identified a number of deregulation measures designed to improve business access, the latter of which were expected announcements in line with Japan's schedule of domestic deregulation. Beijing's package has been characterized by some analysts as more substantial, including 30 % tariff reductions on more than 4,000 items. China also committed to eliminate the quota, licensing and other import control measures on about 170 tariff lines, accounting for over 30 percent of the commodities now subject to import quota and licensing requirement. But in China's case, it is important to keep in

at CURNWS; and Yang Razali Kassim, Former Military Man Takes Charge of APEC, BUSINESS TIMES, Feb. 6, 1996, available in LEXIS, Nexis Library at CURNWS. The Manila meetings provided another test of whether APEC can make itself a vehicle for accelerating Uruguay Round commitments but the issue remains very much alive.

Turning to tariffs, every round of multilateral trade negotiations in the postwar period has included negotiated tariff reductions. The Uruguay Round achieved significant increases in the percentage of tariffs subject to bindings, and substantial reductions in tariffs on industrial and agricultural products by APEC and non-APEC countries.⁸¹ Tariff reductions alone, however, do not tell the whole story.

Many of the developing economies of APEC have bound their tariffs at rates higher than those currently applied.⁸² Thus although technically this represents tariff reductions, it suggests that

mind that its package was offered with an eye toward the WTO accession process underway in Geneva. Indonesia committed to reduce a number of its tariff items. The U.S. offer referenced a number of regulatory changes already underway. For example it cited its customs modernization efforts, and efforts to streamline federal procurement practices. It also mentioned efforts underway to streamline its regulations on export controls, certain improvements in FDA procedures governing medical devices, and the paperwork reduction act. One senior Japanese economist, Ippei Yamazawa, who served as a member of the EPG, claimed that the U.S. offer was "very weak indeed". He ranked the South Korean and Thai packages as poor and the Philippine package as "not very impressive". See, David Hulme, Asia Takes Charge of APEC Train, 32 ASIA BUSINESS Jan. 1996, available in LEXIS, Nexis

⁸¹ For example, Canada, Japan, New Zealand, the United States, Chile, Mexico and Indonesia have nearly comprehensive tariff bindings. Many of the developing countries of Asia bound a significant proportion of their tariff lines. For example, Indonesia bound 95 percent of its tariff lines and other countries such as Korea, Malaysia, the Philippines, Singapore and Thailand have all bound between 60-89 percent of their total tariff lines. See, PACIFIC ECONOMIC COOPERATION COUNCIL, MILESTONES IN APEC LIBERALIZATION, (1995) at 43.

⁸² In terms of overall trends, for developed economies, some 18 percent of bound imports enter duty free. Of the remaining imports, two-thirds of tariff lines were reduced as a result of the Uruguay Round while 9 percent of tariff lines were bound at higher than the applied rates. Some 7 percent of tariff lines experienced no offers, these were primarily in the areas of transport equipment, leather, rubber, footwear and travel goods. In terms of share of imports, for developed economies, 19 percent of imports were either bound at higher than applied rates or not covered by tariff bindings. In the case of developing economies, almost no countries have duty free imports. Forty-six percent of their tariff lines were bound at reduced levels, and 24 percent were bound at higher rates than applied rates. Nearly one-third of tariff lines were subject to no offers at all. Among developing economies as a group, 68 percent of imports saw now reduction in applied rates or were not subject to tariff offers. Comparisons across regions are more illuminating. In Asia, 51 percent of all imports have seen either no reduction in applied rates or are not subject to tariff offers. This compares only slightly favorable to Africa,

the resulting reductions may do little to improve market access.⁸³ Although the developing countries of East Asia are credited with having the lowest applied rates of tariffs among the developing regions of the world, the gap between bound rates and applied rates continues.

In the industrial goods area, for example, the average bound rates range from less than 10 percent, for Korea and Malaysia, to nearly 40 percent for Indonesia and over 30 percent for Mexico. The 1995 applied rates for industrial goods for Korea, Indonesia, and Mexico were 6.5 percent; 11.3 percent, and 13.5 percent, respectively.⁸⁴

In terms of agricultural products, all but two of the APEC countries import a quarter or more of their agricultural products at applied rates below their bound rates.⁸⁵

One relatively costless step for APEC members to take as part of their acceleration of Uruguay Round commitments would be to lower their tariff bindings to their applied rates. While such a step would not necessarily increase access to their markets it would be an important symbol of their commitment to trade liberalization. Economically, lowering to applied rates is relatively costless because it simply brings de jure rates into line with de facto tariff rates.

Bringing tariff bindings down to applied rates would, however, require APEC members to forego the possibility of raising their tariffs, if domestic circumstances were seen as warranting such increases. Although this provides one with an admittedly narrow perspective from which to view APEC's efforts to support multilateral trade liberalization, early indications suggest that further tariff reductions, even down to applied levels, are likely to prove difficult for a good many APEC countries.⁸⁶ And of course, even if countries dropped their applied tariff rates, this step offers little assurance that rates will remain at lower levels unless countries then took the next step of binding those lower rates in the WTO.

where the comparable statistic is 53 percent. *Id.* at 46.

⁸³ See, *Id.*

⁸⁴ Of the five developed APEC economies, overall tariff reductions were well above the 36 percent requirement of the Uruguay Round, with the highest reductions offered by Japan and New Zealand and the lowest reductions by the United States because its tariffs were lower to start with. After implementation, Japan will have the lowest average tariff rate of 1.7 percent, followed by the United States at 3.5 percent. Post implementation, Australia and New Zealand's average bound tariffs will be close to three times the average for all developed economies. See, Milestone in APEC Liberalization, *supra* note 77 at 47 and Table A and, Pacific Economic Cooperation Council, SURVEY OF IMPEDIMENTS TO TRADE AND INVESTMENT IN THE APEC REGION (1995) at 264.

⁸⁵ *Supra* note at 50.

⁸⁶ In China's case, for example, Chinese officials have argued that in some instances it is not politically possible to bring their bound rates down to their applied rates because China's import regime remains extremely porous and subject to extensive smuggling of imported items. In this sense, imports enter China far in excess of even applied rates. Interview with a PRC official, (Jun. 20, 1996).

2. The Position of APEC and its Members on Basic Telecommunications Services Negotiations

Another way of viewing the likely contribution of APEC to the enhancement of multilateral trade disciplines is to examine the positions taken by APEC members in the context of the Uruguay Round negotiations on basic telecommunications services.⁸⁷

A few contextual points may be useful to offer perspective. For most of the postwar period, services have been among the most highly regulated sectors of economic activity worldwide. During the 1970s and 1980s, regulatory reform efforts in many countries, especially in the developed economies, resulted in the removal or liberalization of prior limits on competition in a number of industries. And beginning in the 1980s, services became part of the international trade policy agenda, largely as a result of the efforts of the U.S. government to pursue multilateral rules to govern policies affecting trade in services.

But, as others have noted, the decision to negotiate on telecommunications established a negotiating process on matters which, from the outset, there was "far from a consensus as to the appropriateness of trade strictures" and considerable divergence of opinion as to the domestic effects of deregulation and liberalization.⁸⁸ Thus, the services negotiations in general have been one of the most difficult areas and certainly among the newest areas for multilateral trade negotiations.

Advocates of liberalization of trade in services have tended to argue that more liberal international trade will produce domestic gains.⁸⁹ But international differences on this point have

⁸⁷ This article focuses on basic telecommunications as distinct from other areas of services trade because basic telecoms remains under negotiation in the WTO.

⁸⁸ See, Michael J. Trebilcock & Robert Howse, *THE REGULATION OF INTERNATIONAL TRADE*, (1995).

⁸⁹ The United States has not been alone in advocating multilateral disciplines for basic telecommunication services. During the Uruguay Round, a group of countries including the United States, Sweden, Australia and New Zealand, among others pressed for an agreement on the liberalization of basic telecommunications to be included as part of the GATS. See for example, *GATT Liberalisers Discuss Basic Service Competition*, *THE FINANCIAL TIMES*, (Nov. 11, 1993) available in LEXIS, Nexis at CURNWS file.

varied greatly, especially between some developed and developing economies.⁹⁰ And indeed the negotiation of access to services markets, as distinct from negotiations over barriers to goods, implicate fundamental issues of regulatory design.

Within the context of the General Agreement on Trade in Services (GATS), which is itself largely a framework agreement, the parties to the negotiations were able to agree on general principles covering trade in services. And with respect to telecommunications more specifically, the parties agreed on an annex on telecommunications.⁹¹

However, the concerns of U.S. services industries regarding the application of unconditional MFN led to the inclusion of an annex to the GATS under which countries could exempt, at the time of joining the GATS, certain sectors from the MFN obligation contained in the GATS. In the final days of the Uruguay Round it became clear that a number of countries were prepared to invoke the MFN exceptions, (e.g., for financial services, telecommunications, maritime and audio-visual) and a compromise solution was ultimately reached whereby negotiations would continue on a number of these sectors. The deadline for negotiations on basic telecommunications services was initially set for April of 1996.⁹²

⁹⁰ Id. The authors note that during the Uruguay Round negotiations, for example, a number of developing countries argued that developed countries had a comparative advantage in services by virtue of their overall level of economic and technological development, and if liberalization occurred under these circumstances, developing country providers would lose out. Id. at 225. liberalization of services trade would result in domestic providers being out competed by foreign firms. This proposition has been challenged most forcefully by the economist Jagdish Bhagwati. See, Jagdish Bhagwati, *International Trade in Services and its Relevance for Economic Development*, in *POLITICAL ECONOMY AND INTERNATIONAL ECONOMICS* (1991).

⁹¹ The Annex on telecommunications provides for transparent, reasonable and non-discriminatory access to, and use of, public telecommunications transport networks and services. "It proscribes the imposition conditions on access and use other than those necessary to ensure the availability of services to the general public or to protect the technical integrity of the network. It requires that Members undertake to price public telecom services on a cost-oriented basis and allow interconnection and cross-border movement of information". See, Bernard Hoekman & Pierre Sauve, *Liberalizing Trade in Services*, in *WORLD BANK DISCUSSION PAPER* (1995) at 38. It does not, however, cover measures applying to the provision of public telecommunications networks and services.

⁹² The Final Act of the Uruguay Round contained a Decision on Negotiations on Basic Telecommunications [hereinafter the Telecommunication Decision] which provided for an extension of those negotiations under the direction of the Negotiating Group on Basic Telecommunications (NGBT) until April of 1996. In addition, the Telecommunication Decision further provided that negotiations should be entered into "on a voluntary basis with a view to the progressive liberalization of trade in telecommunications transport networks and services...within the framework of the GATS." See, Article 1. These negotiations were to be "comprehensive in scope with no basic telecommunications excluded a priori". See, Article 2.

The ensuing negotiations focused on three elements: obtaining commitments from countries to liberalize market access and national treatment restrictions and efforts to reach agreement on a set of regulatory principles that are to guide domestic regulatory practices. Some 53 countries participated in the negotiations with 24 other countries formally taking observer status.

The principles were intended to complement the market access and national treatment commitments. The principles reflect a recognition that telecommunications remains a heavily regulated sector and in many jurisdictions regulatory authorities are not independent of telecom providers. And, since domestic suppliers are usually dominant suppliers, whether private or public entities, if they are left free to make decisions about how to treat other suppliers such entities would be capable of thwarting the market access and national treatment commitments made by governments.⁹³

For this reason, the principles are designed to support competition in the telecommunications sector through competitive safeguards that would prevent major suppliers from engaging in anticompetitive practices⁹⁴; through undertakings to provide transparent and nondiscriminatory interconnection with essential telecommunications facilities; through transparent and publicly available licensing criteria; and by requiring that domestic regulatory authorities are independent from and not accountable to any supplier of basic telecommunications services, among other features.⁹⁵

The United States Government argued that the critical elements for an agreement were mutual, unrestricted access to basic telecommunications markets and open investment among a "critical mass" of countries. At the end of April 1996, the U.S. Government took the opinion that only 10 of the 53 offers were acceptable,⁹⁶ and there was insufficient progress, especially among the advanced nations but also within the important Asian markets, to warrant the United States

⁹³ See, Bernard M. Hoekman, Patrick Low and Petros C. Mavroidis, *Antitrust Disciplines and Market Access Negotiations: Lessons from the Telecommunications Sector*. Paper presented at the Oslo Competition Conference: Competition Policies for an Integrated World Economy, Oslo, June 13-14, 1996, available on file with M.E. Janow.

⁹⁴ Identified anticompetitive practices included cross subsidization, using information obtained from competitive with anticompetitive results and "not making available to other suppliers on a timely basis technical information about essential facilities and commercially relevant information which are necessary for them to provide services". See, Final Draft of WTO Telecom Regulatory Principles, April 30, 1996.

⁹⁵ *Id.*

⁹⁶ U.S. trade officials argued that while the U.S. had made "the most comprehensive market opening offer of any nation", over "40 percent of world telecom revenues and over 34 percent of global international traffic are not covered by acceptable offers." See, Statement of Ambassador Charlene Barshefsky, Basic Telecom Negotiations (Apr. 30, 1996). Press Release, Office of the U.S. Trade Representative.

entering into an agreement that would have obliged it to keep its telecommunications market open.

In an effort not to lose the momentum that had been developed, the Director General of the WTO then called for an extension of the talks until February 17, 1997. The United States, for its part, reserved its right to modify or withdraw its offer, should the talks fail achieve sufficient liberalization packages by the new February 17, 1997 deadline.

