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# “Black Ships” and Balance Sheets: The Japanese Market and U.S.-Japan Relations

*Kenneth W. Abbott\**  
*Conrad D. Totman\*\**

*In this Article, Professors Abbott and Totman address the widespread Western belief that the Japanese economy is unfairly closed to foreign trade and investment. The authors identify several levels of barriers to penetration of the Japanese market. They find that considerable progress has been made in reducing direct official restraints and official non-tariff barriers. Further progress in resolving the closed market issue, the authors predict, will be more difficult. Some of the remaining problems are rooted in Japanese society and culture; others in Western attitudes toward Japan. All reflect the historical pattern of Japan's relations with the West. The authors conclude with recommendations for Japanese and American policy aimed at resolving the closed market issue while maintaining amicable relations.*

Recurrent conflict, primarily over economic issues, has been the most visible feature of relations between Japan and the United States for more than a decade.<sup>1</sup> Although the two nations have in general

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<sup>1</sup> See Destler & Sato, *Political Conflict in U.S.-Japan Economic Relations: Where It Comes From; What to Do About It*, in APPENDIX TO THE REPORT OF THE JAPAN-UNITED STATES ECONOMIC RELATIONS GROUP 331-32 (1981). Major trade disputes have involved Japanese exports to the United States, including textiles, steel, color televisions and consumer electronics as well as automobiles and trucks, *id.* at 331-34; restrictions on American exports to Japan, including agricultural products and high technology items, *id.* at 344-45; and overall trade and economic policy, *id.* at 353-59.

maintained cordial, even warm relations,<sup>2</sup> their economic disputes have tended to become more highly politicized and bitter than the disputes of either party with its other trading partners.<sup>3</sup> The most recent controversy, sparked by efforts in the United States to limit exports of Japanese automobiles and trucks to the American market, illustrates the point. The American automotive industry and its supporters brought to the fray an impressive panoply of legal and political weapons, including strong public statements,<sup>4</sup> congressional hearings,<sup>5</sup> restrictive tariff measures,<sup>6</sup> an escape clause action,<sup>7</sup> and proposed quota legislation.<sup>8</sup> The controversy rose to the highest levels of government, even

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<sup>2</sup> See, e.g., DESTLER, SATO, CLAPP & FUKUI, *MANAGING AN ALLIANCE: THE POLITICS OF US-JAPANESE RELATIONS* 1 (1976) ("[A] close, mutually beneficial relationship between two bitter wartime enemies . . . emerged and has persisted.")

<sup>3</sup> REPORT OF THE JAPAN-UNITED STATES ECONOMIC RELATIONS GROUP 96 (1981) [hereinafter referred to as WISE MEN'S REPORT]. For a discussion of the Wise Men and their report, see text accompanying notes 14-16 *infra*.

<sup>4</sup> E.g., *Impact of Non-Tariff Barriers on the Ability of Small Business to Export to Japan, Hearing Before The Select Senate Comm. on Small Business*, 96th Cong., 2d Sess. 3 (1980) (statement of Sen. Gaylord Nelson); [1980] 48 INT'L TRADE REP. U.S. IMPORT WEEKLY (BNA) at M-1 (statement of Douglas Fraser before the Int'l Trade Comm'n Investigation of Automobile Relief Petitions).

<sup>5</sup> Following the decision by the International Trade Commission (ITC) described in note 7 *infra*, hearings on protection from auto imports were held before the Subcommittee on Trade of the House Ways and Means Committee. See *Automobile Situation Autumn 1980: Hearing Before the Sub-Comm. on Trade of the House Comm. on Ways and Means*, 96th Cong., 2d Sess. (1980). Hearings on the problems of the automobile industry in general, including trade issues, were held in January and March, 1981 by the Subcommittee on International Trade of the Senate Finance Committee. See *Issues Relating to the Domestic Automobile Industry: Hearings Before the Subcomm. on International Trade of the Senate Comm. on Finance*, 97th Cong., 1st Sess. (1981).

<sup>6</sup> Effective August 21, 1980, the U.S. Customs Service began to classify imported lightweight cab chassis for tariff purposes as "automobile trucks," dutiable at 25% ad valorem, after determining that its prior practice of classifying cab chassis as "bodies (including cabs) and chassis," dutiable at 4% ad valorem, was "clearly wrong." 45 Fed. Reg. 35,057 (1980). Whether political considerations influenced this decision, and if so whether the decision should be invalidated, are questions before the U.S. Court of International Trade in a suit brought by the importer of Toyota light trucks. *Toyota Motor Sales, U.S.A., Inc. v. U.S.*, Case No. 81-1-00048 (pending). See [1981] 90 INT'L TRADE REP. U.S. IMPORT WEEKLY (BNA) at A-9-11.

<sup>7</sup> *Certain Motor Vehicles and Certain Chassis and Bodies Thereof*, 45 Fed. Reg. 45,731 (Int'l Trade Comm'n, 1980). The ITC determined that trucks, automobiles and truck chassis were not being imported into the U.S. in such increased quantities as to be a substantial cause of serious injury or the threat thereof to the competing domestic industries. *Id.* The "escape clause" refers to a procedure under §§ 201-03 of the Trade Act of 1974, (codified at 19 U.S.C. §§ 2251-2253 (1976, Supp. III 1980)) whereby increased tariffs, quotas or other remedies can be temporarily imposed to protect an American industry injured or threatened with injury from imports of competing products. See generally J. JACKSON, *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS* 615-64 (1977).

<sup>8</sup> Senator John Danforth (R-Mo.) and Senator Lloyd Bentsen (D-Tex.) introduced S. 396, to establish auto import quotas, on Feb. 5, 1981. See [1981] 64 INT'L TRADE REP. U.S. IMPORT WEEKLY (BNA) at A-2-5. An identical bill, H.R. 1823, was introduced the next day by Reps. Robert Traxler (D-Mich.) and William Brodhead (D-Mich.). *Id.* at M-1. Other quota bills were

threatening to disrupt an impending summit conference.<sup>9</sup> As in similar episodes in the past,<sup>10</sup> the American tactics succeeded in extracting from the Japanese government a last-minute pledge of "voluntary export restraint."<sup>11</sup> This concession, subsequently imposed on the reluctant Japanese auto manufacturers,<sup>12</sup> resolved the immediate crisis. If the pattern of periodic conflict continues, however, another crisis in trade relations can be expected to follow all too soon.<sup>13</sup>

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introduced later. See [1981] 66 INT'L TRADE REP. U.S. IMPORT WEEKLY (BNA) at A-2-5; [1981] 67 INT'L TRADE REP. U.S. IMPORT WEEKLY (BNA) at A-1.

<sup>9</sup> See *Brock to Visit Japan for Auto Talks*, N.Y. Times, April 27, 1981, at D1, col. 3; *Free Traders' Defeat on Cars*, N.Y. Times, May 6, 1981, at D2, col. 1.

<sup>10</sup> Striking parallels to the auto import controversy can be seen in the 1969-71 crisis over Japanese textile exports. See DESTLER, SATO, CLAPP & FUKUI, *supra* note 2, at 35-45.

<sup>11</sup> See Conte & Lehner, *Car Import Limit Eases U.S.-Japan Trade Rift*, Wall St. J., May 4, 1981, at 3, col. 1; [1981] 76 INT'L TRADE REP. U.S. IMPORT WEEKLY (BNA) at A-1, N-1. The U.S. has negotiated "voluntary" export restraint agreements, more recently referred to as "orderly marketing agreements," since the 1930s, but the technique became particularly popular in the 1960s and 1970s. For discussion of voluntary restraint agreements, see J. JACKSON, *supra* note 5, at 668-78; A. LOWENFELD, PUBLIC CONTROLS ON INTERNATIONAL TRADE 197-253 (1979); Fulda, *Textiles and Voluntary Restraints on Steel: Protecting U.S. Industries from Foreign Competition*, 13 VA. J. INT'L L. 516 (1973); Smith, *Voluntary Export Quotas and U.S. Trade Policy—A New Nontariff Barrier*, 5 LAW & POL. IN INT'L BUS. 10 (1973). "The 'voluntary' restraint upon exports is in reality a misnomer—it is an action of restraint by an exporting country taken because of its concern that unilateral quotas would otherwise be imposed against it by an importing country . . ." Metzger, *Injury and Market Disruption from Imports*, in COMM. ON INT'L TRADE AND INVESTMENT POLICY, US INTERNATIONAL ECONOMIC POLICY IN AN INTERDEPENDENT WORLD 167-68 (1971).

In the 1980-81 auto import controversy, the Japanese government agreed to monitor passenger car exports to the United States for three years by means of reports to be filed by all Japanese manufacturers. During the first year of the program (April 1981 through March 1982), the Ministry of International Trade and Industry will limit passenger car exports to the United States to 1,680,000 units by issuing an individual directive to each manufacturer. The directives will be replaced by a formal export licensing system if necessary to achieve compliance. During the second year, the same measures will be used to limit exports to the same base figure plus 16.5 percent of the increase in total automobile sales in the U.S. market. The measures to be applied during the third year (other than reporting and monitoring, which will continue) will be negotiated later. See *Announcement by the Japanese Minister of International Trade and Industry on Auto Export Restraint Measures*, [1981] 76 INT'L TRADE REP. U.S. EXPORT WEEKLY (BNA) at N-1 (provisional and unofficial translation).

<sup>12</sup> See note 11 *supra*, for the legal arrangements by which the Japanese manufacturers were required to comply with the terms of the agreement. In the opinion of U.S. Attorney General Smith, these measures insulated the Japanese firms from liability under the American antitrust laws by virtue of the doctrine of sovereign compulsion. See correspondence between William French Smith, U.S. Att'y Gen., and Yoshio Okawara, Ambassador of Japan to the United States (May 1981), reprinted in [1981] 77 INT'L TRADE REP. U.S. IMPORT WEEKLY (BNA) at M-1, 2. The auto manufacturers strongly resisted the settlement. See N.Y. Times, May 2, 1981, at 1, col. 3.

<sup>13</sup> Disputes over non-economic matters also arise in the U.S.-Japan relationship. Instead of the period of relative calm that should have followed settlement of the auto dispute, for example, there ensued a period of conflict over Japanese defense spending, American nuclear weapons in Japanese waters, and related security matters. See, e.g., *Japanese Foreign Minister Resigns in Dispute Over Existence of "alliance" with United States*, N.Y. Times, May 16, 1981, at 3, col. 4; *Former*

In the heat of confrontations such as the one over auto imports, participants and observers alike tend to lose perspective on the issues at hand. Among the often shrill voices raised at the time of the dispute over auto imports, however, one group of commentators succeeded in maintaining an unusual degree of perspective on the troublesome issues of bilateral economic relations. This was the Japan-United States Economic Relations Group, commonly known (sometimes to the dismay of its members) as the "Wise Men."<sup>14</sup> The Group was established in 1979 by former President Carter and then-Prime Minister Ohira.<sup>15</sup> Eight leading figures in business and economics, four from each country, were named to the Group, with two former government officials appointed as Co-Chairmen.<sup>16</sup> The mandate of the Wise Men was to recommend ways of improving the bilateral economic relationship over the long term.<sup>17</sup> The Group's report (the "Report")<sup>18</sup> was issued in January 1981.<sup>19</sup> Like most developments in U.S.-Japan relations, the

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*Ambassador Edwin Reischauer States that American Vessels in Japanese Waters May Carry Nuclear Weapons under Confidential Agreement*, N.Y. Times, May 19, 1981, at 5, col. 1; *Demonstrations on Arrival in Japan of American Aircraft Carrier Midway*, N.Y. Times, June 5, 1981, at 1, col.3.

<sup>14</sup> See, e.g., Letter of Transmittal from James R. Jones, Charles A. Vanik, and Bill Frenzel to Al Ullman, Chairman, House Comm. on Ways and Means (Sept. 5, 1980), reprinted in SUBCOMM. ON TRADE OF THE HOUSE COMM. ON WAYS AND MEANS, 96TH CONG., 2D SESS., UNITED STATES-JAPAN TRADE REPORT III (Comm. Print 1980) [hereinafter cited as U.S.-JAPAN TRADE REPORT].

<sup>15</sup> In a Joint Communique of May 2, 1979, President Carter and Prime Minister Ohira stated the need for joint actions to "remove contentious bilateral issues from the forefront of [U.S.-Japan] relations" and agreed to form a small group of distinguished persons from private life to recommend measures to maintain a healthy bilateral economic relationship. Reprinted in REPORT BY THE COMPTROLLER GENERAL OF THE UNITED STATES, UNITED STATES-JAPAN TRADE: ISSUES AND PROBLEMS 197 (1979). The President and the Prime Minister requested Robert S. Ingersoll and Nobuhiko Ushiba to serve as Joint Chairmen and form such a group. See note 16 *infra*. See generally Memorandum of Understanding—October 26, 1979, reprinted in U.S.-JAPAN TRADE REPORT, *supra* note 14, at 91-92.

The Group's official existence ended on September 30, 1981, when federal appropriations for staff and other expenses of the American side expired. The Supplemental Report of the Japan-United States Economic Relations Group was published in October 1981. It discusses American and Japanese responses to the original report of the Group, analyzes additional issues in the bilateral economic relationship, and makes further recommendations. Copies of both reports are available from the following sources: United States; Japan Desk, U.S. Department of State, EA/J Room 4210, Washington, D.C. 20520. Japan: Japan Center for International Exchange, 9-17, 4-chome, Minami-Azabu, Minato-ku, Tokyo 106.

<sup>16</sup> Joint Chairman Ingersoll was a former U.S. Ambassador to Japan and Deputy Secretary of State. Joint Chairman Ushiba was a former State Minister of External Economic Affairs. The other members were: Akio Morita, Chairman, Sony Corporation; Shuzo Muramoto, President, Dai-Ichi Kangyo Bank, Ltd.; Kiichi Saeki, Chairman, Nomura Research Institute; A.W. Clausen, President, Bank of America; Hugh T. Patrick, Professor of Economics, Yale University; and Edson W. Spencer, Chairman, Honeywell, Inc. WISE MEN'S REPORT, *supra* note 3, at 1.

<sup>17</sup> *Id.* at i.

<sup>18</sup> *Id.*

<sup>19</sup> Although the Report was issued as the auto import drama was nearing its climax, the

Report has been much more widely discussed in Japan than in the U.S.<sup>20</sup> In most respects, however, the Report is so sane and balanced in its approach to international economic issues, as well as in its conclusions and recommendations, that it is worthy of note for readers of this journal, even though it deals only briefly with strictly legal matters. One purpose of this Article, then, is simply to draw to the Report the attention it deserves.

The second purpose of this Article is to consider in greater depth than was allowed by the format of the Report one of the specific issues discussed by the Wise Men, the degree to which the Japanese economy can properly be characterized as closed to foreign trade and investment. The closed market issue is of great importance to U.S.-Japan relations. It was the basis for one of the most bitter disputes between the two countries in recent years.<sup>21</sup> As this is written, furthermore, both the Reagan Administration and some members of Congress seem intent on forcing another confrontation over access to the Japanese market.<sup>22</sup>

The Report concisely states the closed market issue and its effect on other bilateral disputes, such as those over Japanese exports:

There is a pervasive perception in the United States that Japan's market is more closed than those of other advanced countries, and particularly the American market. This perception contributes to a strongly negative image of Japan as a country which does not play the international trade game fairly, and it provides ammunition for those in the United States

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Group held to its instructions to consider long-term issues and refused to comment on the auto import situation in spite of pressure from the American government. Interview with Robert S. Ingersoll, American Co-Chairman, in Chicago, Ill. (June 24, 1981).

<sup>20</sup> In particular, press coverage of the WISE MEN'S REPORT, *supra* note 3, and of the activities of the Wise Men generally, was substantially more extensive and prominent in Japan. Further, the entire Group was asked to meet with Japanese Prime Minister Suzuki, while as of June 1981 the Group had not met as a body with any American cabinet officer. In both countries, however, the Group has met with representatives of the government departments that would be affected by its recommendations and other government contacts have been made by individual members. Interview with Robert S. Ingersoll, *supra* note 15.

<sup>21</sup> See text accompanying notes 75-76 *infra*.

<sup>22</sup> Commerce Secretary Malcolm Baldrige, in testimony before the Joint Economic Committee in June 1981, stated that it will be a major Administration goal to reduce the American trade deficit with Japan by renewed efforts to increase access to the Japanese market. See [1981] 363 INT'L TRADE REP. U.S. EXPORT WEEKLY (BNA) at C-1. William Brock, the U.S. Trade Representative, in subsequent testimony, added that "equivalent openness" will be the central objective of the Administration's policy toward Japan. [1981] 365 INT'L TRADE REP. U.S. EXPORT WEEKLY (BNA) at C-11. Statements by members of the Committee demonstrate a similar interest in forcing the closed market issue. See, e.g., [1981] 363 INT'L TRADE REP. U.S. EXPORT WEEKLY (BNA) at C-1 (reporting remarks of Rep. Fred W. Richmond (D-N.Y.) urging immediate U.S. adoption of strategy to "unlock Japan's doors to U.S. traders and investors.").

who advocate restrictive trade measures against Japan.<sup>23</sup>

Without doubt, the Japanese economy was tightly closed during the period immediately following World War II and even into the 1960s, with imports and foreign capital largely barred by an extensive system of tariffs, quotas and other direct controls on trade, investment and foreign exchange transactions.<sup>24</sup> Japan's postwar economic situation, particularly its serious lack of foreign exchange, virtually required such a restrictive policy; indeed, the major problem for Japan at the time was how to export enough in the short run to be able to pay for the imported energy, food and other basic items necessary for reconstruction, if not for survival.<sup>25</sup> Most objective observers agree, however, that Japan kept its rigid official barriers to foreign economic activity in place considerably longer than was justified by the postwar balance of payments emergency.<sup>26</sup>

The late 1960s and 1970s saw significant changes in this system of restraints. For one thing, Japan and the United States began to engage in extensive discussions and negotiations over the closed market issue. These negotiations, furthermore, were often unusually one-sided, with America pressing Japan to modify its restrictive practices and Japan gradually giving ground. Largely as a result of this kind of pressure, the Japanese economy has opened dramatically, especially in terms of such direct official restraints as tariffs, quotas and investment controls. Japanese import and foreign direct investment statistics confirm this

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<sup>23</sup> WISE MEN'S REPORT, *supra* note 3, at 54. Numerous recent statements by American government officials and business leaders attest to the validity of this observation. See, e.g., *Impact of Non-Tariff Barriers on the Ability of Small Business to Export to Japan*, Hearing before Senate Select Comm. on Small Business, 96th Cong., 2d Sess. 3 (1980) (statement of Sen. Nelson) (hereinafter referred to as *Impact of Non-Tariff Barriers*); *United States-Japanese Trade Relations and the Status of the Multinational Trade Negotiations*, Hearing Before Subcomm. on Trade of Senate Finance Comm., 96th Cong., 2d Sess. 7 (1978) (statement of Sen. Roth); [1981] 305 INT'L TRADE REP. U.S. EXPORT WEEKLY (BNA) at C-3, 0-1 (statement of former U.S. Trade Rep. Reubin Askew); NEWSWEEK, April 20, 1981, at 15 (statement of Lee Iacocca, Pres. of Chrysler Corp.); [1981] 340 INT'L TRADE REP. U.S. EXPORT WEEKLY (BNA) at C-3 (statement of Malcolm Baldrige, Secretary of Commerce designate); [1981] 81 INT'L TRADE REP. U.S. IMPORT WEEKLY (BNA) at B-2 (interview with U.S. Trade Rep. William Brock).

<sup>24</sup> Abegglen & Hout, *Facing Up to the Trade Gap with Japan*, 57 FOR. AFF. 146, 146-47 (1978); WISE MEN'S REPORT, *supra* note 3, at 56; Krause & Sekiguchi, *Japan and the World Economy*, in ASIA'S NEW GIANT: HOW THE JAPANESE ECONOMY WORKS 438-58 (Patrick & Rosovsky eds. 1976) [hereinafter cited as Krause & Sekiguchi].

<sup>25</sup> UNITED STATES-JAPAN TRADE: ISSUES AND PROBLEMS, *supra* note 15, at 174; Krause & Sekiguchi, *supra* note 24, at 411; Patrick & Rosovsky, *Japan's Economic Performance: An Overview* 57, in ASIA'S NEW GIANT: HOW THE JAPANESE ECONOMY WORKS 4 (Patrick & Rosovsky, eds. 1976).

<sup>26</sup> WISE MEN'S REPORT, *supra* note 3, at 56; Abegglen & Hout, *supra* note 24, at 147; Krause & Sekiguchi, *supra* note 24, at 413; UNITED STATES-JAPAN TRADE: ISSUES AND PROBLEMS, *supra* note 15, at 189.

opening, and demonstrate that many foreign sellers and investors have been able to take advantage of the new opportunities.<sup>27</sup> As foreign businesses have begun to expand their activities in Japan, however, they have encountered other Japanese rules and practices that impede further penetration. Some of the newly identified impediments seem to be merely more subtle manifestations of the same official policies previously implemented through direct restraints. Others, however, seem not to reflect official policy at all, or to do so only in part, but to derive primarily from the characteristics of Japanese society and culture. Businessmen and government officials in the United States and other countries have increasingly turned their attention to these two less familiar, and very different, types of impediments to foreign economic activity, while continuing to press for removal of the remaining direct official restraints. As a result, the closed market issue has taken on a much more complex character than it had even ten to fifteen years ago.

The current complexity of the issue, however, has not been reflected in most public debate within the United States.<sup>28</sup> This suggests that American trade policy has yet to adjust fully to the new realities. Until it does adjust, negotiations over the closed market issue risk unnecessary confrontation between Japan and the United States and unnecessary damage to bilateral relations. The Report of the Wise Men, while recognizing the continued existence of significant restrictions in the Japanese market, makes a major effort to speed the needed adjustment in American attitudes. Since our views of the changes necessary closely parallel those of the Wise Men, the two purposes of this Article go hand in hand.

The first section of this Article will examine the form and content of several recent negotiations over the closed market issue, noting particularly their lack of mutuality. The second section will trace the lowering of direct official barriers to trade and investment in Japan and the growing significance of the newly-identified impediments to foreign ec-

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<sup>27</sup> American exports to Japan in 1970 amounted to some \$4.6 billion. KEY ECONOMIC STATISTICS IN THE U.S.-JAPAN RELATIONSHIP, in APPENDIX TO THE REPORT OF THE JAPAN-UNITED STATES ECONOMIC RELATIONS GROUP, *supra* note 1, at 377, 387-88. By 1979, exports had increased to over \$17 billion. *Id.* American direct investment in Japan increased from \$1.4 billion in 1970 to over \$5.7 billion in 1979. *Id.* at 397-98.

<sup>28</sup> See note 23 *supra*. An example is the "singular and simplistic focus in the United States on the bilateral merchandise trade imbalance." WISE MEN'S REPORT, *supra* note 3, at 16. The House U.S.-Japan Trade Task Force admits that in economic terms the bilateral trade imbalance should not be of overriding concern, but argues that this "economic truth . . . is a political falsity." U.S. JAPAN TRADE REPORT, *supra* note 14, at 3. Accordingly, rather than attempting to direct public attention to more appropriate concerns, the Task Force has continued to press for increased Japanese imports to reduce the "unacceptable trade imbalances." *Id.* at 11.



onomic activity. The third section will suggest at least a partial explanation for two phenomena we believe are related: first, the extent and persistence of restraints on foreign participation in the Japanese economy, and second, the perception among Westerners that certain characteristics of Japanese society and culture constitute barriers to foreign economic activity. The fourth section will offer several recommendations for dealing with the complexities of the closed market issue in the future. The final section considers some implications of our analysis for Western lawyers.

## I. THE CHARACTER OF NEGOTIATIONS ON THE CLOSED MARKET ISSUE

Over the past decade, the numerous economic issues arising between Japan and the United States, including the closed market issue, have been extensively discussed and negotiated in many fora, both public and private. As this section will demonstrate, all of the customary bilateral and multilateral forms of international economic diplomacy—and some innovative forms unique to the U.S.-Japan relationship—have been utilized. More striking than the mere extent of the negotiations, however, is the lack of mutuality evident in much of the economic diplomacy between Japan and the United States, particularly in negotiations dealing with perceived restraints on access to the Japanese market. Such imbalance is quite atypical of international trade negotiations. In most such proceedings, scrupulous adherence to the principle of reciprocity is the norm.<sup>29</sup> In negotiations with Japan, however, the United States has frequently succeeded in limiting the agenda to a single issue, the need for action on the part of Japan to reduce barriers to foreign trade and investment.<sup>30</sup> Japan—which has consistently come to the table with the weaker bargaining position because of its dependence on its trade and security relationships with the U.S.—has acquiesced in this definition of the issue. As a result, many negotiations have been remarkably one-sided, not only in terms of the subjects discussed, but also in terms of the actions agreed upon, with Japan often making concessions with little or no American quid pro quo.

The most comprehensive trade negotiation of the decade was the Tokyo Round of multilateral trade negotiations (MTN).<sup>31</sup> Although

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<sup>29</sup> See, e.g., A. LOWENFELD, *supra* note 11, at 120.

<sup>30</sup> The agenda has been similarly limited in negotiations concerning Japanese exports, as in the recent automobile crisis, see text accompanying notes 4-11 *supra*.

<sup>31</sup> The literature on the Tokyo Round is already extensive. The most convenient summary is

the principle of reciprocity was in general observed during the MTN,<sup>32</sup> some imbalance could be noted even there. First, Japan lowered its tariff rates unilaterally prior to the conclusion of the negotiations as a concession to the United States.<sup>33</sup> It also agreed in the course of the MTN to disproportionately high reductions in tariffs on industrial products of special interest to the United States.<sup>34</sup> Since the end of the Tokyo Round, moreover, Japan has implemented additional unilateral tariff reductions.<sup>35</sup>

Imbalance is more noticeable in the numerous bilateral negotiations of the last several years. The best example is the Strauss-Ushiba Joint Statement of January 13, 1978.<sup>36</sup> Rough reciprocity was maintained in many of the more general sections of the Joint Statement. Both sides, for example, agreed to promote "non-inflationary economic growth," though Japan alone enunciated a specific target growth rate.<sup>37</sup> Under the heading "Trade Objectives," however, Japan stated its intention to take "all reasonable steps" to increase its imports of manufactured goods, not simply to reduce trade barriers. Under the heading "Trade Measures" it also agreed to fourteen specific actions toward that objective: reduction of tariffs, removal and expansion of quotas, simplification of inspection requirements for imports, expansion of credit for imports, securing of substantially increased opportunities for foreign bidders under Japanese government procurement systems, and relaxation of restrictions on foreign exchange transactions, among others.<sup>38</sup> There were no reciprocal United States undertakings for any of these concessions. Other bilateral agreements, though less sweeping

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*Symposium on the Multilateral Trade Agreements*, 11 LAW & POL. INT'L BUS. 1257-1526 (1979); 12 LAW & POL. INT'L BUS. 1-333 (1980).

<sup>32</sup> For example, both Japan and the United States signed all of the "codes" on non-tariff measures agreed on during the Tokyo Round. U.S.-JAPAN TRADE REPORT, *supra* note 14, at 11; WISE MEN'S REPORT, *supra* note 3, at 56-63. Reciprocity was specifically required by U.S. law in some aspects of the MTN. See note 96 *infra*.