What was the position taken by APEC countries in these negotiations?

As noted, the United States identified ten countries that provided open market access offers equivalent to the U.S. offer; among the APEC members, only New Zealand was identified as one of the ten.⁹⁷ Both Indonesia and Malaysia failed to make any offers within the context of the telecom negotiations⁹⁸.

The offers of every other APEC member were seen, at least by the United States, as deficient in some way or another. Seven of the APEC members adopted the regulatory principles⁹⁹ but each of their offers contained some limitations in terms of market access or investment restrictions.¹⁰⁰ And, three of the APEC countries, Thailand, Philippines and Chile, either refused to adopt the regulatory principles or made a less than full commitment to the principles.¹⁰¹

⁹⁷The other countries included Austria, Denmark, Finland, Germany, Luxembourg, Netherlands, Norway, Sweden and the U.K., Supra note .

⁹⁸ In addition, other countries that failed to make any offers included Columbia and South Africa.

⁹⁹ These included: Australia, New Zealand, Canada, Japan, Korea, Singapore and Hong Kong.

¹⁰⁰ For example, in Hong Kong's case, local wire-line and wireless network services were limited to the current four providers and no commitments were made to keep its market open for local or international public wire/wireless services and facilities even after the expiration of Hong Kong Telecom's exclusive rights in 2006. Singapore's offer committed to open facilities and services by 2002 with the exception of international simple resale. It chose, however, to retain a 40 percent ceiling on foreign investment. Among the developed members of APEC, Canada maintained an investment limit of 46.7% in general with additional limits on foreign investment in mobile satellite systems. Australia's offer contained certain investment limits on specific companies. Japan's offer permits both market access and investment with certain investment restrictions in the major domestic and international carriers. See,

¹⁰¹ The Chairman of the FCC has identified Singapore and Hong Kong as delaying "too long in the complete opening of their markets given their sophisticated national economies". See, Chairman Reed Hundt, FCC, Speech to the Institute for International Economics, 10/23/96 available in www.fcc.gov/Speeches/hundt.

Although this discussion has not identified in detail the specific negotiating position of individual APEC members, as a general proposition we may reasonably infer that so far, neither APEC-based initiatives nor the position of many individual members of APEC have added particular momentum to the WTO negotiations. This outcome is not altogether surprising, especially given the only recent (and still incomplete) record of domestic telecommunication liberalization in much of the Asia-Pacific region. Many developing countries remain fearful that liberalization of telecommunications will threaten domestic telecom providers, result in job losses or thwart local efforts to expand service.

Since the WTO negotiations are still underway an accord may yet be reached. Viewed through an APEC lens, it is noteworthy that the Manila meetings appear to have generated little additional momentum to the WTO telecom negotiations.¹⁰²

3. An Information Technology Agreement.

In the run up to the Manila meetings, the U.S. government pushed hard to obtain an APEC endorsement of the so-called Information Technology Agreement (ITA), within the WTO. APEC's support of an ITA was seen as offering some potential for spurring the WTO members to eliminate tariffs in this vast sector of economic activity.¹⁰³ To this end, the Leader's

¹⁰² This recent negotiating record raises an important question that pertains not only to telecommunications but difficult sectoral issues more generally. The logic of the so-called "single package" approach of the Uruguay Round was premised on the notion that negotiators would be able to achieve more by way of concrete commitments if all of the negotiated areas were under a single undertaking; in other words countries would be able to make concessions across sectors that would result in a better package of concessions overall than if negotiations were broken out into specific areas and the concessions only available on a conditional MFN basis to those countries that made comparable offers. As it turned out, that logic did not provide enough of an incentive for countries to make sufficiently ambitious market access offers to induce the United States to bind its offer on an unconditional MFN basis in the telecom or financial services sectors. The subsequent negotiations on a sectoral basis have as yet, still failed to reach a satisfactory conclusion. This recent record raises the broader question whether these sectors are in some sense not ripe for multilateral negotiations or will only be likely to result in accords if countries are able to extend conditional MFN treatment.

¹⁰³ The U.S. government has defined information technology to include products inclusive of semiconductors, software, fax machines, modems, computers, telecommunications equipment and others. U.S. government sources argue that ITA products are worth \$1 trillion annually, and that an agreement to eliminate tariffs in these sectors will accelerate global trade and save the U.S. industry over \$1 billion a year. Global trade in information technology amounted to \$500 million in 1995, 80 percent of that was among APEC countries but tariffs remain high in many jurisdictions. For example, tariffs on computers in Korea, Thailand and the Philippines are as high as six times the levels in the United States, while EU tariffs on local area network equipment are twice as high as in the U.S. Similarly, "semiconductor tariffs in the EU can be as high as 14 percent, 10 percent in the Philippines and 10 percent in Thailand, as compared with zero in the United States. And tariffs in telecommunications

Declaration contained a reference to the conclusion of an "information technology agreement by the WTO Ministerial Conference that would substantially eliminate tariffs by the year 2000, recognizing the need for flexibility as negotiation in Geneva proceed." ¹⁰⁴

President Clinton characterized this ITA reference as a "big deal" and stated that he was "especially pleased that today the APEC leaders endorsed the early completion of an information technology agreement which would cut to zero tariffs a vast array of computers, semiconductors and telecommunications by the year 2000". ¹⁰⁵ But almost immediately, there was open disagreement among APEC officials as to the meaning of the ITA undertaking.

The language in the Declaration does not specifically state that tariffs will be reduced to zero but rather indicates that tariffs will be "substantially eliminated". U.S. officials commented that this terminology was in fact "tradespeak for zero", but there was considerable ambiguity on this point. ¹⁰⁶ For example, when asked if Malaysia had committed itself to eliminating tariffs on information technology products by 2000, Prime Minister Mahathir indicated that this was actually a non-binding undertaking, and one that "if we are ready, we will do it. If not, we will not". ¹⁰⁷ Reservations about the year 2000 were also expressed by senior officials from Thailand and Singapore. ¹⁰⁸

Thus, at the end of the Manila meetings it was far from clear whether or not the APEC undertaking on ITA represented a hearty endorsement of liberalization of tariffs in information technologies. Nor was it clear whether the APEC language on an ITA was likely to contribute much momentum to the deliberations at the WTO ministerial. As it turned out, at the December

equipment are as high as 15 percent in Indonesia, 20 percent in Korea, and 14 percent in the EU, much higher than in the United States." See, USTR Press Release, APEC Leaders Back Agreement to Eliminate Technology Tariffs by Year 2000", November 25, 1996 available through USTR on line facsimile retrieval, document number 40240.

¹⁰⁴ See, Leaders' Declaration, supra note 3 at para 13.

¹⁰⁵ Remarks by the President to the Embassy Community, White House, Office of Press Secretary, Nov 25, 1996 available in <http://www.whitehouse.gov/WH/html/briefroom.html>.

¹⁰⁶ See, Press Briefing by Ambassador John Wolf, Assistant USTR Bob Cassidy and Ambassador Winston Lord, The White House, Office of the Press Secretary, November 25, 1996 available in <http://www.whitehouse.gov/WH/html/briefroom.html>

¹⁰⁷ See, The Star, November 26, 1996 available at www.apecgspa.washington.edu/apec/media/mediahtml

¹⁰⁸ See, Bangkok Post, November 20, 1996. Anuraj Manibhandu, available at www.apec.org/newmedia. Singapore's Prime Minister Go Chok Tong was quoted as saying that while the agreement was helpful, "it will not lead to a firm conclusion that we are going to free up the information technology sector by the year 2000. It could be treated by members any way they want to". See, Bill Tarrant, APEC Fudge Gives Good Nudge to WTO, November 26, 1996, Reuters available in LEXIS/NEXIS CURNWS.

WTO meetings some 28 countries agreed to eliminate duties for certain specified information technologies beginning in 1997 and concluding in 2000. This represented well over 80 percent of trade in these products.¹⁰⁹ Thus, with the benefit of hindsight it appears that that the early endorsement, even tentative, by some APEC countries for the ITA was a useful foundation for generating some momentum for the ITA at the WTO.

B. Regional Trade Liberalization through APEC

The inclusion of trade liberalization as a central component of the APEC process has been controversial but it is now firmly rooted as one of the three pillars of the APEC agenda. The Bogor Declaration established APEC's long-term goal of free trade in the region, and the Osaka Action Agenda advanced an approach for achieving those goals and offered a few initial proposals.

Some concrete offers in the form of individual action plans were presented at the Manila APEC meetings. Since trade and investment liberalization through the APEC process is still at an early stage, it is too soon to draw any hard and fast conclusions. The early evidence suggests a mixed picture.

As to approach, there has still been no resolution of the issue of whether to apply the liberalization achieved within APEC to non-members on an unconditional, most-favored nation basis or on a reciprocal basis.

The U.S. government has resisted accepting the notion that liberalization must rest solely on unconditional extension of the benefits on a MFN basis. Its reasoning stems from a concern that unconditional extension would amount to giving other countries, notably Europe, a free ride on American concessions. This reflects the judgment that unconditional MFN provides insufficient incentives for non-members to undertake comparable liberalization measures.

Advocates of this perspective tend to argue that unconditional MFN liberalization by an economy as large as that of the United States constitutes a disincentive for other countries to support another round of multilateral trade negotiations. For this reason, the argument goes, APEC members must be free to refuse to extend APEC trade liberalization to nonmembers. As a negotiating tactic, this would induce non-members to offer comparable concessions.¹¹⁰ Given the size of the U.S. market relative to that of the small and medium size economies of APEC, this stance by the United States is not surprising. It is consistent with the position taken by the United States in the Uruguay Round (including in telecom services) and it does not necessarily imply an unwillingness to further open the U.S. market to imports of goods and services. U.S. trade policy makers now perennially stress the importance of reciprocal trade concessions.¹¹¹

¹⁰⁹ Ministerial Declaration on Trade in Information Technology Products. Press Release, World Trade Organization, Singapore December 13, 1996. The 28 countries included Australia, Canada, Taiwan, European Union (15 members), Hong Kong, Iceland, Indonesia, Japan, Korea, Norway, Singapore, Switzerland, Turkey and the United States.

¹¹⁰ See, David K. Linnan, *supra* note 5.

¹¹¹ Ambassador Charlene Barshefsky put it this way: "Building and maintaining an American constituency for an internationalist trade policy depends in no small part on

A closely related issue dividing APEC's members is the APEC modality for liberalizing trade and investment, embodied in the Action Agenda's proposed approach of taking both collective and unilateral actions. The tension on this point also stems in part from differing perspectives as to whether unilateral measures will provide the necessary incentives for countries to undertake meaningful and politically difficult reforms. For this reason the United States pressed for the inclusion of collective measures as part of the Osaka Agenda, believing that this would help to encourage the drawing up of meaningful liberalization proposals and to inspire APEC members to take comparable steps. More generally, the United States, Canada, Singapore, Hong Kong, and some others are associated with the position that APEC undertakings should strive to be rule-based and formalized.

Some countries, such as China, Thailand and Malaysia, are seen to favor an approach to trade and investment liberalization that relies primarily on unilateral measures. This stems at least in part from a desire to preserve policy flexibility, including the ability of those countries to protect their domestic industries until they have become internationally competitive.¹¹² An additional motivation may stem from the recognition that external pressure to liberalize coming from the United States or other countries has the potential to derail existing liberalization in developing countries and to generate political backlash.¹¹³

Those academics and government officials who argue that MFN liberalization within APEC is possible and desirable, and that unilateral liberalization will prove and already has proven meaningful, tend to focus on underlying economic factors. Notably, the evidence that many countries in the Asia-Pacific region are choosing to further open their markets for their own economic reasons, not because they are obliged to do so through trade negotiations.¹¹⁴

Proponents of this point of view argue further that the "trade expansion game" that has emerged in the Pacific can be characterized as "prisoner's delight" rather than a prisoner's dilemma. In the latter scenario, liberalization is viewed as a concession in order to overcome the possibility of unfavorable outcomes. In the Pacific, it is argued, the dynamic is quite different. Because liberalization enhances economic performance, this has "changed the political perceptions of the payoff matrix."¹¹⁵ In this regard it is argued that the Asia Pacific region already is

establishing greater reciprocity in trade--where we share both benefits and the obligations....Unfortunately, while Asia is a region of enormous potential, it is also the region where Americans face the greatest obstacles in trade". Remarks before PBEC, supra note 8.

¹¹² See, Hugh T. Patrick, Part I: Some Thoughts on the Future of APEC (May 1995) (unpublished manuscript on file with M.E. Janow)

¹¹³ See, Y. Funabashi, supra note 16 at 121.

¹¹⁴ See, Peter Drysdale & Ross Garnaut, Principles of Pacific Economic Integration, in ASIA PACIFIC REGIONALISM, 48-61 (Peter Drysdale & Ross Garnaut, supra note).

¹¹⁵ The authors go so far as to argue that "any perceived disadvantages in chances in income distribution associated with trade liberalization are judged by the political process to be less important than the gains for the nation as a whole". Id. at 51.

experiencing "competitive liberalization."¹¹⁶ The APEC methodology of open regionalism, operationalized through collective actions and concerted unilateral offers, is seen as being likely to "ratchet up" trade and investment liberalization even without negotiated agreements.¹¹⁷

Since the 1980s, there has been significant liberalization in all the APEC economies, especially in terms of reductions in the level of official border restrictions.¹¹⁸ And certainly APEC's Asian members have consistently eschewed the protectionism of others. There also is little if any evidence that through APEC-sponsored initiatives its members have undertaken liberalization measures that discriminate against non-members. In these respects, the positive-sum dynamic implied above may accurately characterize what is driving the trade and investment liberalization that is occurring in the Asia-Pacific region. But those dimensions only provide a partial picture of trade liberalization in the Asia-Pacific region.

For the time being, numerous impediments to trade and investment remain in the Asia Pacific region¹¹⁹. Some countries continue to pursue policies that reflect discriminatory impulses,

¹¹⁶See, C.Fred Bergsten...

¹¹⁷ A number of U.S. and Asia-based economists hold this view of Asian liberalization and the APEC process. Notable among them are C. Fred Bergsten of the Institute for International Economics in Washington D.C. and Peter Drysdale of Australia National University. Some of Dr. Bergsten's writings have argued that the formation of the European Economic Community spurred the U.S. to launch the Dillon and Kennedy Rounds of GATT negotiations. Similarly, the engagement of the EEC propelled the U.S. to push for the Tokyo Round. And, the U.S. pursuit of regional agreements with Israel and Canada in the 1980's, Bergsten has argued, convinced the EC to drop its earlier resistant against a new multilateral round of trade talks, which helped to launch the Uruguay Round. See, Jeffrey A, Frankel, Does Regionalism Undermine Multilateral Trade Liberalization or Support it? A Political Economy Survey in REGIONAL TRADING BLOCS (forthcoming, 1996). More recently, as noted above, the APEC Seattle Leader's Meeting in the context of APEC served to jolt the Europeans into making more progress in the Uruguay Round. Although these examples are often cited as evidence for the proposition that regional arrangement can serve as a catalyst for multilateral trade liberalization, they may also be viewed as reactions against what some countries have perceived as potentially discriminatory arrangements rather than affirmations of a shared confidence in the open and non-discriminatory approach embodied in the current APEC approach to trade liberalization.

¹¹⁸ See, Peter Drysdale and Ross Garnaut, supra note 8 at 48

¹¹⁹ It is clearly beyond the scope of this article to detail the full range of impediments to trade and investment that remain in the Asia Pacific region. However, for illustrative purposes, it is useful to identify several studies that give different dimensions of remaining trade and investment restraints: Arvind Panagariya argues that there is substantial variation in the level of protection across APEC countries. For example, Hong Kong and Singapore are free trading economies. Quantitative restrictions have virtually disappeared in Korea, Malaysia, the Philippines and Thailand, but tariff rates remain high in a number of APEC countries, especially in Thailand. See, Arvind

despite the weak standstill commitment contained in the Action Agenda.¹²⁰

If trade and investment liberalization in the APEC context is limited only to those steps that

Panagariya, East Asia and the New Regionalism in World Trade, 17 WORLD ECONOMY, PAGE (1994). According to World Bank estimates, effective rates of protection for manufacturing in Indonesia, Thailand, Korea, the Philippines, and Malaysia are estimated at 52 percent, 51 percent, 28 percent, 32 percent and 23 percent respectively. See, Building on the Uruguay Round, EAST ASIAN LEADERSHIP IN LIBERALIZATION, A World Bank Discussion Paper. (April 1994). Gary Hufbauer, a Senior Fellow at the Institute for International Economics in Washington D.C., has recently launched a major comparative study that examines the cost of protection in a number of countries including the United States, Japan, Korea, Indonesia, China, the E.U., Australia and Canada. Early conclusions of this study argue that "old fashioned trade barriers still impose major costs, both in developed and developing countries". See, Gary Hufbauer, Surveying the Costs of Protection: A Partial Equilibrium Approach, Paper prepared for a Conference sponsored by the Institute for International Economics, (Jun. 1996). Two studies undertaken under the auspices of the PECC and mentioned elsewhere above have identified in quantitative and qualitative terms the range of measures taken by APEC economies to liberalize their economies as well as remaining restraints. See, PECC, MILESTONES IN LIBERALIZATION, supra note 77; PECC, SURVEY OF IMPEDIMENTS TO TRADE AND INVESTMENT IN THE APEC REGION, supra note 80. See also, Merit E. Janow, Japan's Uncertain Politics, Testimony Before the House Subcommittee on Asia and Pacific Affairs and the Subcommittee on International Economic Policy and Trade, Committee on International Relations, October 30, 1995. This testimony identifies a number of sources of resistance to economic deregulation in Japan even in the face of considerable domestic support for the domestic gains that deregulation might augur for the Japanese economy. For perspectives on deregulation in South Korea, see: Kim Do Hoon, Korea's Experience in Regulatory Reform. Korean Institute for Industrial Economics and Trade, July 9-10, 1996, mimeo on file with M.E. Janow. Here it is noted that in South Korea, President Kim Young Sam outlined an ambitious deregulation program including plans to deregulate state monopolies in the steel, power generation and telecoms sector, but these efforts appear to have met with substantial opposition from domestic interests including existing monopolists and government ministries. Dr. Kim notes that while the Korean government has deregulated a number of economic regulations, government efforts have been largely focused on easing the procedural regulations and the most serious regulations that restrict access to the Korean market have been "put aside, left untouched". Id.

¹²⁰ A notable example in this regard was President Suharto's decree in June 1996 to let the Indonesian "national car" be initially produced in South Korea and imported duty-free, while keeping in place a tariff level of some 125% to apply to imported cars from other countries. The EU, Japan and the United States have challenged Indonesia's automotive practices at the WTO as violating GATT articles I and III as well as TRIMS. See, available at www.wto.org/wto/dispute/bulletin.

countries have on their own initiative decided to take irrespective of the actions of others, then the issue of MFN treatment is less likely to be a major obstacle to trade liberalization. But MFN is not meaningful in and of itself without market access. To put it another way, if a country provides MFN treatment to its trading partners but denies all of them effective access to its domestic markets, then MFN can mean very little.

Are the gains from liberalization so overwhelmingly clear to APEC members that leaders (and legislatures) in the Asia-pacific region are prepared to unilaterally liberalize on an MFN basis, without obtaining major concessions from other countries and in the face of strong domestic pressure groups that see such liberalization as antithetical to their commercial interests?

The record of multilateral trade negotiations (alluded to briefly above), not to mention the history of regional arrangements elsewhere in Asia, suggest that domestic lobbies often are able to persuade policy makers to leave sensitive sectors untouched or subject to only limited reforms.

¹²¹

Although officials from many of the Asian members of APEC would find this assertion objectionable, there is little evidence to suggest that the APEC methodology has eliminated the need for negotiations in the classic GATT sense, even within the APEC context. Let us look again at the dynamics that emerged in arriving at the non-binding investment principles as well as the Action Agenda. These two items of recent record suggest that the incipient negotiating style developing within APEC has not found a way to surmount traditional obstacles; special-interest concerns have surfaced in predictable ways, and discussions have stumbled at predictable points.¹²²

1. A Look at APEC's Non-Binding Investment Principles

¹²¹ So far, for example, trade preferences within ASEAN or the ASEAN Free Trade Area (AFTA) have so far had only trivial effects, largely because of the limited nature of concessions offered by AFTA members. See, Peter Drysdale and Ross Garnaut, "Principles of Pacific Economic Integration"...p 48 In a review of ASEAN's efforts in the 1960's to implement a Preferential Trading Arrangements, Dr. Ippei Yamazawa of Hitotsubashi University concludes that "none of these have been very successful because of limited concessions by member countries. Instead, the six countries succeeded in strengthening their bargaining position against outside developed trading partners." See, Ippei Yamazawa "On Pacific Economic Integration", in Ross Garnaut & Peter Drysdale, supra note 8 at 206.

¹²² Trade economists have for some years studied the manipulation of trading arrangements by special interests. Jeffrey Frankel has produced a comprehensive summary of this literature. See. Jeffrey Frankel, supra note 105. Dr. Frankel also points out that ASEAN members have until now exempted almost all of the important sectors from the system of preferences that they have decided to grant to each other. See, Id. at 9. Instead, they have tended to liberalize those sectors that are less likely to be threatened by import competition. A famous example in this respect was Indonesia's offer to liberalize imports of snow plows, even as it excluded numerous other major sectors of its economy. Id.

The APEC non-binding investment principles not only weak but are weaker in some respects than the investment commitments already agreed to in the context of the Uruguay Round Trade Related Investment Measures (TRIMS)-- which is itself quite limited in scope.

The TRIMs accord identified an illustrative list of measures deemed inconsistent with GATT obligations on national treatment and elimination of quantitative restrictions. The identified measures included local content requirements, trade-balancing requirements, foreign-exchange balancing requirements and domestic sales requirements.¹²³ Yet even these areas are not fully delineated in APEC's non-binding investment principles. This is curious given the fact that all of the APEC member economies, with the exception of China and Taiwan are subject to WTO disciplines.

The preamble to the non-binding APEC principles states that these are principles to which "APEC Members aspire."¹²⁴ They contain some 12 provisions covering: transparency; nondiscrimination between source economies; national treatment; investment incentives; performance requirements; expropriation and compensation, repatriation and convertibility; entry and sojourn of personnel; removal of barriers to capital exports; avoidance of double taxation; investor behavior; and settlement of disputes.¹²⁵

Some of the principles, notably the transparency and nondiscrimination provisions, have been drafted relatively unambiguously.¹²⁶ Both of these principles address matters of obvious

¹²³ Local content measures and trade balancing requirements were identified in the TRIMS as being inconsistent with Article III of the GATT on national treatment. Similarly, foreign exchange balancing restrictions and domestic sales requirements were identified as inconsistent with Article XI or the GATT governing quantitative restrictions. The TRIMS was silent on export performance requirements. For TRIMS covered by the Uruguay Round, WTO members were required to notify the WTO of all GATT inconsistent measures within ninety days of entry into force of the WTO. All such notified TRIMS are then subject to a phasing out process subject to various timetables depending on whether the notifying country is an industrial, developing or LDC member. A recent PECC report has shown that as of May 1995, five APEC member economies had made notifications to the WTO--i.e., Indonesia, Malaysia, Mexico, the Philippines and Thailand. See, PECC, SURVEY OF IMPEDIMENTS TO TRADE AND INVESTMENT IN THE APEC REGION, supra note 80 at [chapter 6]. The absence of notification by others presumably indicates their belief that there were no GATT-inconsistent TRIMS in place. This same PECC report identified the local content requirements, administrative impediments, discriminatory market access or national treatment standards, and operational restrictions imposed by APEC economies. The list of such measures is lengthy. The PECC Report concluded that all APEC members continue to restrict inward foreign investment in some way. *Id.*

¹²⁴ APEC Non-Binding Investment Principles, available in Bijit Bora & Monty Graham, supra note 63.

¹²⁵ *Id.*

¹²⁶ For example, the transparency principle states plainly that "Member economies will make all laws, regulations, administrative guidelines and policies pertaining to investment in their economies publicly available in a prompt, transparent and readily

importance to investors and both are core GATT principles.

Other provisions of the non-binding principles, such as the principles covering national treatment, performance requirements, and avoidance of double taxation, enshrine exceptions or contain caveats that could easily nullify the principle to which they are attached¹²⁷.

Further, certain obvious government investment restrictions that have been applied by most of the developing countries of APEC and some of the developed countries of APEC find no reference in the principles at all. For example, the reference to investment incentives is limited to a prohibition against relaxation of health, safety, and environmental regulations. It ignores a host of commonly applied incentives such as coverage of foreign-exchange risk, export taxes, use of other incentive schemes, or subsidies more generally.¹²⁸

Performance requirements, another major impediment to potential investors in a number of APEC countries, also received limited attention in the non-binding principles. These simply state that member economies will minimize their use, thereby leaving unaddressed the issue of whether or not APEC countries will continue to include export minimums, domestic content requirements, limitations on royalties, trade-balancing requirements, land-use restrictions, technology transfer or licensing requirements, local equity restrictions, and other such commonly applied restrictions in the more restrictive investment regimes of APEC members.

Importantly, the principles contain no standstill or rollback provisions, nor do the principles define investment.