<sup>33</sup> E. KAPLAN, JAPAN'S TARIFF AND NONTARIFF BARRIERS: THE PERCEPTION GAP 4, 5 (1979) [hereinafter cited as PERCEPTION GAP]. This document was published by the U.S.-Japan Trade Council, an American research organization funded by the Japanese government. BARREDA, IMPACT OF THE MULTILATERAL TRADE NEGOTIATIONS ON U.S.-JAPAN TRADE, in FED. BAR ASS'N, U.S.-JAPAN TRADE LAW CONFERENCE 51 (1979).

<sup>34</sup> PERCEPTION GAP, *supra* note 33, at 3-4; WISE MEN'S REPORT, *supra* note 3, at 56-57; BARREDA, *supra* note 33, at 51.

<sup>35</sup> See text accompanying notes 69-71 *infra*.

<sup>36</sup> Joint Statement by Minister Ushiba and Ambassador Strauss, reprinted in U.S.-JAPAN TRADE REPORT, *supra* note 14, at 82-83. Mr. Ushiba was then State Minister of External Economic Affairs; he was later Co-Chairman of the Wise Men. Mr. Strauss was then Special Trade Representative.

<sup>37</sup> *Id.* at 82 (par. 3).

<sup>38</sup> *Id.* at 82 (paras. 5, 8).

and less markedly imbalanced than the Joint Statement, have addressed current trade issues in similar fashion.<sup>39</sup>

Even the institutional structure of negotiations between Japan and the United States sometimes reflects a lack of mutuality. The best example is the U.S.-Japan Trade Facilitation Committee (TFC).<sup>40</sup> The TFC is an intergovernmental body created in 1977 by agreement between the U.S. Department of Commerce and the Japanese Ministry of International Trade and Industry (MITI). It was established solely to identify Japanese practices which impede the penetration of American exports—normally through the complaints of American business interests—and to work for their removal.<sup>41</sup> Under the TFC procedure, American firms aggrieved by what they considered Japanese trade barriers would file complaints with the TFC staff in the U.S. Commerce Department; complaints that the staff found to have merit were forwarded to the American Embassy in Tokyo. After further investigation, the Embassy would present the complaints it considered well-founded to MITI with a request for action.<sup>42</sup> The TFC obtained action resolving several specific complaints,<sup>43</sup> and focused considerable attention on various restrictive Japanese practices.<sup>44</sup> After an initial flurry of complaints, however, American business virtually ceased resorting to

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<sup>39</sup> See, e.g., Joint Statement of Ambassador Strauss and Minister Ushiba, June 2, 1979, *supra* note 36, at 84 (addressing government procurement, standards, and barriers to sale of tobacco products).

Even observers critical of Japanese market restrictions have acknowledged that Japan has "generally been careful in living up to its specific trade commitments." SUBCOMM. ON TRADE OF HOUSE COMM. ON WAYS AND MEANS, TASK FORCE REPORT ON U.S.-JAPAN TRADE, 95TH CONG., 2D SESS. 17 (Comm. Print 1979) [hereinafter cited as TASK FORCE REPORT]; TASK FORCE ON U.S.-JAPAN TRADE RELATIONS, SUMMARY OF FIRST INTERIM REPORT, *reprinted in id.* at 59.

<sup>40</sup> See generally Weil & Glick, *Japan—Is the Market Open? A View of the Japanese Market Drawn From U.S. Corporate Experience*, 11 LAW & POL. INT'L BUS. 845 (1979) [hereinafter cited as Weil & Glick]. Frank A. Weil was Assistant Secretary of Commerce for Industry and Trade from 1977 through 1979. Norman D. Glick was Staff Director of the TFC in the Department of Commerce in 1979. The article is based on TFC files and the experiences of the authors with the TFC.

<sup>41</sup> See Hollerman, *The Politics of Economic Relations Between the U.S. and Japan*, in JAPAN AND THE U.S.: ECONOMIC AND POLITICAL ADVERSARIES 213-23, 218 (L. Hollerman, ed. 1980) ("no provision for reciprocal complaints by Japanese exporters against restrictive U.S. trade practices").

<sup>42</sup> Weil & Glick, *supra* note 40, at 859-61.

<sup>43</sup> By mid-1980, some 15 "cases" had been resolved to the satisfaction of the U.S. side. U.S.-JAPAN TRADE REPORT, *supra* note 14, at 15. The Japanese side has been criticized, however, for not responding more favorably to requests for action from the TFC. TASK FORCE REPORT, *supra* note 39, at 24; FIRST INTERIM REPORT, *reprinted in id.* at 59; SECOND INTERIM REPORT, *reprinted in id.*, at 60.

<sup>44</sup> Data gathered by the TFC, particularly as set forth in Weil & Glick, *supra* note 40, have frequently been relied on in influential Congressional reports and hearings. See, e.g., U.S.-JAPAN TRADE REPORT, *supra* note 14 at 15-19; TASK FORCE REPORT, *supra* note 39, at 19-25; JAPAN-U.S.

the TFC,<sup>45</sup> and the organization became relatively moribund, its activities limited to participating in consultations on broader issues in cooperation with the U.S. Trade Representative.<sup>46</sup> Various explanations for the abandonment of the TFC by American business have been advanced, including the theory that firms fear reprisals by Japanese officials if they lodge complaints, as well as the theory that so much progress has been made in reducing the kinds of trade barriers within the TFC's mandate that its services are now less important than anticipated.<sup>47</sup> Many of the possible explanations lead to one of two conclusions: that the TFC format is inappropriate (if trade barriers have in fact been greatly reduced, for example, continuation of the TFC may be insulting to Japan) or that the format is unworkable (if reprisals are in fact likely, more subtle methods of dealing with Japanese trade barriers would be more effective).<sup>48</sup> In spite of the doubts this analysis raises, however, the Reagan Administration has recently announced steps to reactivate the TFC.<sup>49</sup>

The U.S.-Japan Trade Study Group (TSG), also formed in 1977, is another institution with an agenda limited to the reduction of Japanese trade barriers.<sup>50</sup> The TSG includes Japanese and American members from both business and government, representing such organizations as the American Chamber of Commerce in Japan, the Japanese Federation of Economic Organizations (Keidanren), the American Embassy, and MITI. It operates more informally than the TFC, conducting re-

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TRADE, H.R. REP. NO. 96-1345, 96th Cong., 2d Sess. 3-5 (1980); *Impact of Non-Tariff Barriers*, *supra* note 23, at 7 (statement of Abraham Katz), 331-89 (reprint of Weil & Glick article).

<sup>45</sup> U.S.-JAPAN TRADE REPORT, *supra* note 14, at 19 (17 cases submitted from January 1979 through mid-1980).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* Other explanations hypothesized by the U.S.-Japan Trade Task Force of the House Ways and Means Committee include lack of awareness of the TFC, disappointment at TFC effectiveness and lack of interest in exporting to Japan. *Id.*

<sup>48</sup> The U.S. Co-Chairman of the Wise Men is of the opinion that those American firms most knowledgeable about Japan at the outset determined to use more subtle methods; less sophisticated firms initially resorted to the TFC, leading to the high rate at which claims were rejected before being presented to the Japanese side. Interview with Robert S. Ingersoll, *supra* note 15.

<sup>49</sup> See *Hearings Before the Joint Economic Subcomm. on International Trade, Finance & Security Economics*, 97th Cong., 1st Sess. (1981) (testimony of Commerce Secretary Malcolm Baldrige) reported in [1981] 363 INT'L TRADE REP. U.S. EXPORT WEEKLY (BNA) at C-1; [1981] 367 INT'L TRADE REP. U.S. EXPORT WEEKLY (BNA), at C-1 (reporting formation of TFC "executive council," consisting of the U.S. Undersecretary of Commerce for International Trade and the Japanese Vice Minister for International Affairs of MITI, to deal with general problems of U.S. penetration of the Japanese market).

<sup>50</sup> The TSG is described in TASK FORCE REPORT, *supra* note 39, at 19-24; U.S.-JAPAN TRADE REPORT, *supra* note 14, at 14-15; Weil & Glick, *supra* note 40, at 860 n.94; AMERICAN CHAMBER OF COMMERCE IN JAPAN, U.S.-JAPAN TRADE: WHITE PAPER 26-27 (1979).

search into alleged restrictions on the sale of particular American products and recommending changes in Japanese government regulations and practices that it identifies as restrictive. Some of its findings have been taken up in a more formal way by the TFC. Even acting on its own, however, the TSG, with its influential Japanese membership, has brought about change in several areas of regulation, primarily those under the influence of MITI.<sup>51</sup>

The work of the Wise Men stands in sharp contrast to the one-sided negotiations and institutions just described. The Group's approach, like its composition, was carefully balanced. Its Report accordingly addresses a wide spectrum of long-term economic and political issues.<sup>52</sup> Some of these are matters of joint concern, such as the adequacy and security of the industrial world's energy supplies. Others relate to American policy, such as the allegation that American trade laws are overly protective. Still others relate to Japanese policy, including the closed market issue. Overall, the work of the Wise Men demonstrates that representatives of Japan and the United States are capable of a truly bilateral enterprise, producing balanced conclusions and recommendations that transcend mere generalities. The work of the Group also demonstrates the value of a long-term approach to economic issues, a refreshing change from the usual atmosphere of crisis.

With the existence of the Wise Men at an end,<sup>53</sup> the American government has asked the Advisory Council on Japan-U.S. Economic Relations to take the lead in implementing the Wise Men's recommendations for strengthening the American economy and to act as the principal private sector forum for the discussion of bilateral economic problems.<sup>54</sup> Despite the similarity in names, the Council is a much different organization from the Japan-U.S. Economic Relations Group. Formed in 1971 to advise the United States government on economic problems involving Japan,<sup>55</sup> the Council consists of sixty top executives of major American corporations doing business in Japan. It meets annually with its Japanese counterpart, the Japan-U.S. Economic Coun-

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<sup>51</sup> *Id.*; U.S.-JAPAN TRADE STUDY GROUP, A SPECIAL PROGRESS REPORT (1980), reprinted in *Impact of Non-Tariff Barriers on the Ability of Small Business to Export to Japan*, supra note 23, at 267-326.

<sup>52</sup> See generally WISE MEN'S REPORT, supra note 3.

<sup>53</sup> See note 15 supra.

<sup>54</sup> See Nakamura, *U.S.-Japan Businessmen's Conference Held in New York*, JAPAN INSIGHT, June 26, 1981, at 4 (newsletter of Japan Economic Institute); Interview with Robert S. Ingersoll, note 15 supra.

<sup>55</sup> Secretariat functions are performed for the Council by staff of the Chamber of Commerce of the U.S., but the Council is formally independent in matters of policy. See ADVISORY COUNCIL ON JAPAN-U.S. ECONOMIC RELATIONS, MEMBERSHIP DIRECTORY (1981) 1-2.

cil, as the Japan-U.S. Businessmen's Conference. For most of its life, the organization has concentrated on business promotion rather than matters of policy. As an organization of businessmen, the Council may be well suited to its assignment of promoting increased American competitiveness. In its present form, however, one may question whether it will be able to maintain the balanced approach to the resolution of long-term economic issues that distinguished the work of the Wise Men.

The high-level contacts described thus far are only the tip of the iceberg of discussions on the economic issues that confront the United States and Japan. In Chicago, for example, rarely does a week pass without an opportunity to hear remarks on such issues or to discuss them with concerned Americans and Japanese. Local business groups are active in arranging such opportunities. Speeches and seminars by Japanese and American government officials, business representatives, academics and other experts are also regularly sponsored by non-profit organizations, such as the Chicago Council on Foreign Relations and the Japan America Society of Chicago, and by academic institutions. The local representatives of Japan—the Consulate General in particular—regularly provide opportunities to discuss troublesome issues. Members of the Chicago Association of Commerce and Industry (CACI), the principal organization of businessmen in the Chicago region, exchange annual visits with their counterparts in Tokyo and Osaka and discuss current economic issues both informally and in highly formal settings. In general, these discussions are more balanced than the formal exchanges we have been describing. Even here, however, discussions often follow an American agenda, with the closed market issue a prominent item.<sup>56</sup>

It may be, ironically, that the very extent and imbalance of the discussions and negotiations described in this section have contributed significantly to the negative American perceptions of Japan identified by the Wise Men.<sup>57</sup> For one thing, many years of negotiations structured around American pressure and Japanese concessions may simply have created momentum behind the belief that Japan is acting improperly, forestalling recognition of the many changes made. The Wise Men suggest, further, that some Americans have interpreted the char-

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<sup>56</sup> One of the authors accompanied a visit to Japan by the Chicago Association of Commerce and Industry in 1978, at the height of the crisis over exports of citrus and beef to Japan. Much of the discussion concerned the Japanese restrictions on those and other products, and the American position on access to the Japanese market was advanced with remarkable directness.

<sup>57</sup> See text accompanying note 23 *supra*.

acteristic Japanese reticence in arguing their case during bilateral negotiations as an admission of "guilt".<sup>58</sup> It may also be that the repeated undertakings by Japan have raised unrealistic expectations of greatly increased exports or investment among American businessmen;<sup>59</sup> as these expectations have been less than completely fulfilled, Japan has acquired a reputation as a dissembler.<sup>60</sup>

Whatever the case, one-sided negotiations, perhaps justified in the days of extensive official barriers to trade and investment in Japan, have become increasingly inappropriate as those rigid barriers have begun to fall and more complex problems have come to the fore.

## II. THE CHANGING NATURE OF THE CLOSED MARKET ISSUE

There have been drastic, even "revolutionary"<sup>61</sup> changes in the trade barriers that in earlier days protected the Japanese economy from foreign penetration. The Wise Men,<sup>62</sup> and most other informed observers,<sup>63</sup> now agree that the tightly closed market of the 1950s and 1960s no longer exists.

### A. Direct Official Barriers

The first barriers to be significantly reduced were the traditional, positive restraints on imports—tariffs and quotas. By the start of the Tokyo Round in 1975, Japanese tariffs had on the whole been reduced to a level comparable to that of the U.S., although a few high ad

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<sup>58</sup> WISE MEN'S REPORT, *supra* note 3, at 102.

<sup>59</sup> In some cases tangible economic results have not resulted from seemingly successful negotiations because of the internal problems of instituting important policy changes in a consensus-based governmental system like that of Japan. See ARTHUR D. LITTLE INC., THE JAPANESE NON-TARIFF TRADE BARRIER ISSUE: AMERICAN VIEWS AND THE IMPLICATIONS FOR JAPAN-U.S. TRADE RELATIONS V-20-22 (1979) [hereinafter cited as ARTHUR D. LITTLE, INC.]; DESTLER, SATO, CLAPP & FUKUI, *supra* note 2, at 101-08 (1976). Cf. P. DRUCKER, MANAGEMENT: TASKS, RESPONSIBILITIES, PRACTICES 257-58, 465-70 (1974) (Japanese consensual decision-making appears slow to Westerners because delay occurs in different parts of the decision-making process).

In other cases, the rapid economic results that American negotiators tend to demand would not be forthcoming even with a more effective Japanese response. Knowledgeable observers have pointed out that in many product areas, American producers are simply not competitive with Japanese or lower-cost third country producers. Abegglen & Hout, *supra* note 24, at 152-59. In such product sectors, American exporters have been losing market share to other suppliers even as Japan liberalizes. *Id.* at 148-50. American businessmen experienced in Japan state that the total elimination of Japanese non-tariff barriers would not have a dramatic effect on U.S. trade, at least in the short run. U.S.-JAPAN TRADE STUDY GROUP, *supra* note 51, at 3.

<sup>60</sup> ARTHUR D. LITTLE, INC., *supra* note 59, at V-22.

<sup>61</sup> WISE MEN'S REPORT, *supra* note 3, at 63.

<sup>62</sup> *Id.* at 56.

<sup>63</sup> Abegglen & Hout, *supra* note 24, at 147; TASK FORCE REPORT, *supra* note 39, at 17; U.S.-JAPAN TRADE REPORT, *supra* note 14, at 1; ARTHUR D. LITTLE, INC., *supra* note 59, at V-12-13.

valorem rates effectively excluded some products, such as tobacco.<sup>64</sup> Since 1975, multilateral and bilateral negotiations have led to further reductions. On more than one occasion, Japan has unilaterally lowered its tariffs in response to American pressure.<sup>65</sup> During the MTN, Japan agreed to tariff reductions averaging 46 percent on 2600 categories of products; as mentioned above, the average reduction on products of particular interest to the U.S. was even higher.<sup>66</sup> When the tariff reductions agreed on during the Tokyo Round are fully effective,<sup>67</sup> Japan's average industrial tariff rate will be only 3.2 percent, slightly lower than that of the U.S.<sup>68</sup> Since the end of the Tokyo Round, moreover, the high tobacco tariffs have been moderated,<sup>69</sup> agreed semiconductor tariff reductions have been accelerated,<sup>70</sup> and tariffs on auto parts have been eliminated altogether.<sup>71</sup>

Postwar Japan relied heavily on quotas to restrict imports.<sup>72</sup> By 1978, however, only twenty-seven quotas remained, and almost all of them protected politically influential groups engaged in farming and fishing.<sup>73</sup> As regards manufactured goods, Japan has become the target of many more quantitative restraints than it maintains, at least if one considers "voluntary" Japanese export restraints like those on autos, most of which are simply disguised quotas.<sup>74</sup>

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<sup>64</sup> PERCEPTION GAP, *supra* note 33, at 4, 5. See also Krause & Sekiguchi, *supra* note 24, at 428 (table showing effective tariff rates after Kennedy Round). According to one recent set of calculations, in 1976 the weighted average Japanese tariff rate on manufactured goods was already lower than that of the United States. Olechowski & Sampson, *Current Trade Restrictions in the E.E.C., the U.S. and Japan*, 14 J. WORLD TRADE L. 220, 225 (1980).

<sup>65</sup> See text accompanying notes 33-35 *supra*.

<sup>66</sup> See sources cited in note 34 *supra*.

<sup>67</sup> The Protocol on tariff reductions agreed upon at the end of the Tokyo Round provides that agreed rate reductions should be effected in eight equal annual installments, beginning January 1, 1980 (although some flexibility as to the date of the first reduction was allowed) and ending January 1, 1987. Any party can implement its agreed reductions more quickly. The Contracting Parties to the General Agreement on Tariffs and Trade, Geneva (1979) Protocol to the General Agreement on Tariffs and Trade, para. 2(a), GATT DOC. L/4875 (1979), reprinted in GENERAL AGREEMENT ON TARIFFS AND TRADE, BASIC INSTRUMENTS AND SELECTED DOCUMENTS, 26th Supp. at 3 (1980).

<sup>68</sup> PERCEPTION GAP, *supra* note 33, at 3-4; WISE MEN'S REPORT, *supra* note 3, at 57.

<sup>69</sup> Wall St. J., Nov. 24, 1980, at 34, col. 1; [1980] 334 INT'L TRADE REP. U.S. EXPORT WEEKLY (BNA) at C-5-6.

<sup>70</sup> Wall St. J., May 12, 1981, at 48, col. 4. It appears that the tariff reduction may have been part of an overall settlement of the auto import crisis. See [1981] 76 INT'L TRADE REP. U.S. IMPORT WEEKLY (BNA) at 1.

<sup>71</sup> [1980] 308 INT'L TRADE REP. U.S. EXPORT WEEKLY (BNA) at C-6.

<sup>72</sup> Krause & Sekiguchi, *supra* note 24, at 413.

<sup>73</sup> TASK FORCE REPORT, *supra* note 39, at 36 n.11 (table of quotas as of April 1978); WISE MEN'S REPORT, *supra* note 3, at 57, 82; Weil & Glick, *supra* note 40, at 856.

<sup>74</sup> WISE MEN'S REPORT, *supra* note 3, at 57.



Although few of the remaining quotas restrict trade in commodities of great interest to American exporters, two of those that do were the cause of "serious economic friction" between Japan and the United States in 1977-78. During those years, an emotional dispute over the Japanese quotas on high-quality beef and citrus fruits escalated to crisis proportions.<sup>75</sup> Intense pressure by the United States led Japan to enlarge the relevant quotas several times.<sup>76</sup> Since 1978, quotas have also been raised on certain fish products<sup>77</sup> and on leather goods<sup>78</sup>—the latter a particularly sensitive product traditionally processed in Japan by a disadvantaged minority group known as the Dowa.<sup>79</sup>

One can question the judgment of American trade authorities in pressing so hard for increases in the beef and citrus quotas. Most observers agree that if these quotas were removed completely, only relatively small increases in American exports could be expected. While these would undoubtedly be important to particular exporters, at the national level the potential gains do not seem commensurate with the extraordinary efforts poured into the negotiations on beef and citrus or with the damage to U.S.-Japan relations that the controversy caused.<sup>80</sup> Further, most advanced nations, including the United States, afford their producers of primary products forms and levels of protection similar to those provided by Japan, though the Wise Men conclude that the degree of protection Japan maintains may be somewhat higher than the norm.<sup>81</sup> In spite of these factors, the dispute over beef and citrus

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<sup>75</sup> *Id.* at 81-82.

<sup>76</sup> See U.S.-JAPAN TRADE REPORT, *supra* note 14, at 55-56.

<sup>77</sup> [1980] 316 INT'L TRADE REP. U.S. EXPORT WEEKLY (BNA) at C-4.

<sup>78</sup> U.S.-JAPAN TRADE REPORT, *supra* note 14, at 59; PERCEPTION GAP, *supra* note 33, at 7-8. As of 1980, American leather exports were not sufficient to fill the relatively small U.S. quotas. *Id.* at 59.

<sup>79</sup> PERCEPTION GAP, *supra* note 33, at 7-8; TASK FORCE REPORT, *supra* note 39, at 41. For a recent analysis of Japanese government efforts to improve the lot of the Dowa, see Upham, *Ten Years of Affirmative Action for Japanese Burakumin: A Preliminary Report on the Law on Special Measures for Dowa Projects*, 13 LAW IN JAPAN 39 (1980). The U.S.-Japan Trade Task Force of the House Ways and Means Committee's Subcommittee on Trade has argued that the role of the Dowa should not retard liberalization for leather products, since a relatively small proportion of Dowa workers are actually employed in the tanning industry. TASK FORCE REPORT, *supra* note 39, at 41.

<sup>80</sup> WISE MEN'S REPORT, *supra* note 3, at 85; TASK FORCE REPORT, *supra* note 39, at 37; PERCEPTION GAP, *supra* note 33 at 6-7. Cf. ARTHUR D. LITTLE, INC., *supra* note 59, at V-20 (American effort expended in negotiations over citrus products incomprehensible to Japanese.)

<sup>81</sup> WISE MEN'S REPORT, *supra* note 3, at 57. Trade in agricultural commodities is generally much less liberal, and much less responsive to liberalization, than trade in manufactured goods. It would be difficult to conclude that the record of the General Agreement on Tariffs and Trade in the sphere of temperate agricultural commodities is other than one of failure. Not only is effective protection in all likelihood higher on average than in any other sector of the international economy, but . . . the rate of effective protection is increasing. . . . [T]he most

seems to have taken on a life of its own as a symbol of the closed market issue, and threatens to erupt again at any time.<sup>82</sup>

Like direct restrictions on imports, formal barriers to foreign investment in Japan have been significantly reduced. Controls on foreign direct investment were for years maintained under the Law Concerning Foreign Investment,<sup>83</sup> enacted in 1950, and the regulations adopted thereunder.<sup>84</sup> Originally, foreign businesses and individuals could make virtually no direct investment in Japan without the prior approval of the competent ministry.<sup>85</sup> When Japan joined the OECD in 1963 its restrictions on foreign capital were among the most severe of any member.<sup>86</sup> Pressure from the members of the OECD, however, particularly the United States, led Japan to begin liberalizing its investment regulations.<sup>87</sup> A four-year capital liberalization program was announced in 1967, and there followed several "rounds" of

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<sup>1</sup> important restrictions on international trade in temperate agricultural commodities are non-tariff barriers, and a large proportion of these are maintained in blatant violation of the General Agreement.

K. DAM, *THE GATT: LAW AND INTERNATIONAL ECONOMIC ORGANIZATION* 257 (1970). See generally J. JACKSON, *supra* note 7, at 979-94.

<sup>82</sup> Interview with William Brock, *supra* note 23; [1981] 363 INT'L TRADE REP. U.S. EXPORT WEEKLY (BNA) at C-1 (remarks of Sec. of Commerce Malcolm Baldrige); [1981] 365 INT'L TRADE REP. U.S. EXPORT WEEKLY (BNA) at C-11-12 (testimony of U.S. Trade Representative William Brock).

Disputes over Japanese agriculture may involve Japanese exports as well as restraints on imports. For example, protectionist policies, along with declining demand, have produced Japanese surpluses in rice, and Japan has begun to export rice. WISE MEN'S REPORT, *supra* note 3, at 85. This has led to conflict with other rice exporting nations, including the United States *Id.* See also [1980] 280 INT'L TRADE REP. U.S. EXPORT WEEKLY (BNA) at C-3. A complaint by American rice millers under Section 301 of the Trade Act of 1974 led to bilateral negotiations, and Japan has agreed to "voluntary" restraints on its rice exports to world markets, with specific limits for Asian markets of special interest to the United States. See U.S.-JAPAN TRADE REPORT, *supra* note 14, at 60-61.

Japan is dependent on imports for several important foodstuffs. WISE MEN'S REPORT, *supra* note 3, at 86; SANDERSON, *JAPAN'S FOOD PROSPECTS AND POLICIES* 1-2 (1978). Recent indications are that Japan will continue its efforts to increase the nation's self-sufficiency in food. [1981] 350 INT'L TRADE REP. U.S. EXPORT WEEKLY (BNA) at C-10. If this policy leads to additional protective measures and increased subsidies, it may spark even further conflict over agricultural policy.

<sup>83</sup> Mimpo (Civil Code), Law No. 163 of 1950.

<sup>84</sup> See Pearl, *Liberalization of Capital in Japan (Part I)*, 13 HARV. INT'L L.J. 59-64 (1972); D. HENDERSON, *FOREIGN ENTERPRISE IN JAPAN: LAWS AND POLICIES* 217-36 (1973).

<sup>85</sup> Hartman, *Japanese Foreign Investment Regulation: Semantics and Reality*, 18 N.Y.L. FOR. 355, 358-61 (1972). According to Professor Henderson, as of 1973, "Together, the FIL [Law Concerning Foreign Investment] and FECL [Foreign Exchange and Foreign Trade Control Law, discussed below] subject almost every imaginable transaction with a foreign contact to a licensing requirement; almost everything is prohibited, unless one first obtains approval." D. HENDERSON, *supra* note 84, at 217.

<sup>86</sup> Pearl, *supra* note 84, at 60.