The principles do include a dispute settlement provision, but this seems especially artificial given that it would be foolhardy for an investor to try to seek redress either through arbitration or

accessible manner." See, *Id.* The nondiscrimination between source economies reads: "Member economies will extend to investors from any economy treatment--in relation to the establishment expansion and operation of their investments--that is no less favorable than that accorded to investors from any other economy in like situations, without prejudice to relevant international obligations and principles". See, *Id.*

¹²⁷ For example, the national treatment principle provides that "With exceptions as provided for in domestic laws, regulations, and policies, member economies will accord to foreign investors--in relation to the establishment, expansion, operating and protection of their investment--treatment no less favorable than that accorded in like situations to domestic investors". See, *Id.* The performance requirement principles states that "member economies will minimize the use of performance requirements that distort or limit expansion of trade and investment". *Id.* Similarly, the principles covering removal of barriers to capital exports states that "member economies accept that regulatory and institutional barriers to outlaw of investment will be minimized". *Id.* And, the double taxation principles states that "member economies will endeavor to avoid double taxation related to foreign investment". *Id.*

¹²⁸ The provision on investment incentives states that "Member economies will not relax health, safety and environmental regulations as an incentive to encourage foreign investment". *Id.*

through litigation for a violation of some aspect of the non-binding principles.¹²⁹ acceptable to both parties." *Id.*

If one takes at face value the proposition that these principles represent the standards to which APEC economies "aspire", then that should raise concerns about the prospect of achieving the Bogor goal of free trade and investment by the target dates of 2020/2010. The APEC principles as currently drafted afford no degree of meaningful legal protection to investors from arbitrary and capricious actions of governments.¹³⁰ member committees, particularly the United States, were similarly disappointed. The existing APEC agreement on investment principles is a clear example of the 'lowest common denominator approach that dilutes the impact and effectiveness of APEC." See, Prepared Statement of Mark Borthwick, Chairman International Coordinating Group, Pacific Economic Cooperation Council (PECC) Before the House Committee on International Relations, Subcommittee on Asia and the Pacific and Subcommittee on International Economic Policy and Trade, on Future of Asia-Pacific Economic Cooperation (APEC) (Jul. 18, 1995). Doubtless for that very reason, business groups have argued that APEC should strengthen the existing principles and revised principles should then be rendered legally enforceable through their incorporation into the domestic laws of each APEC member.¹³¹ More recently, in October 1996, the APEC Business Advisory Council (ABAC) called for an expansion of the principles.¹³²

This response from at least some important voices in the international business community was predictable. Indeed, even during the negotiation of the principles many Asian nations apparently were concerned that they soon would be pressured to turn the non-binding principles into binding ones. This concern seems to have been converted into a desire to keep the principles sufficiently weak so as to foreclose the possibility that the resulting principles would receive

¹²⁹ The principles state: "Member economies accept that disputes arising in connection with a foreign investment will be settled promptly through consultations and negotiations between the parties to the dispute or, failing this, through procedures for arbitration in accordance with members' international commitments or through other arbitration procedures

¹³⁰ This perspective is shared by a number of experts who have been involved in the APEC initiative on investment. For example, Mark Borthwick, Executive Director of PECC, stated in Congressional testimony that "the agreement last year by APEC was arrived in too great haste and fell short of the expectations of the U.S. government officials who reluctantly and conditionally agreed to it rather than remain isolated on the issue. Some PECC

¹³¹ See, Pacific Business Forum (PBF), OSAKA ACTION PLAN: ROADMAP TO REALIZING THE APEC VISION, (1995) available in <http://www.apecsec.org>.

¹³² In particular, ABAC suggested that as an interim measure, APEC establish voluntary investment projects under which APEC economies would apply a specific set of improved principles for enhanced investment protection. SEE, APEC Business Advisory Council, Report to the Economic Leaders, 1996, APEC MEANS BUSINESS, October 25, 1996 at p. 2

much support from the international business community.

More fundamentally, as one U.S. scholar wisely has noted, since there was little empirical basis upon which to argue that the absence of an investment code was impeding the flow of funds into the region, there also was little incentive for the developing nations of APEC to raise the principles above the lowest common denominator.¹³³ All of this leads one to wonder whether the results were worth the effort.

Granted, a more generous view of the existing non-binding investment principles would see them as reflecting an initial and early effort to build consensus on a complex and divisive issue. From that perspective, one could reasonably argue that even these flawed principles have served to inaugurate a process of building consensus within the region on steps necessary toward even wider investment liberalization.¹³⁴ Indeed, some experts have argued that the non-binding approach already has proved itself a "valuable experience" for many of APEC's less developed members, who now have been exposed to alternative views of foreign investment.¹³⁵

Certainly the investment principles do not represent the end of a process of policy dialogue on investment restraints, but rather only a beginning. Working groups continue to focus on investment rules. At this juncture it remains unclear whether those efforts ultimately will take the shape of binding investment principles or less formalized alternatives, such as an improved set of non-binding principles or a regional investment code that countries could enter into on a voluntary basis.¹³⁶

Again, over the long term there are grounds for optimism about investment liberalization in the Asia-Pacific region. As implied by the above, notwithstanding the flaws of the initial non-binding principles and the current inability of APEC itself to agree on comprehensive rules, a number of the APEC members are unilaterally liberalizing their investment regimes.¹³⁷ Its negative list in

¹³³ Carl Green, *supra* note 5.

¹³⁴ See, B. Bora & M. Graham, *supra* note 63.

¹³⁵ See, *Id.*

¹³⁶ Several pairs of APEC countries have entered into bilateral investment agreements that contain undertakings with respect to the right of establishment, the right to transfer funds, and assurances against expropriation. See, PECC, PACIFIC ECONOMIC DEVELOPMENT REPORT (1995). An outside advisory group to the APEC CTI have advanced a number of proposals on how investment liberalization might usefully proceed in the APEC context. One such proposal is that APEC develop an Asia Pacific investment code that would not seek to impose a uniform investment regime on participating economies but rather would provide a frame of reference or set of guiding principles that signatories would commit in principle to implement over time. It is argued that this could then serve as the basis for achieving a binding plurilateral instrument. *Id.* at 122.

¹³⁷ See, PECC, MILESTONES IN APEC LIBERALIZATION, *supra* note 77 at C13. This report itemizes a number of steps taken in recent years by APEC countries to liberalize their investment regimes. A few examples are usefully referenced here. In China's case,

1991, 1992, 1993, 1994 and 1995. South Korea, for its part, has undertaken substantial relaxation of certain administrative impediments. For example, it has reduced the documentation requirements, shortened the processing time for review of investment related documentation and abolished certain review procedures. In Malaysia's case, it has reduced certain operational restrictions such as the withholding tax on technical fees and royalties and it now permits exporters to retain a portion of export proceeds in a foreign currency account in Malaysia. The Philippines for its part in 1991 increased the number of sectors open to foreign investments, with still additional sectors liberalized in 1994.

The investment principles point up a paradox that is surfacing in other areas under review within APEC as well: Countries may already be doing more by way of liberalization, or plan to do more, than they are prepared to codify or commit to through binding or even non-binding rule-based instruments. At the same time many impediments to trade and investment remain high in a number of APEC countries and to that extent, the rhetoric of liberalization has outpaced the reality.

2. Assessing the Action Agenda

Turning to the Osaka Action Agenda, the principles contained therein are not as limited as the non-binding investment principles, partly because the former have been designed to guide the overall process of achieving the Bogor vision rather than address a specific set of impediments.

In some respects the Action Agenda resembles the Punta Del Este Declaration that launched the Uruguay Round. Neither is a legally binding document and both identified approaches and issues subject to future liberalization.¹³⁸

since 1986 it has taken a number of steps to provide greater market access for foreign investors. In 1986, it permitted 100 percent foreign capital affiliated enterprises; in 1990 it liberalized its regulations on joint ventures and in 1991 it liberalized the range of enterprises eligible for investment. In Indonesia's case, in 1989 it switched from identifying a positive list of areas where foreign investment was permitted to a negative list-- whereby all investments would be permitted except those explicitly prohibited. Indonesia has made further modifications in

¹³⁸ The Punta Declaration was structured in two parts. Part I, covering negotiation on trade in goods included a statement on objectives and eight principles that were to govern the negotiations including: transparency, agreement that the outcome of the negotiations shall be treated as a single package, an undertaking on balanced concessions, differential and MFN treatment, an undertaking that developed countries do not expect the developing countries to make contributions inconsistent with their individual development, progressive liberalization on the part of less developed parties, and special attention to the problems of least developed countries. It also contained an undertaking on standstill and roll back, identified subjects for negotiation, which included: tariffs; nontariff measures; tropical products; natural resource based products; textiles and clothing; agriculture; GATT Articles; safeguards; MTN Agreements and Arrangements; subsidies and countervailing measures; dispute settlement; trade related intellectual property rights and trade related investment measures. See The Punta Del

The "general principles" contained in the Action Agenda are said to apply to the entire APEC liberalization and facilitation process.¹³⁹ Part One, Section A. Here again, as in the case of the investment principles, some of the general principles contained in the Osaka Agenda have been drafted without ambiguity; other principles have been drafted to enshrine flexibility on the part of individual APEC members to decide how best to apply the principles in light of their domestic constraints and priorities. For example, the principles of comprehensiveness, WTO consistency, and transparency have been drafted in a straightforward fashion; each states that measures taken "will " be comprehensive, WTO-consistent and ensure transparency.¹⁴⁰

In the run up to the meetings, a number of countries, including Japan, China, Taiwan and Korea were seeking sectoral exclusions for sensitive sectors. The draft Action Agenda contained an escape clause that would have permitted countries to avoid making commitments in such difficult areas as agriculture and textiles.¹⁴¹ At the end of the day, and in no small measure because of the efforts of the United States and Australia, the principle of comprehensiveness remained in the Osaka Agenda. However, the principles reflect a compromise in that they also include a "flexibility" principle designed to formally acknowledge the different levels of development among the APEC economies and to provide countries with a basis for contesting specific trade proposals that might surface in the future.

In addition, the language of the Action Agenda is ambiguous with respect to the three principles of "comparability," "non-discrimination" and standstill". In each instance the principle states that the APEC economies "will endeavor" to ensure overall comparability; will "apply or will endeavor" to apply the principles of non-discrimination; and will "endeavor" to "refrain from using measures that would have the effect of increasing levels of protection." The reasons for these qualifiers differ in each case.

Este Ministerial Declaration, GATT FOCUS, October 8, 1989.

¹³⁹ The 9 principles include: comprehensiveness, WTO consistency, comparability, non-discrimination, transparency, standstill, simultaneous start, continuous process and differentiated timetables, flexibility, and cooperation. See, Action Agenda, *supra* note 68 at

¹⁴⁰ *Id.*

¹⁴¹ See, Honorable William Bodde Jr., Senior Advisor, Pacific Basin Economic Council, United States Member Committee, Statement Before the House Committee on International Relations Subcommittee on Asia and the Pacific and the Subcommittee on Economic Policy and Trade, Nov. 9, 1995, available in LEXIS, Nexis Library, CURNWS File. Ambassador Bodde notes that Japan and China were in favor of sectoral exclusions. In Japan's case, the primary concern appears to have been agriculture--a sector that had been Japan's major difficulty in the context of Uruguay Round as well. In China's case, it supported sectoral exclusions because they wanted to enshrine the principle of exceptions, given that they were not fully sure how their economy might evolve and they thought that they might want to be able to exclude sectors at some later date. See also, C. Fred Bergsten, APEC After Osaka: Toward Free Trade by 2010/2020, Working Paper Series, Number 96-1, (1996)

In the case of non-discrimination, it appears that the cautiously worded "will endeavor" was included because the United States was unable to commit to MFN for China, given the U.S. Jackson-Vanik amendment to the Trade Act of 1974.¹⁴² The comparability point was, in contrast, an undertaking sought by the United States, because this was seen as a way of applying pressure on APEC members to produce comparably ambitious undertakings. In these ways the principles reflect compromises negotiated among the members.

Bearing in mind the debate surrounding the inclusion of a comprehensiveness principle in the Action Agenda, this suggests that the APEC process has thus far been subject to the same difficulties that proved so difficult to address in the context of the Uruguay Round. Most notable in this regard are the efforts of some APEC members to exclude from coverage those sectors (e.g., agriculture) most threatened by a reduction of formal barriers to trade.

As noted earlier, the inclusion of a comprehensiveness principle overcame that hurdle in the first instance, but it is not yet clear whether the compromise reached has removed the tendency for countries to maintain protection for sensitive sectors or simply postponed addressing it.

C. APEC's Contribution to Frontier Trade Issues

What role is APEC playing with respect to the "new" issues that either fall outside of multilateral disciplines or are only partially covered by those disciplines? Early evidence seems to suggest that APEC initiatives are serving a useful role in deepening understanding of some issues currently outside of international trade disciplines.

As described in section I above, APEC has developed numerous working groups that are focusing on a range of issues having direct bearing on trade and investment and not fully covered by international rules. One notable example in this regard is the facilitation efforts being made in the areas of competition policy, deregulation, and access to services markets broadly. Even the issue of corruption, which only recently has been introduced by the United States as a potential subject for multilateral negotiations, has been raised in the APEC forum in the context of improving transparency and the rules governing government procurement. In a steady, workaday manner, APEC is providing one of the very few places where discussions are being held among both developed and developing economies, on a broad range of nontariff issues that can distort trade and access to markets and with respect to which there is little consensus, either domestically or internationally.

With the gradual lowering of the more obvious border barriers to trade and investment, many of the remaining impediments to trade and investment stem from practices designed primarily to respond to domestic regulatory concerns. Seen through this lens, APEC's efforts in these new issue areas could be seen as the accretion of information and knowledge about domestic practices with implications for access to markets and international trade and investment.

Competition policy is a case in point.

Increasingly, private business practices have become sources of international trade and commercial friction. And it is increasingly recognized that at least the market access concerns of trade policy share with competition policy an interest in enhanced consumer welfare and the

¹⁴² See, Jackson Vanik Amendment..

fostering of competitive, market oriented environments¹⁴³.

Although it is widely recognized that private restraints can impede access to markets, there is no comprehensive international framework of rules or principles covering business practices under either trade or competition disciplines. Whether anticompetitive and exclusionary business practices are matters purely for domestic competition authorities or matters properly addressed at an international level by some mix of trade and competition experts, is a topic of ongoing discussion in numerous academic and policy fora.