<sup>87</sup> Pearl, *Liberalization of Capital in Japan (Part II)*, 13 HARV. INT'L L.J. 245, 247-53 (1972).

liberalization.<sup>88</sup> In the first round, lines of business drawn from Japan's standard industrial classification were divided into three categories:<sup>89</sup> one in which 100 percent foreign ownership would be permitted without prior approval, if stated conditions were met;<sup>90</sup> one in which up to (but not more than) 50 percent foreign ownership would be so permitted; and one in which all foreign investments continued to require prior review and approval. In later rounds, business lines were moved from the third category to one of the other two.<sup>91</sup>

This program was perceived in the U.S. as "a highly controlled liberalization, partial and incomplete. . . ."<sup>92</sup> Although by the end of the original program in 1971 only some 7 percent of the lines of business affected by the liberalization still required prior approval for all foreign investments, well over half of those lines required approval for investments above 50 percent.<sup>93</sup> The industries requiring approval for all investments, furthermore, included "the most attractive investment opportunities for foreigners. . . ."<sup>94</sup> Finally, liberalization was "accompanied at every instance by 'countermeasures' designed to limit the ability of foreign investors to make serious inroads into the control of Japanese industry."<sup>95</sup> For example, instead of relying on its former power to review proposed investments under the Law Concerning Foreign Investment, the government was often able to achieve the same ends by requiring the screening of contracts for the transfer of technology, often associated with direct investments by foreign firms under the foreign investment law and other statutes.<sup>96</sup> Over the course of the 1970s, the remaining formal restrictions were gradually lifted, to the point where 100 percent foreign ownership was permitted in all but a few lines of business (including agriculture, petroleum and leatherworking).<sup>97</sup> As described below, however, restraints on foreign

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<sup>88</sup> Pearl, *supra* note 84, at 60. See D. HENDERSON, *supra* note 84, at 237-90.

<sup>89</sup> A fourth category of industries, including public utilities and various security-related industries, was completely excluded from the liberalization program. In addition, investments in existing Japanese enterprises were subject to a different regulatory regime; only the establishment of new firms was liberalized under the 1967 program. D. HENDERSON, *supra* note 84, at 244-45.

<sup>90</sup> The first of these conditions was that the proposed investment be "not exceptionally harmful to Japan's interests." *Id.* at 245-46.

<sup>91</sup> *Id.* at 64-66; Hartman, *supra* note 85, at 362-65.

<sup>92</sup> D. HENDERSON, *supra* note 84, at 237.

<sup>93</sup> Hartman, *supra* note 85, at 365-66.

<sup>94</sup> D. HENDERSON, *supra* note 84, at 249. Investments in computers and electronics were among those restricted.

<sup>95</sup> Pearl, *supra* note 84, at 60. Some countermeasures are discussed in *id.* at 75-81. See also D. HENDERSON, *supra* note 84, at 254-67.

<sup>96</sup> Pearl, *supra* note 84, at 79-80.

<sup>97</sup> Krause and Sekiguchi, *supra* note 24, at 444-47.

investment still remain.

The Foreign Exchange and Foreign Trade Control Law,<sup>98</sup> adopted in 1949 at the height of the postwar balance of payments crisis, was for years used in tandem with the Law Concerning Foreign Investment to restrict foreign participation in the Japanese economy.<sup>99</sup> Under this Law, international capital transactions, including foreign direct investment, required prior government approval, and the exception procedures were complex and burdensome.<sup>100</sup> In the Strauss-Ushiba Joint Statement, however, Japan agreed to make a "sweeping review" of its entire foreign exchange control system.<sup>101</sup> A few specific measures were announced soon after,<sup>102</sup> and in 1980 a substantially amended Foreign Exchange and Foreign Trade Control Law became effective.<sup>103</sup> The new statute incorporates and repeals the Law Concerning Foreign Investment, and adopts what Japanese sources refer to as a "free in principle" approach: most capital transactions, including foreign direct investment, may go forward without approval (though in many cases only upon prior notification) except during balance of payments emergencies and in other specified circumstances.<sup>104</sup> Some of the excep-

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<sup>98</sup> Mimpo (Civil Code), Law No. 228 of 1949.

<sup>99</sup> The Foreign Exchange and Foreign Trade Control Law (FEL) and the Law Concerning Foreign Investment (FIL) were closely interrelated, sharing many definitions. The FEL was considered a "general law" and the FIL a "special law;" thus the FIL governed the specific transactions falling within its terms and the FEL governed all other economic transactions with foreigners. The FEL, for example, governed the establishment of branches and certain contracts for the transfer of technology to subsidiaries. The FEL also governed transnational payments in situations where the FIL had applied to the original establishment of a foreign business. D. HENDERSON, *supra* note 84, at 217-21.

An official history of MITI describes the FEL as "MITI's main tool," for "industrial rationalization, industrial protection, and the promotion of exports . . ." as well as for its original purpose of rationing foreign exchange. Johnson, *MITI and Japanese International Economic Policy*, in *THE FOREIGN POLICY OF MODERN JAPAN* 227, 248 (R. Scalapino ed. 1977).

<sup>100</sup> See Ichikawa, *The Liberalization of Japan's Foreign Trade and Foreign Exchange Transactions*, in Appendix to the Report of the Japan-United States Economic Relations Group, *supra* note 1, at 165, 181-83; WISE MEN'S REPORT, *supra* note 3, at 57-58. See also *The Foreign Exchange and Foreign Control Law: "Prohibition Principle" Amended to Be Free*, LOOK JAPAN, Jan. 10, 1980, at 12-13.

<sup>101</sup> Joint Statement by Minister Ushiba and Ambassador Strauss, *supra* note 36, at 83, para. 8.

<sup>102</sup> TASK FORCE REPORT, *supra* note 39, at 18.

<sup>103</sup> WISE MEN'S REPORT, *supra* note 3, at 58. The statute was enacted late in 1979, but was not made effective until December 1, 1980. See Law Concerning Partial Amendment of the Foreign Exchange and Foreign Trade Law, Mimpo (Civil Code), Law No. 65 of 1979, amending the Foreign Exchange and Foreign Trade Law, Mimpo (Civil Code), Law No. 228 of 1949. A section by section summary in English issued by the Japanese Ministry of Finance appears in [1980] 330 INT'L TRADE REP. U.S. EXPORT WEEKLY (BNA) at 0-1.

<sup>104</sup> Ichikawa, *supra* note 100, at 187-92; WISE MEN'S REPORT, *supra* note 3, at 58; LOOK JAPAN, *supra* note 100, at 12-13. See also Seki, *Major Points in the Revision of the Foreign Exchange and Foreign Trade Control Law*, 1 JAPAN BUS. L.J. 8, 10, 15-17 (1980).

tions, however, are so broad that they could make the "free in principle" approach nearly meaningless. A foreign direct investment, for example, may be prohibited if the relevant government agencies conclude that the investment might have serious adverse effects on competing Japanese business enterprises or on the "smooth performance of Japan's national economy."<sup>105</sup> These provisions leave great discretion in the hands of the administering agencies, as is characteristic of Japanese statutes,<sup>106</sup> and there remains considerable uncertainty as to how liberally the new law will be applied.<sup>107</sup>

Japan seems to have removed its official restrictions on foreign investment more slowly and grudgingly than its direct official barriers to trade. It may be that the greater Japanese reluctance to permit uncontrolled foreign direct investment stems not only from concern with the effect of foreign-controlled companies on national industrial policy,<sup>108</sup> but also from concern over the greater penetration of the domestic economy and society that typically results from that form of economic activity: permanent places of business are established, foreign managers take up residence, local citizens are employed by foreign interests, and local assets are controlled from abroad.<sup>109</sup> We will return to this thought in Parts III and IV of this Article.

### B. "Second Level" Barriers

As foreign products and enterprises began to enter Japan in growing numbers through the widening gaps in its outer wall of tariffs, quotas and investment controls, Western businessmen encountered a different set of barriers to economic activity. Like the more familiar direct controls, these restraints, which we will call "second level" barriers,<sup>110</sup> involved policies and actions of the Japanese government. The

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<sup>105</sup> Ichikawa, *supra* note 100, at 197-99. Cf. Seki, *supra* note 104, at 17.

<sup>106</sup> See Lury, *Japanese Administrative Practice: The Discretionary Role of the Japanese Government Official*, 31 BUS. LAW. 2109, 2210-11 (1976).

<sup>107</sup> WISE MEN'S REPORT, *supra* note 3, at 58-59; [1980] INT'L TRADE REP. U.S. EXPORT WEEKLY (BNA) at C-1 (remarks of Secretary of Commerce Malcolm Baldrige).

<sup>108</sup> See Seki, *supra* note 104, at 15.

<sup>109</sup> Cf. K. UEMURA, CHALLENGE FOR A RESPONSIBLE PARTNERSHIP 13 (1971), *quoted in* D. HENDERSON, *supra* note 84, at 453 n.20:

Transnational investments are indeed transfers of the totality of managerial resources and are bound to have influence on local business practices, employment patterns, working rules, community relations and the sense of participation among workers. This is a profound social and political hurdle in such a homogeneous nation as ours.

<sup>110</sup> The designation "second level" is not meant to indicate that the rules and practices described in this section were necessarily encountered prior in time to those described below as "third level" barriers. The two groups are described in this order because second level barriers, which as we define them have an official character, resemble direct official restraints on trade and

governmental activities at issue, however, were not aimed directly at the regulation of foreign trade and investment. In fact, governmental inaction, rather than action, was largely responsible for the problem.

Second level barriers resulted from the reluctance of the Japanese government to accommodate foreign participants in the Japanese economy by modifying longstanding official practices developed in a purely domestic context. Examples include continued government procurement from traditional domestic suppliers, the continued formulation of industrial and agricultural standards in ways suitable for domestic but not foreign production, and the continuation of discriminatory state trading operations designed to achieve domestic economic goals.<sup>111</sup> Government procurement, standards setting, and state trading are legitimate and commonplace practices in themselves. They did not discriminate against foreign business in any meaningful way when foreign activity in Japan was minimal; their significance for foreigners was then mooted, one might say, by the tariffs, quotas and investment controls that blocked foreign penetration at the border. As those rigid barriers were removed, however, previously innocent domestic regulatory measures came to function as new trade barriers.<sup>112</sup> Such measures, often referred to as non-tariff barriers (NTBs),<sup>113</sup> have proven much more difficult to deal with than the relatively straightforward tariffs and quotas.<sup>114</sup> A closer look at two areas—public procurement and product

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investment more closely than the private attitudes and practices described below as “third level” impediments.

<sup>111</sup> See, e.g., *Impact of Non-Tariff Barriers on the Ability of Small Business to Export to Japan*, *supra* note 23, at 8-12 (statement of Abraham Katz).

<sup>112</sup> In general, then, most second level barriers were not, strictly speaking, newly erected to take the place of more direct restrictions. Some second level restraints, however, must have been newly established, or at least strengthened, as the rigid barriers were removed. The practice of inflating the customs value of imported goods, for example, known as “uplift,” see Weil & Glick, *supra* note 40 at 862-865, would have been largely unnecessary when tariff rates were high.

<sup>113</sup> Extensive literature exists on the problem of non-tariff barriers to trade. For a general introduction to many of the NTBs that have been the subject of negotiations in recent years, see Marks & Malmgren, *Negotiating Nontariff Distortions to Trade*, 7 LAW & POL. INT'L BUS. 327 (1975). United States concern over NTBs was expressed in section 102 of the Trade Act of 1974, 19 U.S.C. § 2112 (1976 & Supp. III 1979), finding that such barriers were adversely affecting the U.S. economy and preventing the development of open and non-discriminatory international trade, and urging the President to take all appropriate and feasible steps within his power to reduce or eliminate them. NTBs were intended to be a major focus of the Tokyo Round. See Tokyo Declaration of September 1973, GATT Doc. MIN (73)(1) (Sept. 14, 1973), *reprinted in* GATT, THE TOKYO ROUND OF MULTILATERAL TRADE NEGOTIATIONS: REPORT BY DIRECTOR-GENERAL OF GATT at 185, 186, paras. 3(b), 4 (1979). Extensive negotiations on various non-tariff measures distinguished the Tokyo Round from all prior rounds of GATT multilateral trade negotiations. *Id.* at 49.

<sup>114</sup> The work of the TFC demonstrates some of the difficulties with NTBs. See notes 24-29 and accompanying text *supra*.

standards—will illustrate some of the problems that have been encountered.

Although Japan has not had an official “buy Japanese” policy since 1975,<sup>115</sup> it has still had little experience with open competitive bidding for government contracts.<sup>116</sup> One estimate is that over 90% of the procurement by the central government ministries has been done through privately negotiated contracts, without public notice.<sup>117</sup> Moreover, Japan’s procurement system is highly decentralized, so that responsible officials are often relatively inaccessible to foreign firms.<sup>118</sup> Decentralization is increased by Japan’s unusual degree of reliance on public and quasi-public corporations for carrying out public policy.<sup>119</sup> Of particular importance are over 100 organizations created by special legislative acts and designated by the government as public enterprises.<sup>120</sup> These entities expend an amount approximating half the total official national budget,<sup>121</sup> and although they are “operative extensions of the central government bureaucracy,”<sup>122</sup> the central government claims to have no control over their procurement policies.<sup>123</sup>

Most public and quasi-public procurement in Japan has come from traditional, often local, suppliers. Nippon Telegraph and Telephone Corporation (NTT), for example, the focus of the most intense bilateral dispute over procurement, has historically negotiated virtually all of its major contracts with four Japanese suppliers.<sup>124</sup> The traditional ties are cemented by the well-established practice known as

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<sup>115</sup> See Anthony & Hagerty, *Cautious Optimism as a Guide to Foreign Government Procurement*, 11 LAW & POL. INT’L BUS. 1301, 1308-09 (1979).

<sup>116</sup> WISE MEN’S REPORT, *supra* note 3, at 63.

<sup>117</sup> U.S. COMMERCE DEPARTMENT, JAPAN’S NONTARIFF BARRIERS 4 (Report prepared for Senate Select Comm. on Small Business), reprinted in *Impact of Non-Tariff Barriers on the Ability of Small Business to Export to Japan*, *supra* note 23, at 54, 61.

<sup>118</sup> AMERICAN CHAMBER OF COMMERCE IN JAPAN, U.S.-JAPAN TRADE: WHITE PAPER, *supra* note 50, at 14; Task Force Report, *supra* note 39, at 31.

<sup>119</sup> Abegglen & Hout, *supra* note 24, at 157. See generally C. JOHNSON, JAPAN’S PUBLIC POLICY COMPANIES (1978).

<sup>120</sup> Johnson refers to this group of companies as “special legal entities, narrowly defined.” The usual Japanese term is *tokushu hōjin*, which can also refer to a much larger group of entities. C. JOHNSON, *supra* note 119, at 34-36.

<sup>121</sup> *Id.* at 34.

<sup>122</sup> *Id.* at 35.

<sup>123</sup> PERCEPTION GAP, *supra* note 33, at 11. See *Recent Development, International Trade: Government Procurement of Telecommunications Equipment—Japan-U.S. Agreement on the Government Procurement Code*, 22 HARV. INT’L L.J. 464, 470 n.42 (1981) (hereinafter referred to as *Recent Development*) (competent ministry’s authority over Nippon Telegraph and Telephone unclear).

<sup>124</sup> *Id.* at 470 n.38; *Impact of Japan’s Nontariff Barriers on the Ability of Small Business to Export to Japan*, *supra* note 23, at 3. NTT, Japan National Railways Corporation and Japan Monopoly Corporation (state trading monopoly in tobacco and salt) were formerly parts of central

“amakudari”: government officials retiring from their positions between the ages of 45 and 55 “descend from heaven” to jobs in quasi-public corporations or in private firms that may supply the officials’ former agencies.<sup>125</sup>

Against this background, the idea of opening public purchases to foreign suppliers through competitive bidding after public notice was nothing less than revolutionary, and was quite unwelcome to many Japanese officials and businessmen.<sup>126</sup> In the 1978 Strauss-Ushiba Joint Statement, however, Japan announced initial measures to increase foreign procurement.<sup>127</sup> In addition, the MTN Government Procurement Code, signed in 1979, prohibited “buy national” policies on major government purchases and required greater openness in the procurement process.<sup>128</sup> Japan was thus committed to change in this sensitive area, but moved with a degree of caution suggesting conscious resistance to foreign penetration.<sup>129</sup>

The MTN Procurement Code had been drafted to apply only to purchases by those public entities that the signatory nations specifically identified in an Annex to the Code.<sup>130</sup> As of the end of the MTN, negotiations between Japan and the United States to establish equivalent reciprocal procurement opportunities had not yet been completed.<sup>131</sup> Japan sought to omit most of its quasi-public corporations from the Annex; and it sought to limit the sizes or types of purchases by others,

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government ministries. Ironically, they were ordered to be spun off into separate entities by the American occupation authorities. C. JOHNSON, *supra* note 119, at 29-30.

<sup>125</sup> Weil & Glick, *supra* note 40, at 879. See C. JOHNSON, *supra* note 119, at 101-17.

Informal expressions characterizing the ways of bureaucrats are colorful in most cultures. Another Japanese term related to *amakudari* is *wataridori*, or “migratory birds,” applied to retired government officials who successively occupy high positions in several public corporations. *Id.* at 110. The closest American expression is probably the “revolving door.”

<sup>126</sup> WISE MEN’S REPORT, *supra* note 3, at 63.

<sup>127</sup> Joint Statement (para. 8), *reprinted in* U.S.-JAPAN TRADE REPORT, *supra* note 14, at 83. See TASK FORCE REPORT, *supra* note 39, at 31.

<sup>128</sup> See Agreement on Government Procurement, *reprinted in* GENERAL AGREEMENT ON TARIFFS AND TRADE, BASIC INSTRUMENTS AND SELECTED DOCUMENTS, 26th Supp. at 33 (1980); Note, *Technical Analysis of the Government Procurement Agreement*, 11 LAW & POL. INT’L BUS. 1345 (1979).

<sup>129</sup> U.S.-JAPAN TRADE REPORT, *supra* note 14, at 28.

<sup>130</sup> See Agreement on Government Procurement, *supra* note 128, at art. I, para. 1(c); see also Anthony & Hagerty, *supra* note 115, at 1310-11.

<sup>131</sup> U.S.-JAPAN TRADE REPORT, *supra* note 14, at 28-29. Under section 301(b)(1) of the Trade Agreements Act of 1979, 19 U.S.C. § 2511(b)(1) (Supp. III 1979), the President was only authorized to waive American “buy national” legislation under the Code in favor of suppliers from other major industrial countries, including Japan, if those countries provided reciprocal procurement opportunities to American companies. See *Recent Development*, *supra* note 123, at 469 n.36.



including NTT, that would be opened to foreign bidding.<sup>132</sup> In the case of NTT, Japan argued substantively that foreign procurement could hamper the quality and uniformity of critical equipment.<sup>133</sup> U.S. negotiators, however, insisted that American procurement would not be opened to Japanese suppliers unless Japan agreed at the least to subject NTT's procurement of high technology equipment to the requirements of the Code.<sup>134</sup> Intensive negotiations on several levels took place during 1979 and 1980, and shortly before the Code was to take effect a bilateral agreement was reached enabling foreign firms to bid on virtually all NTT procurement, in excess of \$3 billion per year.<sup>135</sup> American telecommunications firms, however, remain "skeptical" that the agreement will actually yield them substantial sales, suspecting that NTT will find ways to direct major purchases to traditional suppliers in spite of the requirements of the Code and the bilateral agreement.<sup>136</sup>

Regulation of product standards illustrates even more clearly the type of NTB that results from a reluctance to adapt long-standing prac-

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<sup>132</sup> TASK FORCE REPORT, *supra* note 39, at 31; U.S.-JAPAN TRADE REPORT, *supra* note 14, at 28-29. *See Recent Development*, *supra* note 123, at 469.

<sup>133</sup> *Recent Development*, *supra* note 123, at 471. Foreign telecommunications companies would probably make the same argument. *See* ARTHUR D. LITTLE, INC., *supra* note 59, at IV-17.

<sup>134</sup> The NTT dispute is discussed in Weil & Glick, *supra* note 40, at 880-86; TASK FORCE REPORT, *supra* note 39, at 31-33; U.S.-JAPAN TRADE REPORT, *supra* note 14, at 26-29.

<sup>135</sup> The agreement establishes three procurement "tracks." Track I covers all products other than public telecommunications equipment. Valued at \$1.5 billion annually, procurement of these items is to be governed by the MTN Procurement Code. Tracks II and III cover public telecommunications equipment. Valued at \$1.8 billion annually, these items are governed only by the bilateral agreement, but procurement will be opened by Japan to all foreign bidders under the most-favored-nation principle. A dispute resolution procedure is provided, available only to U.S. bidders. The agreement includes a Joint Statement in which NTT agrees to greater openness in its procedures for regulating equipment attached to its system by subscribers (the interconnect market). Agreement on the Government Procurement Code, Dec. 19, 1980, United States-Japan, T.I.A.S. No. 9961, *reprinted in* 338 INT'L TRADE REP. U.S. EXPORT WEEKLY (BNA), at N-1-5. *See Recent Development*, *supra* note 123, at 464.

<sup>136</sup> [1980] 338 INT'L TRADE REP. U.S. EXPORT WEEKLY (BNA) at C-10; [1980] 336 INT'L TRADE REP. U.S. EXPORT WEEKLY (BNA) at C-7. *But cf. Recent Development*, *supra* note 123, at 472 (American firms may have advantage over other foreign bidders under bilateral agreement). It is also possible that American firms will not be able to win orders because of the very high standards set by NTT. *Id.* at 472-73.

Skepticism continues within the American telecommunications industry even though NTT has taken several steps to accommodate foreign suppliers, such as publishing technical manuals and information on procurement procedures in English, and conducting seminars on its procedures and technical requirements in both Japan and the U.S. *See* [1981] 362 INT'L TRADE REP. U.S. EXPORT WEEKLY (BNA), at C-2-3 (reporting testimony of John Sodolski, Vice President, Electronics Industries Ass'n: "Because of our perceived heavy reliance on [Japanese] good faith, many are skeptical. . ."). Such measures are required for policies and requirements affecting the interconnect market. *See Recent Development*, *supra* note 123, at 469.

tices to foreign participation. Like other advanced nations, Japan has established an array of health and safety standards for industrial and agricultural products; these standards require procedures for product testing, approval and marking.<sup>137</sup> Few would dispute the legitimacy of such regulation in principle, and most Japanese standards appear not to have been adopted with a discriminatory purpose.<sup>138</sup> Yet the nature of some standards and the manner in which they are applied to foreign goods have proven to be irritating impediments to foreign trade.<sup>139</sup> Unlike U.S. practice, for example, Japan has required that many foreign products be tested within its territory, rather than in the country of production. Foreigners have had little access to the groups that set standards. Standards have been based on design rather than performance characteristics, the criteria used in the United States; foreign products that function as well as domestic items may thus be excluded. Foreign products have not been allowed to display the coveted "JIS" (Japan Industrial Standards) and "JAS" (Japan Agricultural Standards) marks of quality.<sup>140</sup>

Standards issues have been addressed through all the channels of negotiation described in the previous section. The Tokyo Round Agreement on Technical Barriers to Trade, signed in 1979, creates a general framework of rules designed to prevent unnecessary standards-related obstacles to international trade and to inhibit discrimination against foreign producers in the drafting of standards and the operation of inspection and certification systems.<sup>141</sup> A 1979 agreement between Japan and the United States further expressed the Japanese commitment to make its standards-setting process more visible and accessible to foreign producers and to act on American complaints about several particular standards.<sup>142</sup> Technical standards issues have also been ad-

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<sup>137</sup> WISE MEN'S REPORT, *supra* note 3, at 59.

<sup>138</sup> U.S.-JAPAN TRADE STUDY GROUP, *supra* note 51, at 6. *But cf.* Weil & Glick, *supra* note 40, at 870 (conclusion that Japanese standards frequently revised "solely to frustrate import competitors" is "not . . . entirely unwarranted"). *See also* ARTHUR D. LITTLE, INC., *supra* note 59, at IV-22-32 (views of U.S. businessmen on various standards issues).

<sup>139</sup> *See* WISE MEN'S REPORT, *supra* note 3, at 59-60; Weil & Glick, *supra* note 40, at 865-79; AMERICAN CHAMBER OF COMMERCE IN JAPAN, U.S.-JAPAN TRADE: WHITE PAPER, *supra*, note 50, at 15-17; U.S.-JAPAN TRADE STUDY GROUP, *supra* note 51, at 6-20; ARTHUR D. LITTLE, INC., *supra* note 59, at IV-22-32.

<sup>140</sup> The sources cited in note 139 *supra* describe standards-related restrictive practices in considerably more detail than the text.

<sup>141</sup> *See* Agreement on Technical Barriers to Trade, *reprinted in* GENERAL AGREEMENTS ON TARIFFS AND TRADE, BASIC INSTRUMENTS AND SELECTED DOCUMENTS, 26th Supp. at 8 (1980); Note, *Technical Analysis of the Technical Barriers to Trade Agreement*, 12 LAW & POL. INT'L BUS. 179, 189-204 (1980) [hereinafter cited as *Technical Analysis*].

<sup>142</sup> Joint Statement on Standards, Testing and Certification Activities—December 7, 1979, *re-*

dressed in subsequent bilateral negotiations, with the TFC and TSG playing prominent roles.<sup>143</sup> According to the Wise Men, "very substantial recent progress" has been made;<sup>144</sup> the U.S.-Japan Trade Task Force of the House Ways and Means Committee characterizes progress on standards issues as the "brightest star" in recent trade negotiations.<sup>145</sup> The process of identifying and negotiating over restrictive standards practices on a case-by-case basis, however, has often been slow and difficult.<sup>146</sup> The difficulty has been enhanced because many of the regulations singled out for criticism by foreign companies and governments have, at least on their face, been directed not only at legitimate public objectives but at goals given particularly high priority in Japan, such as automotive safety and environmental quality.<sup>147</sup> A controversy involving this very problem arose as this Article went to press. A regulation of the Japanese agriculture ministry had required certain species of fruit imported from the state of California to be treated against infestation by the Mediterranean fruit fly, popularly known as "Medfly." The species regulated were those normally considered to support propagation of that destructive insect. To the Japanese, this requirement was an appropriate precaution against a Medfly invasion. To American fruit growers, however, already angered by Japan's citrus quotas, it was a "classic Japanese non-tariff barrier." The U.S. government, sharing the opinion of the producers, had begun to apply diplomatic pressure for modification of the regulation.<sup>148</sup>

Progress has undoubtedly been made in reducing a number of particularly irritating Japanese NTBs. Yet the effect of some of the most dramatic measures so far—the NTT agreement, for example—will only become clear after many specific implementing decisions. Even if sub-

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printed in U.S.-JAPAN TRADE REPORT, *supra* note 14, at 85-86. The Joint Statement included an agreement on prompt negotiations to resolve specific product issues. One result of such consultations has been an agreement by NTT to accept foreign test data in fulfillment of its technical requirements. [1980] 338 INT'L TRADE REP. U.S. EXPORT WEEKLY (BNA) at N-1-5.

<sup>143</sup> TASK FORCE REPORT, *supra* note 39, at 19-25.

<sup>144</sup> WISE MEN'S REPORT, *supra* note 3, at 60.

<sup>145</sup> U.S.-JAPAN TRADE REPORT, *supra* note 14, at 30.

<sup>146</sup> See TASK FORCE REPORT, *supra* note 39, at 19-25; Weil & Glick, *supra* note 40, at 878-79. U.S.-JAPAN TRADE STUDY GROUP, *supra* note 51, at 28-61 demonstrates the case-by-case approach by describing the work of TSG committees on various Japanese NTBs, including many standards practices.

<sup>147</sup> See, e.g., TASK FORCE REPORT, *supra* note 39, at 28 (American autos exempted from certain Japanese emission standards; certain auto safety standards regarded by Americans as "excessive").