The degree of experience among the APEC membership with regard to competition policies and norms, ranges from extremely high to almost nonexistent. By way of examples, the United States, Canada, Japan, Australia, and New Zealand have each long had established competition or antitrust regimes in place. Although the approaches differ, each country has rules that prohibit cartels; rules governing mergers; and rules governing monopolization. Yet, even with respect to countries that have established competition laws and policies, many important differences with respect to the structure and purpose of those regimes remain.¹⁴⁴

The range of international experience with regard to cooperation on antitrust matters is also very wide. Australia and New Zealand have integrated their trade and competition policy regimes. Recent years have witnessed expanded cooperation on antitrust matters between the United States and Canada, and the U.S. and the EU, formalized in mutual legal assistance agreements. In Japan's case, although its formal laws bear resemblance to those of the United States, the perceived inadequacies of Japan's enforcement of its domestic Anti-monopoly Act has been a source of serious bilateral trade tension between the United States and Japan. And recent years have seen numerous bilateral trade cases that have included some element of competition policy related undertakings so as to address a perceived problem of private restraints¹⁴⁵.

Other APEC members, such as South Korea and Taiwan, have introduced competition laws and policies only more recently (in 1980 and 1992 respectively) and appear to still be in the early stages of developing competition policy enforcement priorities and establishing the role domestic enforcement agencies within their national governments. Korea's Fair Trade Commission, for example, was established in 1980 but did not become an independent agency until 1994. Taiwan's law was introduced only recently, in 1992. Its FTC is an autonomous

¹⁴³ Other concerns of trade policy, such as those that underpin anti-dumping rules, are at far greater odds with competition policy approaches.

¹⁴⁴ Some countries stress consumer welfare and efficiency as the highest of priorities while others include social goals such as protection of small and medium size industries as among the central purposes of competition policies. These considerable differences between jurisdictions have posed substantial hurdles to those contemplating harmonization of competition laws and policies. See, Merit E. Janow, Public and Private Restraints that Limit Access to Markets, in MARKET ACCESS AFTER THE URUGUAY ROUND 101 (1996).

¹⁴⁵ Examples include the U.S.-Japan bilateral agreements reached in the glass, semiconductor, automotive, paper and construction industries as well as the bilateral Structural Impediments Initiative.

agency, and the agency already has reviewed quite a number of cases. China's law on competition policy was passed in 1993. Its chief aim is to facilitate the curtailment or elimination of unfair business practices. It does not establish a specific competition enforcement agency, and it is expected that only later will laws be introduced to address monopoly concerns. Indonesia is in the process of developing a domestic competition law.¹⁴⁶

Given this diversity of experience with competition laws, institutions and more fundamentally the very different approaches taken by APEC members with respect to competition norms, the Action Agenda undertakings on competition policy appear to be constructive, albeit early, efforts at deepening understanding on the effects of private restraints on consumer welfare and access to markets.¹⁴⁷

As noted in the preceding discussion on MRAs, collaboration on service sector issues has been more advanced than the exploratory discussions in the area of competition policy. As described in Section II above, in the telecommunications area, for example, the Action Agenda proposes the development and implementation of a model Mutual Recognition Agreement (MRA) on standards by the end of 1997.

Many of these frontier areas are not currently subject to international WTO disciplines; hence, approaches developed within the APEC context are less constrained than in areas covered by the WTO. This could provide APEC member countries with some latitude within which to experiment in any arrangements that they undertake.

Given the economic and political diversity within the Asia-Pacific region, it does not seem likely that APEC members will prove better able to develop a common APEC approach to the divisive issues of harmonization of trade and labor rights, trade and the environment and trade and human rights that are proving extremely contentious both in APEC and other international fora.¹⁴⁸ countries to broaden the WTO's work program to include new issues such as multilateral investment rules, labor standards, competition policy and corruption/bribery. These are highly contentious issues and they constitute the single greatest challenge to the sovereignty and economic prosperity of the developing countries in the future". Id.

¹⁴⁶ See, Edward Graham, , mimeo on file with M.E. Janow

¹⁴⁷ Key elements of the undertakings on competition policy in the Action Agenda include: to review competition policies and laws; develop cooperative arrangements among APEC economies; engage in various information sharing exercises on competition policy, and consider developing non-binding principles on competition policy and laws within APEC. See, Action Agenda, supra note 68.

¹⁴⁸ Malaysia has been among the most vocal opponents of the inclusion of these new issues to the multilateral trade agenda. See, Rafida Aziz, Perspectives from the South, REMARKS OF MALAYSIA'S TRADE MINISTER BEFORE THE CONFERENCE ON WORLD TRADE ORGANIZATION, July 9-10, 1996. At this conference the Minister not only singled out labor standards and corruption, but also took a broadside attack on what she saw as the interest on the part of developed countries to establish rules governing competition policy and investment. She stated: "What is even more discomfoting is the move by some developed

D. APEC's Business Facilitation Programs: Reducing Transaction Costs and Increasing Transparency

APEC also is developing concrete and practical work programs vis-a-vis technical issues designed to be business-relevant and to reduce the transaction costs for businesses operating in the region. The Action Plan identifies some 15 areas in which APEC members are expected to put forward specific liberalization and facilitation proposals at the Manila and subsequent meetings of APEC.

Among the most noteworthy examples of practical programs of use to business executives are undertakings to simplify and harmonize customs procedures; achieve mutual recognition arrangements among APEC economies of standards and conformity assessments in both regulated and voluntary sectors;¹⁴⁹ improve upon the transparency of government procurement practices; and enhance the mobility of business persons.¹⁵⁰ All of these areas reflect areas of

¹⁴⁹ The work of the Committee on Trade and Investment (CTI), which oversees standards issues, covers some five areas. Some of these areas appear to be making some headway. For example, there are preliminary discussions of developing APEC-wide mutual recognition agreements (MRA's) on "the acceptance of test data and product certifications in major regulated sectors". The intent of these efforts is not to try and harmonize safety standards or change national regulations to increase trade. Rather, as experts note, the purpose is to develop methods of accepting test and certifications for some areas where existing standards of safety are already in place. In several sectors, APEC members have committed to develop mutual recognition arrangements by specified dates. In the telecommunications sector, the members agreed to develop and begin to implement on an "elective basis a model Mutual Recognition Arrangement on conformity assessment by the end of 1997". Similarly, in the energy sector, APEC members agreed to reach agreement by the end of 1999 "on the mutual recognition of testing protocols and accreditation of laboratories and the acceptance of the tests arising from them". More broadly, in the standards and conformance section of the Osaka Action Agenda, the APEC members committed to: ensure transparency of standards and conformity assessments, align mandatory and voluntary standards with international standards, achieve mutual recognition among APEC economies, among other measures. The Osaka Action Agenda also identified guidelines for achieving those broad objectives, including fairly concrete commitments to: place priority attention to electrical and electronic appliances, food labelling, plastic products and rubber products; develop bilateral, multi-sectoral mutual recognition arrangements that could later provide the basis for plurilateral arrangements; develop plurilateral mutual recognition arrangements in particular sectors, and consider participation in international treaties on standards. See, Action Agenda, supra note 68, at Part 1, Section C.

¹⁵⁰ In the area of government procurement, the Osaka Action Agenda commits the APEC members to develop a "common understanding" on government procurement policies and to develop by 2000 a set of nonbinding principles on government procurement. See, Action Agenda, Id.

regulatory divergence or heterogeneity among APEC members that can impose costs to potential foreign market entrants. Progress in each of these APEC agenda items could therefore provide concrete gains for businesses operating in the region.

Let us take mutual recognition arrangements as a case in point. As scholars have noted, mutual recognition of standards, testing and certification arrangements require that jurisdictions accept for domestic purposes certain agreed upon regulatory determinations of other jurisdictions, even if the underlying criteria on which those determinations are made are not harmonized between the jurisdictions.¹⁵¹

For example, in theory, a mutual recognition arrangement governing telecommunication equipment would provide that if such equipment had been tested and approved in its home market it would be permitted to be sold in the importing country. Thus, mutual recognition can permit firms to realize economies of scale across international markets. Mutual recognition agreement (MRAs) also address transparency concerns since an MRA would forbid domestic regulatory regimes from erecting or applying regulatory barriers to imported products.¹⁵²

Although mutual recognition agreements are very complex, they are proving easier to negotiate than efforts to harmonize regulatory regimes. This is because the latter, harmonization, requires jurisdictions to make their regulations identical or at least more similar while the successful negotiation of sectoral or broader MRAs can permit entry and sale of products or services without requiring fundamental regulatory convergence.¹⁵³ In part for that reason, MRA's are being negotiated or considered bilaterally (between the U.S. and Europe), as well as regionally (within APEC, NAFTA) and elsewhere.¹⁵⁴

In the APEC context, consultations to develop an MRA in the telecommunications sector appear to be the most advanced of the sectoral initiatives.¹⁵⁵ But, at this time, progress in MRA's as

¹⁵¹ See, David W. Leebron, Lying down with Procrustes: An Analysis of Harmonization Claims, 41-117 in FAIR TRADE AND HARMONIZATION (Jagdish N. Bhagwati and Robert E. Hudec eds., 1996)

¹⁵² Id.

¹⁵³ See, Id.

¹⁵⁴ In the context of the U.S.-European negotiations, negotiations are underway for the acceptance of testing, product certification and laboratory accreditation in ten industrial sectors. Some have argued that the fact that the US-EU negotiations have been undertaken as a package has contributed to the slow progress in the negotiations. See, John O. Wilson, STANDARDS AND APEC: AN ACTION AGENDA (1995). The E.U. has stressed that the negotiation of sectoral MRA's should be undertaken as a single package; in contrast, in APEC, several stand alone sectoral negotiations are underway.

¹⁵⁵ As of this writing, the text of draft MRA's have been prepared by several APEC countries. The draft texts do not require that standards be harmonized. Instead, the drafts presuppose that signatories would accept test results from testing organizations in the other country. Interview with U.S. Trade Official, (Jul. 1996).

well as the other business facilitation programs identified above are still in the developmental stage.¹⁵⁶

Business groups have welcomed APEC's trade facilitation initiatives, but U.S. groups in particular have stressed that these must produce concrete results if APEC is to maintain U.S. business support and to ensure that APEC does not stagnate.¹⁵⁷ More recently, APEC's Business Advisory Committee has called for concrete measures such as the creation of an APEC Business visa, and the establishment of an APEC registry for trademarks and patents, among other measures.

E. APEC's Contribution to Broader Aspects of Regional Integration and

¹⁵⁶ Given the diversity among the APEC members, there are enormous variations in technical testing capabilities between the nations. One constructive, albeit long-term, idea that has surfaced within APEC to address concerns about different technical capabilities within the APEC membership is the idea of developing an APEC Laboratory Recognition Center, which could be operated by a private institution, and that could certify laboratories in APEC's economies to test and certify exports. This remains in the idea stage. Interview with U.S. Government officials, July 1996. There are other facilitation efforts that are further along. For example, in an effort to facilitate the flow of goods in the region, APEC members have apparently already agreed to adopt or abide by the principles of the Harmonized Tariff classification system starting in 1996. APEC members have also agreed to adopt or abide by the principles of the WTO Customs Valuation Agreement by the year 2000. See, Ambassador Jeff Lang, Deputy U.S. Trade Representative, Testimony before the House Committee on Agriculture, June 5, 1996. Other, more mundane but practical achievements include the development of a CD-ROM that contains current tariff data for every APEC member. Although this CD-ROM was widely publicized by U.S. officials, it appears that only a fairly limited number of them were produced. Hence, when this author sought to acquire one for pedagogical purposes, none were available. This is not an exhaustive list of facilitation efforts underway. Other examples include: preliminary steps to examine the possibility of establishing an APEC-wide trademark system; a proposal by Prime Minister Keating of Australia that APEC consider developing a so-called "smart card" for APEC business executives that could be used to facilitate business travel throughout the APEC membership, among other measures. See, Foreign Press Center Briefing with Sandra Kristoff, U.S. Coordinator for APEC Affairs (Nov. 30, 1995) available in LEXIS, Nexis Library, CURNWS file.

¹⁵⁷ See, for example, Willard A. Workman, U.S. Chamber of Commerce, APEC: Goals and Opportunities, Statement before the House Committee on International Relations, Subcommittee on Asia and the Pacific, (Nov. 9, 1995). See also, Pacific Business Forum, THE OSAKA ACTION PLAN: ROADMAP TO REALIZING THE APEC VISION, (1995); Pacific Basin Economic Council (PBEC), Implementing Free Trade and Investment in the Pacific Region, U.S. Member Committee Report, (May 18, 1996). This report recommends that " Pacific economies should recognize that the region's businesses need to see concrete effects now, both to boost economic activity and to build increased support for liberalization efforts. Meaningful progress cannot wait until the next century". Id.

Cooperation

While APEC's contribution to trade liberalization, regional as well as global, offer a mixed picture and its trade facilitation features are still at an early stage of implementation, APEC has already made a contribution to regional cooperation by building confidence in its members in their ability to cooperate; by serving as a nascent geopolitical forum and by establishing broad and ambitious goals for the future. Let us examine each of these elements in turn.