<sup>148</sup> N.Y. Times, Aug. 27, 1981, at A-1, col. 5. The Americans argued that certain fruits, notably lemons, could be shown not capable of supporting the Medfly, even though such fruits appeared on the standard list of host species. *Id.*

stantial foreign procurement results from the NTT agreement, many other Japanese entities have not been made subject to the Government Procurement Code.<sup>149</sup> Unresolved problems persist in the areas of customs administration, state trading, even—as the Medfly case demonstrates—standards.<sup>150</sup> Other restrictive devices, particularly the alleged use of “administrative guidance”<sup>151</sup>—a subtle form of bureaucratic direction of the economy—to encourage discrimination against foreign suppliers, remain shadowy and have yet to be effectively addressed.<sup>152</sup> In short, NTBs are still with us, and bid fair to remain a source of controversy for years to come.

### C. “Third Level” Barriers

Foreign business has recently identified still another group of Japanese practices that impede its expansion: a variety of social structures, cultural values, business practices and styles of communication characteristic of Japan. We will call this group “third level” barriers, but with

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<sup>149</sup> Japan has not agreed to subject the purchases of most of its quasi-public corporations to the code. See Appendix I to Government Procurement Code (list of Japanese entities subject to Code), reprinted in HOUSE COMM. ON WAYS AND MEANS AND SEN. FINANCE COMM., 96TH CONG., 1ST SESS., MULTILATERAL TRADE NEGOTIATIONS: INTERNATIONAL CODES AGREED TO IN GENEVA, SWITZERLAND 206-08 (Comm. Print 1979).

Many other nations have also refused to place major government agencies under the Code. For a description of the ways in which the United States has limited the entity coverage of the Code, see Pomerantz, *Toward a New International Order in Government Procurement*, 11 LAW & POL. INT'L BUS. 1263, 1288-91, 1293-94 (1979).

<sup>150</sup> WISE MEN'S REPORT, *supra* note 3, at 59-63. See Weil & Glick, *supra* note 40, at 862-65 (customs practices), 879-89 (standards), 886-87 (state trading). The state trading section of the Weil & Glick article describes the non-tariff restrictions on foreign tobacco products imposed by the government monopoly, the Japan Tobacco and Salt Public Corporation, whose restrictions “border on the ludicrous.” *Id.* at 886. See also Abegglen & Hout, *supra* note 24, at 157.

<sup>151</sup> “Administrative guidance” (*gyōsei shidō*) is a popular term used to describe a variety of actions by Japanese administrative agencies to influence private conduct. Such actions may include requests, recommendations or warnings. Since they are often not based on specific statutory provisions but only on the general wording of the statute establishing a particular government agency, cooperation is often voluntary, though indirect rewards and sanctions are often available. Useful sources on administrative guidance include Narita, *Administrative Guidance*, 2 LAW IN JAPAN 45 (Anderson trans., 1968), and Yamanouchi, *Administrative Guidance and the Rule of Law*, 7 LAW IN JAPAN 22 (Figdor trans., 1974).

Administrative guidance is often seen as an integral part of the government-business relationship that Westerners find difficult to penetrate. See E. KAPLAN, JAPAN: THE GOVERNMENT-BUSINESS RELATIONSHIP 30-32 (1972). The Japanese government agency most often involved in cases challenged by the United States is MITI. See, e.g., TASK FORCE REPORT, *supra* note 39, at 23 (MITI administrative guidance alleged to restrict imports of phosphates for fertilizer). For a discussion of administrative guidance as used by MITI, see C. JOHNSON, *supra* note 119, at 125-127.

<sup>152</sup> WISE MEN'S REPORT, *supra* note 3, at 61-62; Weil & Glick, *supra* note 40, at 889-93; ARTHUR D. LITTLE, INC., *supra* note 59, at IV-18-19; *Impact of Non-Tariff Barriers on the Ability of Small Business to Export to Japan*, *supra* note 23, at 16-17.

an important caveat. The term "barriers" implies the intentional creation of obstacles; in the context of trade policy it suggests governmental action, or at least deliberate inaction. Most third level barriers, however, are the unintentional products of private attitudes and conduct.

Perhaps the most complete description of the private trade barriers perceived by Western businessmen is found in a 1979 report prepared by Arthur D. Little, Inc. (ADL), the well-known American consulting firm.<sup>153</sup> ADL interviewed over 100 business executives, governmental officials, academicians and other specialists on Japan—including some Japanese officials and managers of American-affiliated business firms—as to their experiences with Japanese NTB's, broadly defined to include both official and private practices.<sup>154</sup> While the study does not purport to be based on a statistically valid sample,<sup>155</sup> its findings are highly suggestive of the obstacles encountered by Westerners operating in Japan. In addition to restrictive product standards and testing procedures and other second level measures, three groups of practices that we would define as third level barriers figured among the six obstacles to foreign business most often mentioned by ADL's respondents.<sup>156</sup> Most of these were problems "which individual businessmen from a wide range of industrial sectors encountered directly, repeatedly, and often on a first-hand basis. . . ."<sup>157</sup>

Among the specific factors complained of in this and similar studies are: a "complex and often seemingly inefficient . . . distribution system," particularly for certain consumer goods;<sup>158</sup> informal "buy Japanese" practices and traditional supplier relationships on the part of private purchasers;<sup>159</sup> the close interrelationship of government and

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<sup>153</sup> See ARTHUR D. LITTLE, INC., *supra* note 59.

<sup>154</sup> *Id.* at II-4-6.

<sup>155</sup> *Id.* at II-4.

<sup>156</sup> *Id.* at IV-3-4. The three were the Japanese distribution system, "cultural and business practices," and domestic supplier preferences.

<sup>157</sup> *Id.* at IV-3.

<sup>158</sup> *Id.* at IV-48-53; WISE MEN'S REPORT, *supra* note 3, at 63. See also Weil & Glick, *supra* note 40, at 893-95; PERCEPTION GAP, *supra* note 33, at 13-18. For a thorough discussion of the Japanese distribution system, see M. YOSHINO, THE JAPANESE MARKETING SYSTEM: ADAPTATION AND INNOVATION (1971). Professor Yoshino summarizes some of the outstanding features of the system as follows:

[The distribution system] is dominated by a large number of small establishments, and typically, the distribution channels are long and circuitous. Also noteworthy are the complicated trade customs that have evolved over many years. In fact, in a number of aspects the contemporary Japanese distribution system has undergone little basic change in the last century and still retains many features of the premodern system.

*Id.* at 22.

<sup>159</sup> ARTHUR D. LITTLE, INC., *supra* note 59, at IV-42-48; U.S.-JAPAN TRADE REPORT, *supra* note 14.

business, the workings of which are difficult for foreigners to comprehend and participate in;<sup>160</sup> the lifetime employment system and the high level of Japanese employee loyalty to the firm, which are alleged to make it difficult for foreign-owned business ventures to recruit local employees;<sup>161</sup> styles of negotiation and decision-making unfamiliar to foreigners;<sup>162</sup> and many other matters of the same sort—sometimes even the Japanese language.<sup>163</sup> In the words of the Wise Men, such factors not only “contribute to a general sense of Japanese society as closed and impenetrable,”<sup>164</sup> but actually “make it especially difficult for foreigners to fully penetrate Japanese business and society.”<sup>165</sup> The ADL report draws an even stronger conclusion: “For American business in Japan the most fundamental and pervasive obstacles to exporting and manufacturing are those structural characteristics of Japanese society which we have called cultural and business practices.”<sup>166</sup>

Most businessmen<sup>167</sup> and other observers<sup>168</sup> in the United States have to date adhered to the view that it is the responsibility of the trader or investor to overcome the social and cultural obstacles he encounters in endeavoring to reach customers in foreign countries. Accordingly, only modest pressure has thus far been brought to bear on Japan to modify the kinds of structures and practices just described. Yet this relatively complacent attitude may be starting to change. It is clear from the ADL study that American business is intensely frustrated by third level barriers.<sup>169</sup> The U.S.-Japan Trade Task Force of the House Ways and Means Committee states: “These private barriers to trade are very serious and may account for billions of dollars in lost U.S. export opportunity.”<sup>170</sup> The Wise Men devote considerable attention to Japan’s distribution system, business practices, and other social and cultural obstacles to foreign business.<sup>171</sup> At least one U.S. government official with responsibility for international economic affairs has called on the Japanese government to change the way the nation does

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<sup>160</sup> ARTHUR D. LITTLE, INC., *supra* note 59, at IV-34-35, V-3-6.

<sup>161</sup> *Id.* at IV-38-39.

<sup>162</sup> *Id.* at IV-34-36; WISE MEN’S REPORT, *supra* note 3, at 64-65.

<sup>163</sup> WISE MEN’S REPORT, *supra* note 3, at 66.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 55.

<sup>166</sup> ARTHUR D. LITTLE, INC., *supra* note 59, at IV-32.

<sup>167</sup> *Id.* at IV-32-33 (obstacles are simply the problems of doing business in “a very foreign country”).

<sup>168</sup> WISE MEN’S REPORT, *supra* note 3, at 66; Weil & Glick, *supra* note 40, at 895.

<sup>169</sup> ARTHUR D. LITTLE, INC., *supra* note 59, at IV-33.

<sup>170</sup> U.S.-JAPAN TRADE REPORT, *supra* note 14, at 35.

<sup>171</sup> WISE MEN’S REPORT, *supra* note 3, at 63-66.

business.<sup>172</sup> As first and second level barriers continue to decline, Americans may increasingly come to see third level barriers as the major impediments to further economic expansion in Japan. Given the recent pattern of U.S.-Japan trade negotiations, more demands for change are likely to follow.

The core of the third level of trade barriers consists simply of unfamiliar cultural phenomena. The clearest example is language. The use of Japanese undeniably increases the difficulty of operating in Japan for anyone who does not speak it, but the Japanese language is part of the very identity of the country. No one would seriously suggest that the Japanese should adopt English (or German, French or Swedish) as their national tongue in order to ease the way for foreign business. Similar cultural phenomena include styles of communication, negotiation and decision-making, and patterns of interpersonal, employee and business relations.<sup>173</sup> These phenomena all represent private attitudes and patterns of conduct deeply ingrained in Japanese society. In most cases they are not motivated by any discriminatory purpose. In short, it is difficult to identify any sense in which they are improper, as a matter either of law or of policy, and efforts to change them through external political pressure seem both inappropriate and doomed to failure.

Some third level barriers, however, may appear structurally closer to officially sanctioned NTB's—second level barriers—than to these core cultural phenomena. The Japanese distribution system, for example, has retained its complex form in large part because of years of governmental protection for small wholesalers and retailers.<sup>174</sup> Yet the shape of the system was determined over centuries by the characteristics of the Japanese economy and the needs of Japanese society; as those needs and characteristics change, the system is gradually adapting.<sup>175</sup> At its heart, the distribution system is a social and economic, not a political, phenomenon. Moreover, for the most part neither the

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<sup>172</sup> [1980] 327 INT'L TRADE REP. U.S. EXPORT WEEKLY (BNA) at C-11 (statement of Luther Hodges, Undersecretary of Commerce: "We look to the Japanese government . . . to help bring about a change in the attitudes and practices of Japanese businesses").

<sup>173</sup> ARTHUR D. LITTLE, INC., *supra* note 59, at IV-33-44.

<sup>174</sup> See M. YOSHINO, *supra* note 158, at 251-74. In his analysis of the government's involvement in the distribution system, Professor Yoshino states that from 1948 to 1962, "The government's main concern was to protect small independent wholesale and retail establishments . . . from unfair competition from large establishments such as department stores . . . and to make available various types of assistance . . ." *Id.* From 1962 to 1968, protection was still the goal, but more positive measures were taken to modernize small distributors. *Id.* Only after 1968 did "the basic goal [shift] from protecting and promoting only certain segments of the distribution sector to improving the total system." *Id.* at 255-56.

<sup>175</sup> For the historical development of the system, *see id.* at 1-9. For a description of postwar economic and social changes relevant to the system, *see id.* at 25-90. For a description of changes

system itself nor the governmental programs affecting it have had a discriminatory purpose; the system is often as frustrating to Japanese as to Americans.<sup>176</sup> Still, in the case of complex phenomena like the Japanese distribution system, the mixture of extensive official involvement—which might be a proper subject for international negotiation—with social and economic<sup>177</sup> factors — many of which are generally not appropriate targets for external pressure—makes for unusual difficulties of analysis and policy formulation.

Certain other attitudes experienced by Westerners differ from the core cultural phenomena in other ways. Both the ADL report and the U.S.-Japan Trade Task Force report, for example, find a “buy Japanese” preference at work in some sectors of the economy.<sup>178</sup> This attitude is not an obstacle to the sale of consumer goods; the cachet of foreign products may actually give them an advantage in Japan’s consumer markets.<sup>179</sup> The preference seems rather to operate in the purchase of capital goods and basic materials.<sup>180</sup> Such discrimination can be explained in part by economic considerations,<sup>181</sup> but it appears to be supported by a more fundamental aversion to long-term supply relationships with foreign firms.<sup>182</sup> While “buy domestic” attitudes are not uncommon either in the United States or in other countries, the preference for domestic sources of supply in at least some parts of Japanese society is perceived as being unusually strong. A similar attitude on the part of individuals may contribute to the difficulty of attracting local managers and employees to foreign-owned business ventures, although considerations of personal economic security appear to be the primary source of this problem.<sup>183</sup> To the extent such attitudes actually

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in the system resulting from “the emergence of the mass consumer market and the rapidly rising consumer expectations,” *see id.* at 129-72.

<sup>176</sup> *See WISE MEN’S REPORT, supra* note 3, at 64 (system “discriminates against new market entrants both foreign and domestic”).

<sup>177</sup> Many Japanese manufacturers have established vertically integrated distribution systems for their products, most often by creating networks of affiliated dealers, that serve to exclude foreign products from those channels of distribution. *See M. YOSHINO, supra* note 158, at 109-24.