1. APEC as a Confidence Building Exercise

In seven years, APEC has succeeded in developing a structured context for ongoing consultations on economic and trade issues of interest and concern to its members. When viewed from the perspective of their early meetings, which were cautious and tentative, APEC members have been able to develop consensus positions on issues such as membership, work programs and overall goals. APEC has also been able to fashion pragmatic responses to a number of divisive issues.¹⁵⁸

The number of consultative meetings between trade, foreign, finance, and other ministers from the region has steadily increased to the point that such meetings are now uncontroversial.¹⁵⁹ In between ministerial meetings, senior officials regularly meet to review progress on the established work programs and to develop recommendations to Ministers. Numerous lower-level meetings occur between expert groups. APEC therefore has introduced a degree of consultation among government officials on a wide range of economic issues that simply did not exist prior to its formation.

As a related point, it should be noted that APEC often is commended for enhancing the confidence of regional officials in their ability to cooperate on economic issues. Given the economic, political, religious and cultural diversity of the region, and its history of little by way of cooperative economic endeavors at the policy level, the APEC forum has become at a minimum a bully pulpit for developing a sense that they are indeed part of a budding regional "community"¹⁶⁰.

¹⁵⁸ For example, as noted in Section B above, early in the APEC process, the ASEAN members were concerned that APEC would dilute or undermine their interests. This concern was ultimately mitigated by the pragmatic agreement by the APEC members to give the ASEAN members particular prominence in the APEC process by rotating the APEC Chair between an Asean and a non-Asean member. Later, at Osaka, the U.S. interest in ensuring that the Osaka Action Agenda included an undertaking on comprehensiveness was resisted by those members that sought exceptions for sensitive sectors such as agriculture. The inclusion of a flexibility principle offered a pragmatic interim approach to keep the process moving forward.

¹⁵⁹ For example, it is expected that in 1996, some nine ministerial are expected to occur under the APEC auspices. These include meetings with human resource or labor ministers, science and technology ministers, energy ministers, finance ministers, foreign ministers, among others. See, S. Kristoff, *supra* note 143.

¹⁶⁰ There was considerable debate within APEC what the terminology of "community" might mean in the APEC context. C. Fred Bergsten is said to have argued that when the

2. APEC as a Geo-Political Forum

APEC already has developed a limited geo-political dimension. As one official has put it, "We are all in the room together because we want to promote not only prosperity, but stability and security in the Asia-Pacific. APEC is a prime vehicle for bringing together China, Japan, and the United States--which are the key three players that are going to emerge as the triad balance of power over the next 10 to 15 years."¹⁶¹

The Leader's Meetings have been an especially important development in this regard. Although APEC has not been a venue for ameliorating serious points of tension between individual countries (e.g., between the United States and Japan on trade matters, or between the United States and China on trade, human rights, proliferation, and security issues), it has provided a venue through which officials have been able to cooperate in a constructive fashion on a broad range of work programs. APEC meetings also have afforded Leader's and Minister's with the opportunity to convene separate bilateral meetings that can have a diplomatic value broader than the APEC agenda. This may be especially relevant with respect to U.S.-China relations.

Given the serious rift in U.S.-PRC relations that has developed in the post-Tiannamen period, APEC has offered one of the few settings in which senior U.S. foreign policy officials have had a chance to meet with their Chinese counterparts. And even aside from the bilateral meetings that have occurred on the fringes of the APEC meetings, APEC has been one of the very few venues through which the United States (as well as the other APEC members) have been able to engage Chinese officials in relatively nonconfrontational policy discussions about economic reform in the PRC. The recent meetings between President Clinton and President Jiang Zemin at the Manila APEC meetings were, for example, one such occasion where broader geo-political aspects of U.S.-China relations were addressed were Presidents Clinton and Jiang announced that they will exchange visits in 1997 and 1998.

Looking ahead, it would seem likely that given the importance of the United States, Japan, and other APEC members as investors in the PRC and as major export markets for PRC exports, that APEC could prove an important setting for facilitating and encouraging the integration of China into the global economy.

3. APEC as a Goal Setter

The Bogor Declaration of free trade in the region by 2020/2010 has given APEC an ambitious target. Leadership endorsement of this goal has injected in the APEC process a degree of enthusiasm and direction that had not existed previously. The Bogor vision has established a benchmark against which all future APEC undertakings will be evaluated. The question that now

EPG used the term, it was in the chinese sense of a "big family" not in the sense of a formalized common market. Some Asian scholars and officials have asserted that in Washington's view, "community does not mean big family. Rather it means a U.S. centered and U.S. dominated economic bloc in Asia." See, Dezhaio Chen, "China and APEC" China Centre for International Studies. International Review (Beijing) 2 (may) 1995.

¹⁶¹ See, S. Kristoff, supra note 143 .

has been embedded into the APEC process is this: Are the measures proposed advancing APEC toward the Bogor goal or not?

At the same time, the announcement of the goal of achieving free trade in the region by 2020/2010 is not without its risks. As U.S. business groups have noted, the 2020/2010 date is so far in the distant future that it runs the twofold risk of distracting government officials from addressing pressing economic and trade issues and "burdening APEC with unrealistic expectations."¹⁶²

F. APEC's Institutional Future

Thus far the APEC forum has kept its institutional mechanisms to a minimum. This has been the clear preference of the majority of its members. Some scholars have argued that the issue is not whether APEC should become more institutionalized but how quickly and in what manner this should occur. Some have argued that APEC's structure should develop gradually.¹⁶³ It has also been argued that the very agreement to dismantle trade and investment barriers by 2020 could not have been achieved "through the European approach to cooperation, which relies on the drafting and ratification by all participants of legally binding international agreements or treaties."¹⁶⁴ This is an interesting point that highlights some important features differentiating APEC from other, notably European, approaches to regional economic integration.

The motivation behind the creation of the European Community has arguably been as much political as economic. It has reflected a hope that greater economic interdependence will promote not only economic prosperity but a peace which had eluded Europe in the first part of the century. This motivation served to induce European states to eventually cede substantial sovereignty to those newly created institutions that acted on the basis of their judgment of what was in the EC's interest rather than the interest of a member state. These institutions were, in turn, endowed with extensive law-making powers. In the European context, supranational institutional mechanisms were developed that served to advance the "community" aspects of integration in Europe.¹⁶⁵

¹⁶² See, PRESIDENT'S ADVISORY COMMITTEE FOR TRADE POLICY AND NEGOTIATIONS (ACTPN), RECOMMENDATIONS ON ASIA (Sept. 14, 1995)

¹⁶³ See, Hadi Soesatro, The Institutional Framework for APEC: An Asean Perspective, in Chia Siow Yue, ed. APEC CHALLENGES AND OPPORTUNITIES (1994)

¹⁶⁴ See, Andrew Elek, APEC: An Open Economic Association in the Asia-Pacific in REGIONAL INTEGRATION IN THE ASIA PACIFIC, (Bijit Bora & Christopher Findlay eds. 1996) at 227.

¹⁶⁵ See, J.H.H. Weiler, The transformation of Europe, 100 YALE L.J. 2403 (1991). In this seminal article, Professor Weiler argues that the 1951 Treaty of Paris establishing the European Coal and Steel Community, "despite their economic content, are best seen as a long-term and transformative strategy for peace among the states of Western Europe, principally France and Germany". Id. at 2478. Weiler sees the concept of "community" in the transnational European context to mean "a different type of intercourse among the actors belonging to it, a type of self-limitation in their self-perception, a redefined self-interest, adherence, redefined policy goals. ...But crucially, it does not extinguish

In the Asia-Pacific region, the factors driving APEC while not devoid of political content, have chiefly been economic in nature. APEC has developed in response to the growing inter-regional trade and investment flows. The primary actors promoting integration have been firms, not governments. And thus far the members of APEC have not seen it as either feasible nor desirable for APEC to develop an institutional structure analogous to that of the EU.

For APEC to do so would mean taking a leap of faith that the collective interests of its members require that individual countries subsume a meaningful degree of economic autonomy in the design and implementation of their economic and trade policies to the greater economic good of all of the APEC members. Further this vision would require that the APEC organization be entrusted with some regulatory and enforcement capabilities. No such shared underlying sense of community or vision of collective interest presently exists within APEC.

Although the United States (and sometimes Canada, Australia, and others) often is identified as the outlier given its preference for achieving more formalized arrangements within APEC, especially with respect to liberalization of trade--even the most legalistic of APEC's members have not called for the creation of an expanded APEC bureaucracy or the development of a new supra-national authority to administer or develop APEC-wide rules.

There have, however, been proposals to further institutionalize APEC through the various non-binding codes described above, as well as through the creation of an APEC dispute mediation system that would "supplement, rather than compete" with the WTO dispute settlement mechanism, especially with regard to areas not yet subject to WTO disciplines--e.g., deregulation, investment, competition policy, etc.¹⁶⁶

The value of an APEC dispute mediation capability, at least with respect to government to government disputes, is not self-evident. Dispute settlement procedures have been substantially enhanced through the Uruguay Round. And early evidence suggests that it is being used. As of this writing, some 40 disputes have been taken to the WTO.¹⁶⁷

the separate actors that are fated to live in an uneasy tension with two competing senses of the polity's self: the autonomous self and the self as part of a larger community.." Id. at 2480. See also, Jean Monnet, *Economic Integration: New Forms of Partnership*, 97-107 in *CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, PERSPECTIVES ON PEACE, 1910-1960* (1960). In this essay, Jean Monnet argues that "The common market for coal and steel was only the first limited step to unity, but it created the conditions which made others possible. It prepared the astonishing reconciliation between France and Germany. The binding force of common institutions was essential in this process". Id. at 101

¹⁶⁶ See, *Achieving the APEC Vision*, supra note 49, at 23-24. The EPG recommended that APEC should create a Dispute Mediation Service (DMS) that would operate on a voluntary basis to "provide assistance in resolving (and thus, over time, perhaps avoiding) economic disputes among its members." Id. at 24. This proposal was taken up in the Bogor Declaration, where the Leaders "agreed to examine the possibility of a voluntary consultative dispute mediation service." Bogor Declaration, supra note 54.

¹⁶⁷ As of this writing, some 62 disputes have been taken to the WTO, 19 of these

Given the interest of the APEC members in ensuring that the WTO dispute settlement procedures are used and respected, it is not obvious what a regional mechanism would contribute. The EPG Reports that have urged the creation of an APEC mediation capability stress, as noted, that it should be used for matters currently outside WTO disciplines. But unlike dispute settlement procedures in the NAFTA or the WTO, in the APEC context there are no underlying agreements to be interpreted or enforced. This suggests that mediation would likely turn on the assessment of the arbitrators of what is fair to the parties concerned. If so, this raises several different complexities.

If the subject matter of the dispute pertains to a substantive legal matter, for example rights that are conferred by antitrust laws, such rights may be inappropriate for enforcement by mediation or arbitration.¹⁶⁸ At a minimum in the APEC context it is difficult to imagine what standards

represent disputes between APEC members. See, <http://www.wto.org/WTO/dispute/bulletin>.

¹⁶⁸ In the United States, for example, prior to 1985, U.S. Courts of Appeals that decided the question of the arbitrability of antitrust claims held that an agreement to arbitrate an antitrust claims was against public policy. See, *American Safety Equipment Corp. v. J.P. Maguire & Co.*, 391 F. 2d 821 (2d Cir. 1968). This case identified three reasons for refusing to allow arbitration of domestic antitrust claims: first, that such claims involve a broad range of interests including promotion of "the national interest in a competitive economy". *Id.* at 826. Second, because the issues and evidence in resolving private antitrust cases can reach "swollen proportions". *Id.* at 827. And third, that it would be questionable to entrust antitrust claims to arbitrators because arbitrators are "frequently men drawn for their business expertise," and "it is the business community generally that is regulated by the antitrust laws." *Id.* Then, in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*, 473 U.S. 614 (1985), the U.S. Supreme Court refused to follow the American Safety doctrine in the context of a dispute arising out of an international agreement that included an arbitration clause. The opinion stressed the significance of maintaining international comity as a ground for upholding arbitration agreements even if a different rule might be applied to purely domestic agreements.

In the international context, the U.S. Supreme Court held that concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes all require enforcement of an arbitration clause in a private dispute. Since *Mitsubishi*, courts have struggled to decide whether domestic antitrust cases are arbitrable. In *Kotam Electronics, Inc. v. JBL Consumer Products, Inc.*, the Eleventh Circuit initially held that *Mitsubishi* does not require reversal of controlling circuit court precedent that antitrust claims are not arbitrable. The Court relied on the public policy arguments contained in *American Safety Equipment*. Later, the court vacated its decision and the case will be reheard en banc. 59 F. 3d 1155 (11th Cir.), vacated, reh'g en banc granted, 69 F.3d 1097 (11th Cir. 1995). Other circuits have reached different conclusions and rejected the policy considerations of *American Safety Equipment*. See, *Coors Brewing Co. v. Molson Breweries*, 51 F. 3d 1511 (10th Cir. 1995); *Nghiem v. NEC Electronic, Inc.* 25 F.3d 1437 (9th Cir.), cert. denied, 115 S. Cr. 638 (1994) [Agreements to arbitrate antitrust disputes is enforceable.]; *Sanjuan v. American Board*

would be applied.

More fundamentally, as others have noted, the contentious bilateral "disputes" between the United States and a number of APEC countries are not simply disputes about process but rather represent contentious trade negotiations. These are matters that in some instances could not be brought before the WTO because they do not involve practices that violate existing trade agreements nor practices that squarely fit under the GATT provisions governing practices that "nullify or impair" rights under a trade agreement.¹⁶⁹

Practices that can be caught, for example, by the definition of "unreasonable" in section 301 of the 1974 Trade Act, as amended, are very broad. In general, these include practices that are not necessarily inconsistent with the international legal rights of the United States but are deemed otherwise unfair and inequitable and can, for example, including foreign government toleration of anticompetitive conduct that restricts U.S. exports.

When conducting a formal 301 investigation, the Office of the U.S. Trade Representative engages in fact-finding and consultations with the foreign government about the alleged barriers to market access. No single or uniform methodology is employed in the review of a claim of unfairness.

Further, although the petitioner has a burden of persuasion and is obliged to provide evidence of the practices that have given rise to the claim of unfairness, the evidentiary standards are not defined in a section 301 market access case and rest on an assessment by the U.S. Trade Representative. Negotiation rather than adjudication is a hallmark of the 301 process. If the foreign government is prepared to enter into negotiations with the U.S. government, as a practical matter (although not as a matter of law) the burden of persuasion can soon shift to the foreign government.

Although some countries may find attractive the idea of using a regional dispute mediation service as an instrument to blunt U.S. bilateralism--especially when the U.S. invokes section 301 of its trade laws to address practices abroad that it deems unreasonable--it is almost inconceivable that the United States would bring such matters before a voluntary mediation service.¹⁷⁰

of Psychiatry and Neurology, 40 F. 3d 247 (7th Cir. 1994).

¹⁶⁹ See, C. Green, *supra* note 5.

¹⁷⁰ As noted by Professor Green, "given the unpopularity of the United States' "aggressive unilateralism," there is little prospect that the United States would prevail before a mediation body even in cases where there is some sympathy for the goals the United States is pursuing". C. Green, *supra* note 5. More recently, press reports indicate that senior Chinese officials have called for a dispute mediation service within APEC because of their interest in resolving disputes with the United States outside of bilateral channels. See also, Lara Parpan, China Pushes for Mediation Forum in APEC, AGENCE FRANCE PRESS, May 24, 1996 available in LEXIS, Nexis Library, CURNWS file.

This interim assessment of APEC suggests that it should be viewed positively if evaluated from the perspective of an early effort to facilitate regional economic integration in an environment characterized by a historic lack of policy cooperation. The process is, however, likely to be an incremental one that will frustrate those who believe that APEC should be a vehicle for significantly accelerating the pace of trade liberalization in the Asia-Pacific region.

III. Important Challenges Facing APEC

Since APEC is still in its infancy, it will face numerous analytical and policy challenges in the years ahead. This discussion will highlight three: the role for ideas, action and leadership.

A. The Role for Ideas

In recent years, numerous studies have been undertaken by economists that have identified the costs and benefits of trade liberalization in the Asia-Pacific region under different assumptions--e.g., regional liberalization by different groups of countries in the Asia-Pacific on an MFN, non-MFN, sectoral, or other basis. Relatively few studies have sought to identify where the built-in incentives for liberalization among APEC countries are the greatest because of the predominance of trade between and among APEC economies.

If we bear in mind the tensions discussed in Section II above--namely that APEC as a whole has committed itself to WTO-consistent liberalization yet there remain substantial concerns among APEC members about the free rider problems associated with MFN liberalization--then a challenge for policymakers will be to identify those areas in which the benefits of trade liberalization will be the greatest among the APEC members and the free-rider problem will be minimized.

Two recent research approaches have examined this question by identifying where APEC countries are the predominant suppliers in the region. An American and an Australian economist each independently undertook analyses of trade among APEC economies, to identify those areas in which APEC members are predominant global suppliers and therefore MFN liberalization could have positive effects for APEC members and also minimize the free-rider problem.

The study undertaken by an American economist identified products where APEC countries provide 80 percent of world exports and which products also cover some 19 percent of APEC's exports and some 16 percent of APEC's imports.¹⁷¹ Looking at product categories, the study argued that electronic equipment is probably the best candidate for liberalization because of the high volume of trade in this sector, the fact that the headquarters and production facilities of the major global producers are located in APEC countries, and tariffs remain high.¹⁷² Tariffs still are

¹⁷¹ See, Paul Wonnacott, *Merchandise Trade in the APEC Region: Is there Scope for Liberalization on an MFN Basis?*, INSTITUTE FOR INTERNATIONAL ECONOMICS (1994). Smaller thresholds change the gain from negotiation. For example, if negotiations only covered products where APEC countries provide 90 percent of world exports, this would only make up 3 percent of APEC exports. Id.

¹⁷² Items that fit under this category include: comprising TV recorders, TV cameras,

above 10 percent in a number of categories in about half of the APEC countries, thus providing significant scope for liberalization in this category. South Korea, Malaysia, the Philippines and Thailand have trade surpluses in the area of electronics products yet they also maintain high tariffs on some of these products.¹⁷³

A second study undertaken by an Australian economist has identified commodities in which APEC members supply 75 percent or more of the region's import markets and also account for nearly 66 percent of total exports from APEC.¹⁷⁴ This study argued that such a sectoral approach to trade liberalization would prove useful in accelerating progress toward free trade in the region, and also would be consistent with multilateral rules.¹⁷⁵ ASIA-PACIFIC (Bijit Bora and Christopher Findley eds.) (1996) 230.

Looking ahead, we see that much additional work could usefully be undertaken to inform policymakers of the relative economic gains of different approaches that might be undertaken, as well as to offer practical suggestions as to those areas where the benefits of further liberalization on an MFN basis would redound primarily to APEC members but would also prove consistent with multilateral rules.¹⁷⁶

B. The Role for Action

receivers, and picture tubes. *Id.*

¹⁷³ *Id.*

¹⁷⁴ See, Ross Garnaut, *supra* note .

¹⁷⁵ The World Bank has also undertaken a general study comparing the economic consequences of various approaches to trade liberalization in the region, including through MFN liberalization. It suggests that MFN liberalization could usefully focus on those sectors in which regional complementarity is high, or where resource endowments, transport costs or technological differences limit competition from outside the region. Three sectors are noted in this regard, textiles, services and processed minerals. See, WORLD BANK, *East Asia's Trade and Investment: Regional and Global Gains from Liberalization* (1994). An Australian analyst has argued that the process of mutual enforcement of trade liberalization would be stronger, and short-term gains could be accelerated if APEC focused on sectors of particular strategic significance. Although only briefly mentioned, he identified steel and steel products, processed minerals, grains, textiles, clothing and fibers, and aviation in this regard. See, Andrew Elek, *APEC: An Open Association*, available REGIONAL INTEGRATION AND THE

¹⁷⁶ The International Trade Commission (ITC) completed a report in June 1996 for the Office of the U.S. Trade Representative that also identified areas with a high percentage of intra-APEC trade. As of this writing, this Report had not yet been released to the public. See, INTERNATIONAL TRADE COMMISSION, *U.S. INTERESTS IN APEC TRADE LIBERALIZATION*, Investigation 332-364, Jan. 24, 1996, available in <http://www.usitc.govinform>.

APEC's central challenge in the years ahead will be to continue to prove valuable to its members. All three legs of the APEC agenda--trade and investment facilitation, cooperation, and liberalization---will be important in this regard but perhaps none will prove more challenging than trade liberalization.

The November 1996 Manila meetings have been the most recent testing ground, although not in any sense the final one, of APEC's ability to deliver meaningful liberalization by means of the unique approach agreed upon in Osaka. But expectations for Manila should have been modest for a number of near-term and more fundamental reasons.

In the near term, the Clinton Administration, having failed to secure fast-track authority from the U.S. Congress,¹⁷⁷ had no authority to offer broad-based trade-liberalizing proposals in the context of its APEC individual action plan. The Administration did retain negotiating authority attained from the U.S. Congress during the implementation of the Uruguay Round to negotiate and proclaim further tariff reductions with respect to those tariff categories negotiated during the Uruguay Round.¹⁷⁸ 108 Stat. 4809 (1994). It was therefore in that context that the U.S. pressed for an agreement on information technology.

As explained in the Statement of Administrative Action (SAP), the Uruguay Round did not succeed in obtaining complete duty elimination in some of the sectors where Congress gave the Administration authority to negotiate the elimination of tariffs. Examples of these so-called zero-for-zero tariff areas include: wood products, electronics, distilled spirits, non-ferrous metals, and oilseeds and oilseed products, among other sectors. The SAP states plainly that "obtaining further reductions and elimination of duties in these sectors is a priority objective for U.S. multilateral, regional and bilateral negotiations".¹⁷⁹ And in other areas, where the U.S. did

¹⁷⁷ The fast track process for trade agreements was introduced in the 1974 Trade Act. Fast track consists of certain expedited procedures, that if followed, ensure that once the trade implementing bill is submitted to the Congress it will be voted on quickly by both houses of Congress without amendment.

¹⁷⁸ See, Section III(b) of the Uruguay Round Agreements Act (URAA) which states: "...the President may proclaim--(1) the modification of any duty or staged rate reduction of any duty set forth in Schedule XX if--(A) the United States agrees to such modification or staged rate reduction in a multilateral negotiation under the auspices of the WTO, and (B) such modification or stage rate reduction applies to the rate of duty on an article contained in a tariff category that was the subject of reciprocal duty elimination or harmonization negotiations during the Uruguay Round of multilateral trade negotiations, and (2) such modifications as are necessary to correct technical errors in Schedule XX or to make other rectifications to the Schedule." See, Uruguay Round Agreements Act, Pub. L. No. 103-465,

¹⁷⁹ See, Statement of Administrative Action, H.R. Doc., No. 103-316, 103d Cong., 2d. Sess., 656-895 (1994) at 701. The entire range of sectors where Congress granted the Administration negotiating authority for tariff reductions down to zero included: pharmaceutical, electronics, furniture, distilled spirits, medical equipment, non-ferrous metals, paper and paper products, wood products, steel, agricultural equipment, construction equipment, scientific equipment, oilseeds and oilseed products and toys.

achieve duty elimination, the Congress encouraged the Administration to "pursue accelerated staging of tariff reductions as a priority trade objective".¹⁸⁰

The Uruguay Round Agreements Act (URAA), which implemented the Uruguay Round accord permits the U.S. Administration to provide some "limited incentives" for other WTO members to enter into negotiations to reduce their tariffs in order to get tariff reduction commitments from the United States. Congress also indicated that while it thought multilateral agreement to engage in such reductions or accelerated staging will "help ensure that the United States receives adequate benefits in return for action in this area", it was not limiting the Administration in pursuing only multilateral approaches.¹⁸¹

Hence it is not surprising that in the run-up to the Manila APEC meetings, U.S. trade officials were suggesting that the United States was considering proposing early trade liberalization in at least the four sectors of wood products, oil seed products, nonferrous metals, and information technologies.¹⁸² Given the nature of the authority vested in the Administration, U.S. offers in these areas will be contingent upon comparable concessions from other APEC member countries that must then be bound at the WTO.

Although tariff reductions from APEC members in each of these areas would doubtless be of value to U.S. and regional business interests, only the category of information technologies represented a sector of significant trade intensity between the United States and the Asia-Pacific region. This view is also consistent with the conclusions of the academic studies alluded to above.¹⁸³ For example, total U.S. exports of oil seed products to APEC countries amounted to only \$3.57 billion in 1995, which represents only 1 percent of total U.S. exports to APEC countries, although it represents some 52.7% of total U.S. exports of these products.¹⁸⁴ In contrast, if we assume that the information technologies alluded to above include at least computers, semiconductors, telecommunication products and scientific equipment, total U.S. exports to APEC countries amounted to \$58 billion in 1995, which represents 16 percent of total U.S. exports to APEC countries and 65 percent of total U.S. exports in this sector.¹⁸⁵

It is questionable whether U.S. offers in all of these areas will all be viewed as major

Id.

¹⁸⁰ Sectors noted in this regard included paper, paper products and soda ash. Id. at 701.

¹⁸¹ On this point, the SAP states: "it is not anticipated that participation in such agreements by all WTO members would be necessary and in some cases agreement with a limited number of countries with major trading interests in a particular sector would be sufficient". Id. at 702.

¹⁸² See, Remarks of Ambassador Charlene Barshefsky, *supra* note 8. .

¹⁸³ See, Paul Wonnacott, *supra* note 158.

¹⁸⁴ This data does not indicate, however, what U.S. exports of oilseed products could be if oilseed tariffs for the Asia-Pacific region were eliminated.

¹⁸⁵ See, DEPARTMENT OF COMMERCE, NATIONAL TRADE DATA BANK (1995).

concessions or opportunities by other APEC members. For example, U.S. imports of oilseed products from APEC countries amount to \$400 million in 1995, which represents 59.7% of total U.S. imports of oilseeds but only 0.8% of total U.S. imports from APEC economies. Once again, the trade significance of information technologies is far greater since imports from APEC amounted to \$93 billion in 1995, which represented 18 percent of total U.S. imports from APEC economies and 90% of total U.S. imports of this category.¹⁸⁶

Despite the relative openness of the U.S. economy, in contrast to the other APEC economies, and despite the much repeated insistence by many members of APEC that they are liberalizing for their own reasons irrespective of the actions of others, it is rare indeed to hear officials from APEC countries argue even as a rhetorical matter that the United States should free ride on Asian liberalization.

There are other features of the APEC process that do not require the U.S. Administration to obtain negotiating authority from the Congress and that are relatively less controversial than trade liberalization. It is perhaps in those other areas that we should expect to see emerge the most significant initiatives within APEC in the near term--e.g., in the areas of development cooperation and business facilitation.

In addition, the Leader's Meetings provide a unique opportunity for the strengthening of the geopolitical aspect of the APEC forum. This dimension of APEC is relatively underdeveloped and offers substantial room for policy initiatives in the years ahead.

Over the medium term, the questions remains: Will "the "APEC way" of trade liberalization produce substantial progress towards implementation of the Bogor vision? How likely is it that APEC will produce meaningful liberalization on a regional basis that is also WTO-consistent and does not reduce incentives for trade liberalization on a global basis? As with so many fundamental APEC issues, this central challenge remains not only unresolved but also underdeveloped at a conceptual level.

C. The Role for Leadership?

Given the ambitious goals that APEC has identified for itself, what is the role for leadership on trade liberalization and facilitation by individual countries within APEC? In particular, what role for the major countries within APEC such as Japan, China and the United States? These questions does not lend themselves to brief reply, but a few dimensions are worth mention herein.

First, the role that China can and will choose to play within APEC is almost entirely speculative at this point. One can imagine, for example, that since the Chinese economy is still at an early stage of reforming, China is unlikely to make a priority of trade liberalization, except as necessary to gain admission to the World Trade Organization. More likely, China will continue to use the APEC forum as a vehicle for developing and deepening consultative and cooperative activities with its major trading partners in the region. APEC may also be used by China as a forum for garnering support from the Asian members of APEC for its admission to the WTO and resistance to U.S. bilateral trade approaches toward the PRC.

¹⁸⁶ Id.

Japan's role in APEC is important for obvious reasons: it is a major investor in the region, a major exporter to APEC members and increasingly an important market for APEC country exports.¹⁸⁷ Japan has been particularly active within the APEC work programs in support of its development and human resource programs. It has gradually come to develop its own identity within the region, but within APEC it often is associated, along with China and Malaysia with a "go slow" approach to free trade.¹⁸⁸

Given the size and importance of the U.S. market and its continued importance as a security presence in the Asia-Pacific region, U.S. leadership in APEC unquestionably will remain important.¹⁸⁹ To a significant degree, the eventual direction that APEC takes will be influenced by the leadership exercised or not exercised by the United States.¹⁹⁰

But the U.S. obviously faces a number of challenges in its exercise of leadership in APEC. First, within APEC itself there is the tension discussed earlier between the United States government emphasis on trade liberalization and other members of APEC who see cooperation and facilitation as equally if not more important aspects of the APEC agenda. Second, much resentment lingers towards the United States over its continued use of bilateral self-help instruments such as section 301 of the 1974 Trade Act. Regardless of whether the use of section 301 is warranted in specific instances, these investigations are unwelcome.

Despite recent remarks by Japanese trade officials that have suggested that bilateral approaches to trade negotiation are obsolete in the new WTO era, bilateral trade disputes are

¹⁸⁷ As of the end of 1995, for example, Japan was either the largest or second largest export market for 11 of the APEC economies--Australia, Canada, Chile, Brunei, Thailand, Indonesia, Philippines, Korea, Papua New Guinea, New Zealand and the United States. See, UNITED NATIONS, TRADE STATISTICS 1995 (1995)

¹⁸⁸ See, Yoichi Funabashi, *supra* note 16. In this excellent analysis, Funabashi argues that APEC has provided Japan with a means for gradually finding a regional and multilateral framework for its Asia policy. But, he argues, Japan has not been able to pursue a dynamic policy on APEC's liberalization and cooperation agendas. Instead, Japan has attempted to use its bureaucratic instruments to smooth the way for developing nations. He concludes that Japan's "ineffective APEC diplomacy was a result of its lack of political leadership that could prioritize its interests in the forum and the region." *Id.* at 190 and 202.

¹⁸⁹ The United States is either the largest or second largest export market for 13 of the APEC economies--Australia, Canada, Chile, Mexico, Thailand, Singapore, Indonesia, Philippines, China, Taiwan, South Korea, Hong Kong and Japan. See, UN, TRADE STATISTICS 1995 *supra* note 174.

¹⁹⁰ An important underlying trade trend that is often overlooked is that while the U.S. remains a major market for exports from APEC countries, on a relative basis it is less important than in years past. See, for example, James C. Abegglen, *SEA CHANGE*, (1994). In this book, Dr. Abegglen presents data that shows that since the mid-1980s, while U.S. exports to Asia as a share of total exports has grown, Asian exports to the United States as a percentage of its total exports has significantly declined and Asian exports to the rest of Asia have increased significantly. *Id.* at 76.

almost certain to continue.¹⁹¹ Many areas of trade are not fully subject to multilateral disciplines and it is here that views on appropriate U.S. responses to trade distorting measures abroad are likely to remain especially controversial.

But even aside from how the United States chooses to pursue its bilateral agenda, it faces a number of challenges in its exercise of leadership within the APEC forum. Many Asian members of APEC have evinced a marked disinclination to have APEC develop into a full blown negotiating forum. There appears to be considerable antipathy toward perceived U.S. preferences for firm and binding commitments, codified in formal arrangements.

Thus, for U.S. policy makers, APEC presents a twofold challenge. On the one hand, in order to sustain the attention of its political leadership and the support of its publics, APEC must produce the concrete gains identified in Bogor. Yet, as mentioned above, without fast track authority from the U.S. Congress, the U.S. government has limited negotiating authority to propose new trade liberalization measures either within APEC or globally. On the other hand, over and above these U.S.'s domestic constraints, in order to be effective within the APEC context, the U.S. is being challenged within APEC to develop a more consensual leadership style.

IV. Concluding Observations

We may infer from the foregoing discussion that several scenarios are possible for APEC's future.

The first, and arguably most likely scenario for the foreseeable future is a continuation of the status quo. This does not imply stasis. Rather it suggests an approach whereby APEC members will continue to enhance their cooperative work programs and continue to liberalize their economies, largely through their own domestic initiatives, but partly as a result of the APEC process. Dramatic steps in the area of trade liberalization, to the extent that such are taken, are more likely to be the result of market forces rather than APEC-driven policy initiatives. Indeed, as the discussion in Section II illustrated, APEC itself has produced only modest specific undertakings in the area of trade liberalization.

And the APEC methodology of voluntary measures, while both unique and popular among APEC's Asian members because it is neither coercive nor the result of bargaining among trade officials, has yet to demonstrate that it can produce meaningful results over time. In other words, the process is lengthy and it is far from transparent whether the APEC announced liberalization initiatives are resulting in steps that are improving the economic performance of liberalizing economies or providing significantly expanded access for products and services from other economies, notably other APEC economies. But, as we have seen at the recent Manila meetings and indeed the Seattle meetings, a continuation of current trends also implies that APEC can continue to be a setting where steps are taken that can help to pave the way for WTO-based trade negotiations. And in this sense, the actions taken in APEC and in the WTO can be mutually reinforcing.¹⁹²

¹⁹¹ See, Yoshiro Sakamoto, Vice Minister, Ministry of International Trade and Industry, Remarks at the Foreign Correspondents Club of Japan, (Mar. 15, 1996), available on file with M.E. Janow.

¹⁹² This appears to be even more likely when APEC meetings occur in near proximity to

The divisive issue of MFN or non-MFN liberalization within the APEC context is unlikely to be resolved in the short term. The successful pursuit in APEC of MFN liberalization (including by the United States) is likely to require policy makers to either identify those areas where the benefits of trade liberalization will be the greatest among the APEC members and the free-rider problem will be minimized or will require APEC to serve as the catalyst for broader trade liberalization within the WTO context.

A continuation of the status quo for APEC also is likely to require some further degree of institutional development. Yet absent a significant change in the external environment, the institutional development of APEC is likely to be minimal. There appears to be little if any interest in the development of a regional legal regime that is outside the individual control of its members. To go beyond the current approach and develop a regional body with meaningful rule-making, enforcement or adjudicative powers would require the emergence of a different calculus of national self-interest than APEC has given any evidence of producing to date. And the very substantial differences in the legal cultures among APEC members is especially likely to make rulemaking difficult.¹⁹³

It is more likely that APEC will continue to experiment with various nonbinding agreements in functional areas (e.g., government procurement, MRA's, services, perhaps competition policy) that could prove constructive over the long term future, particularly if these areas receive renewed attention at the level of multilateral trade negotiations. Current indications suggest that APEC will continue to adhere to WTO rules and to pursue multilateral liberalization, but will not, absent more definitive leadership by some cluster of its members, particularly the United States, be the driver of another round of multilateral trade negotiations.

A second possible course that APEC may yet decide to pursue is to become a more formalized regional trading arrangement. Although at some instances along the way certain APEC members have indicated an interest in joining NAFTA,¹⁹⁴ the EPG had concluded that piecemeal accession by APEC countries to NAFTA would generate new discrimination within the region. Therefore the concept of NAFTA accession has lain largely dormant in recent years. The idea of a partial or full APEC FTA has not been advanced by APEC as a group, although it has been debated among scholars and policy makers for some time.

The above scenario seems unlikely for a number of reasons. One key reason is the obvious reluctance of APEC's members to enter into a trading arrangement that is a discriminatory trading bloc with meaningful economic consequences that might engender inward looking

meetings of the GATT or WTO. The Manilla meetings of APEC, for example, coming as they do just a short period of time before the first WTO ministerial in Singapore has served to galvanize the APEC members to produce undertakings that can contribute to global trade liberalization and facilitation or at a minimum not detract from global trade objectives.

¹⁹³ See, C. Green, *supra* note 5 .

¹⁹⁴ Senior officials from Singapore and Korea have indicated an interest in associating in some way with Nafta. See, C. Fred Bergsten, *APEC and the World Economy*, available in R. Garnaut and P. Drysdale *supra* note 8 at 222.

responses from other regional blocs.

Second, one of the commonly heard rationales for entering into a free trade arrangement with a handful of countries is that such an approach offers a faster and easier method of achieving significant trade liberalization than if the same steps were negotiated at the global level with all of the members of the World Trade Organization. Although this proposition has been challenged,¹⁹⁵ the proliferation of Free Trade Agreements (FTAs) suggest that at least for some purposes countries have seen regional arrangements as providing some benefits. This same logic applies far less well in the context of the diverse economies of the Asia-Pacific region.

The traditional elements of FTAs (e.g., tariffs, quotas, investment restrictions, etc.) do not get to the heart of the trade frictions between two of the largest and most important economic powers of APEC: the United States and Japan. Existing levels of tariffs in Japan and the United States are relatively low. The trade frictions between the United States and Japan increasingly stem from the perceived role of structural or non-tariff barriers to trade, including such diverse elements as impediments to market access in Japan's distribution sector, non-transparent government procurement practices, regulatory constraints, and allegedly exclusionary business practices. It is extremely difficult to see how these problems could effectively be addressed through an FTA inclusive of the United States.

The United States almost certainly would have similar and additional concerns if it were to consider entering into a regional FTA that included China. Although in the last 15 years China has moved rapidly to liberalize its economy, there is still a long road before it. It remains a socialist economy in transition. China is still trying to reach internal as well as international agreement on the measures that it will undertake in order to bring its domestic regime in conformity with basic WTO disciplines. In the United States, one can expect there to be a great deal of concern over competition from China's low-wage workers. And as others have noted, it is hard to envision that the political economy of trade in the United States could sustain free entry of Chinese textiles and apparel.¹⁹⁶ It is also far from clear whether China would be prepared to enter into negotiations toward the creation of a regional FTA. Although it has been supportive of APEC, it remains suspicious about both U.S. and Japanese intentions in the region.

An FTA formed from a cluster of APEC countries, such as between the United States, Singapore, Hong Kong, Australia, New Zealand and possibly South Korea, would be likely to raise somewhat fewer concerns about invisible barriers to trade and investment in the United States, but most likely would be opposed by Japan and China. Therefore, for economic as well as political reasons, an APEC FTA seems neither a desirable nor a feasible notion.

A third possible scenario is that APEC will stagnate owing to the differing perspectives among its members about the pace and scope of liberalization in trade and investment. This seems a more distinct possibility than the second scenario identified above. In the absence of meaningful momentum on at least some of the areas of the APEC agenda, it may prove difficult to sustain the attention of political leaders.

¹⁹⁵ See, Jagdish Bhagwati, *Regionalism and Multilateralism: An Overview*, available in R. Garnaut & P. Drysdale, *supra* note 8, at 145.

¹⁹⁶ See, Ross Garnaut, *Options for Asia-Pacific Trade Liberalization (A Pacific Free Trade Area?)*

On balance, at least for the foreseeable future, a number of factors are likely to combine to keep APEC alive: the economic dynamism of the Asia-Pacific region, the growing importance of cross-trade and investment and the shared interest of political leaders and business executives from the APEC region in enhanced access to each other's and global markets.

A basic reason for optimism over the long term therefore stems less from expectations of visionary policy initiatives coming out of APEC than from the economic dynamism of the region itself. It is this underlying economic vitality that is spurring economic integration and the APEC process onward--in some instances even when neither sought nor anticipated by local officials. For countries that rely so heavily on export markets, this has less to do with abstract principles than with economic good sense. APEC was born as an outcome of economic factors; it has not been the vehicle that generated the growth of cross-trade and investment.

If one accepts this vision of trade and investment in the Asia-Pacific, the key questions for the future pertain less to the direction of change for APEC's member economies, which is decidedly pointing toward more open markets and increased cross trade and investment, than to the pace and comprehensiveness of the reforms that are being put in place.