<sup>178</sup> *See* note 159 and accompanying text *supra*. Secretary of Commerce Malcolm Baldrige has recently stated that the TFC, *see* notes 40-49 and accompanying text, *supra*, will in the future focus on “informal” trade barriers as well as “official” ones, and hopes to enlist the aid of MITI in changing widespread hostile Japanese attitudes toward certain imports. [1981] 363 INT’L TRADE REP. U.S. EXPORT WEEKLY (BNA) at C-1.

<sup>179</sup> *See* ARTHUR D. LITTLE, INC., *supra* note 59, at IV-43.

<sup>180</sup> *Id.*; *cf.* U.S.-JAPAN TRADE REPORT, *supra* note 14, at 35 (Japanese imports of Korean steel lower than American on per capita basis).

<sup>181</sup> *See* ARTHUR D. LITTLE, INC., *supra* note 59, at IV-44-48.

<sup>182</sup> *Id.* at IV-44.

<sup>183</sup> *Cf. id.* at IV-38-39 (employment by foreign firm accorded “low status” because of short-term management perspective and perception that foreign business may not be successful).



influence Japanese business decisions, they pose much greater obstacles to foreign firms than do such core cultural phenomena as language and styles of communication. The latter can be learned or adapted to, by the use of interpreters and advisers, for example. The former, however, cannot be overcome in the short run by the unilateral efforts of foreign firms. If such attitudes actually pervade Japanese society—a matter we will explore in the next section—they may constitute a “fourth level” barrier to foreign economic penetration, more difficult to overcome than any so far discussed.

### III. THE CULTURAL AND HISTORICAL ROOTS OF JAPANESE-AMERICAN ECONOMIC RELATIONS

There has been real and substantial progress in dismantling many official barriers to trade and investment in Japan, both “first level” restrictions such as tariffs, quotas and investment controls and “second level” NTBs. This progress, however, has been slow and frustrating, at least from the American point of view, and has only been achieved with the expenditure of “a great deal of political capital.”<sup>184</sup> Furthermore, for all of the progress made, foreign business still confronts a variety of restraints that are in whole or in part officially maintained. It may also face, at least in some sectors of the economy, an attitude on the part of private firms and individuals that favors business relations with domestic companies over relationships with foreigners. Finally, foreign business has come to identify many Japanese social structures and cultural characteristics as impediments to penetration of Japan’s economy. All of these diverse phenomena must now be considered when discussing the closed market issue.

Our concluding sections will offer some recommendations for dealing with the various components of this vexing problem. To do so, however, we must first seek to understand more clearly the roots of the problem and the reasons for its persistence.

Many of the official impediments to foreign penetration of the Japanese economy can be explained as products of relatively straightforward political and economic calculation. We have already noted, for example, that most of the remaining Japanese quotas protect politically influential agricultural interests. A variety of other powerful domestic interests, agricultural, industrial and commercial, have inhibited successive Japanese governments from reducing similar protective barriers.

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<sup>184</sup> U.S.-JAPAN TRADE REPORT, *supra* note 14, at 31.

ers.<sup>185</sup> As an example, the government is thought by many to have preserved the traditional distribution system, characterized by multiple layers of wholesalers and many small retailers, as part of the nation's "social welfare system," a sector where many persons who might not easily find work elsewhere can be employed.<sup>186</sup>

Economic calculation is apparent in the Japanese government's moves to protect favored industries from import competition while they develop the size and strength needed to compete in international markets. Japan has consciously "grown" a basic heavy industries sector, then a still-evolving group of low-pollution, knowledge-intensive industries, that together have accounted for much of Japan's stunning economic success.<sup>187</sup> Demonstrating a different sort of economic calculation, Japan has long been predisposed to limit unnecessary imports whenever possible, since available foreign exchange must first be devoted to importing basic materials, food and fuel in huge quantities. This basic economic truth has made some protective measures seem eminently reasonable to the Japanese.<sup>188</sup>

But does such political and economic calculation by the Japanese government adequately explain the range of problems that now makes up the closed market issue? We submit that it does not. First, and most clearly, it does not explain the Western perception of "third level" social and cultural barriers to foreign activity—such as unfamiliar styles of communication and decision-making—that derive, by and

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<sup>185</sup> See, e.g., Abegglen & Hout, *supra* note 24, at 156-57 (discussing "political wards," sectors which receive protection for political reasons); Weil & Glick, *supra* note 40, at 870 (domestic manufacturers benefit from restrictive standards system).

<sup>186</sup> See ARTHUR D. LITTLE, INC., *supra* note 59, at IV-49-51.

<sup>187</sup> See U.S.-JAPAN TRADE: ISSUES AND PROBLEMS, *supra* note 15, at 176-86; U.S.-JAPAN TRADE REPORT, *supra* note 14, at 39-46; Caves and Uekusa, *Industrial Organization*, in ASIA'S NEW GIANT: HOW THE JAPANESE ECONOMY WORKS, *supra* note 25, at 459, 486-89. The appropriateness of these Japanese policies is a matter of fierce dispute, and lies at the heart of much of the discord between Japan and the U.S. over economic matters.

<sup>188</sup> Through the early 1970's, "The Japanese government stimulated exports, restricted manufactured imports, and assisted large scale raw material imports," "classical behavior for an island economy poor in natural resources and prone to experience trade deficits . . ." MAGAZINER & HOUT, JAPANESE INDUSTRIAL POLICY 42-43 (1980). See also Krause & Sekiguchi, *supra* note 24, at 386-88; Abegglen & Hout, *supra* note 24, at 151; D. HENDERSON, *supra* note 84, at 68-69 (Japan has qualitatively greatest dependence on imports of any major nation, though quantitatively imports are not high proportion of GNP). The need to limit nonessential imports and promote exports was particularly acute during the postwar balance of payments crisis. See notes 24-25 and accompanying text *supra*.

Growing dependence on imported foodstuffs has led to concern over security of food supplies. See WISE MEN'S REPORT, *supra* note 3, at 81, 86; SANDERSON, *supra* note 82, at 60-62, suggests that Japan's concerns over inadequate world grain supplies, high world grain prices, and food embargoes have proven to be unfounded.

large, from spontaneous private attitudes and conduct. Those phenomena are only "barriers" from the point of view of the foreign businessman who finds them difficult to master. What needs explanation is not the existence of the phenomena but the fact that foreign businessmen have been so unsuccessful in adapting to them. Second, and almost as clearly, official economic and political calculation does not satisfactorily explain the apparent reluctance among public, quasi-public and, especially, private institutions and individuals in Japan to deal with foreign economic interests. Third, the types of political and economic considerations mentioned above seem best able to explain official restraints on trade; they seem to us to inadequately explain Japan's marked resistance to foreign direct investment, which may affect a nation's balance of payments, employment and other economic conditions much differently than imports. We have earlier suggested that an explanation of this resistance should take into account that direct investment is a more intrusive form of economic activity than trade. Finally, for us, cold economic and political calculation alone does not satisfactorily explain the tenacity with which Japan has clung to the notion of restricting foreign activity through changing economic conditions and in the face of strong pressure from abroad. We seek an explanation that accounts for the emotional intensity of the Japanese actions.

To understand more fully these dimensions of the closed market issue, it is necessary to look at the problem as a manifestation of a larger historical pattern of interaction between Japan and the West. This has been an unbalanced pattern, in which economic and other relations have been carried out for the most part in English and according to Western norms, with the result that Westerners have generally failed to reach an intimate understanding of Japanese society.

Americans first encountered Japan during the out-thrust of nineteenth-century Western imperialism.<sup>189</sup> As Europeans extended their presence around the globe during the sixteenth to nineteenth centuries, they developed a set of methods—largely adopted by the Americans—for dealing with the "natives" in the societies they encountered. Confident that theirs was the only civilized society and the only true religion, and reassured in that confidence by the superiority of their firearms and other technology, they saw no need to gain more than a superficial

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<sup>189</sup> The patterns of nineteenth-century imperialism are examined in a vast array of books. F.C. JONES, *EXTRATERRITORIALITY IN JAPAN AND THE DIPLOMATIC RELATIONS RESULTING IN ITS ABOLITION, 1853-99* (1931), describes the pattern in Japan. For a wider-ranging study, see G. SANSOM, *THE WESTERN WORLD AND JAPAN* (1951).

knowledge of native society. They communicated through their home language, be it English, French, Dutch, or some other European tongue. They worked out relationships according to advantageous precedents developed in the course of prior expansion, living in their own enclaves, according to their own customs, and without regard for local law and practice. When commercial and political links were established, they too were based on imperialist precedents, with minimal reference to indigenous traditions.<sup>190</sup>

From the time Japanese first dealt with Americans and other Westerners, they too were forced to do so almost entirely in Western languages, according to Western norms, and at least in a social sense on the periphery of Japan. Even if the Japanese had wanted to deal with foreigners in their own tongue, according to their own ways, and within the web of Japanese society, they could not have done so. Thus was born the unbalanced pattern of Japanese-Western intercourse and the failure of Westerners to deal with the cultural phenomena inherent in Japanese society.

This does not explain, of course, why the Japanese accepted this pattern nor why they have been able to work so well within it, even though it has made great demands upon them.<sup>191</sup> We believe that the Japanese have been willing and able to function in foreign terms because doing so enables them to satisfy a preference for modes of intercourse that maintain distance between themselves and others.<sup>192</sup>

To elaborate this proposition, one may say that the Japanese draw sharper distinctions between "us" and "them" than do people in many other societies, including the United States. This is a pervasive social tendency affecting all group situations: "my family," "my group," "my company," "my village," "my school," and "my graduating class" are all distinguished from "yours." At the national level, this tendency leads Japanese to draw a sharp distinction between themselves and

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<sup>190</sup> The most famous example of imperialist arrangements—and the one that the Japanese observed most clearly and instructively—was China, where during the mid-nineteenth century the English obtained the long-term concession of Hong Kong, acquired enclaves in a number of Chinese cities, secured partial control of the Chinese tariff, which was reorganized and administered along English lines, and forced the Chinese to reorganize their diplomatic procedures to accommodate Western preferences. J. FAIRBANK, *TRADE AND DIPLOMACY ON THE CHINA COAST: THE OPENING OF THE TREATY PORTS, 1842-1854* (1953).

<sup>191</sup> To attempt to analyze a complex society in a few lines risks extreme oversimplification and the appearance of condescension. We assume those risks in the belief that the Japanese attitudes we describe here—and the American attitudes we discuss above—exist and contribute importantly to trade disputes between the two nations.

<sup>192</sup> Studies of Japanese social psychology are legion. Two recent and illuminating works are T. LEBRA, *JAPANESE PATTERNS OF BEHAVIOR* (1976), and C. NAKANA, *JAPANESE SOCIETY* (1970).

non-Japanese, generically labelled *gaijin*, it being assumed that foreigners can best be understood and dealt with in the clear-cut dualistic terms of "us" and "them."<sup>193</sup> Dealing with foreigners in ways that keep them at a distance enables the Japanese to preserve a clarity of social place and an integrity of self that seem threatened when others, particularly outsiders, become too intimate. The need to maintain a clear sense of self is particularly powerful at the national level, where it is reinforced by an unusually strong feeling of vulnerability *vis-a-vis* foreigners.<sup>194</sup> This feeling is manifested in the constant readiness of Japanese to speak of their island country as "small," "crowded," "weak," "isolated" or "poor," and recently even to envisage it sinking out of sight.<sup>195</sup> In short, because Japanese feel that "we" are so weak compared to "them," it becomes doubly necessary to keep "them" at arm's length, so that "they" cannot harm "us."

It is this desire to protect what is seen as a vulnerable self from alien encroachment that has, we believe, been the sustaining emotional force behind Japan's reluctance to allow foreigners easy access to home markets and that underlies private Japanese attitudes of reluctance to deal with foreigners. We have already suggested that, in economic terms, Japan's feelings of vulnerability are in no way misplaced.<sup>196</sup>

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<sup>193</sup> Americans also label non-Americans generically as "foreigners," but the terms *gaijin* and "foreigner" function differently. In popular Japanese parlance the term *gaijin*, which generally refers to non-Asians and is applied quite openly to people who are visibly different, is a non-pejorative term of identification with certain implicit explanatory connotations. It signifies, in particular, that the person identified is unfamiliar with Japan and does not speak the language. In popular American parlance the term "foreigner" is applied more indiscriminately, most commonly on the basis of language, less commonly on the basis of appearance or manners. More than *gaijin*, the term is often used covertly and in a pejorative sense.

<sup>194</sup> For a recent journalistic comment on Japan's feelings of vulnerability, see Wall St. J., Sept. 14, 1981, at 1, col. 5 ("tendency of the Japanese to downplay or even deny their prosperity"). It is also true that the basic Japanese disposition to see social situations in terms of "us" and "them," reinforced at the national level by a sense of cultural uniqueness, can give rise to an arrogant sense of ethnic superiority. It has led to bold assertions of Japan's unique moral worth, historic destiny, superior social capability or global mission. Especially during the 1930s, Japanese chauvinists celebrated the unique virtues and mission of their nation. See, e.g., SOURCES OF THE JAPANESE TRADITION (R. Tsunoda, comp. 1958). But whereas some societies' comparable notions of cultural superiority, "manifest destiny," civilizing mission, world leadership, or racial supremacy have been uncomplicated by countervailing sensibilities, the Japanese have been persistently tormented by their unusually strong feeling of vulnerability *vis-a-vis* foreigners.

Recently the notion of Japanese uniqueness has been evidenced in a psychological hypothesis that Japanese brains work differently from the brains of other people, with the right hemisphere doing what the left hemisphere does in the brains of *gaijin*. See Sibatani, *The Japanese Brain*, SCIENCE 80 (Dec. 1980).

<sup>195</sup> The sense of vulnerability was recently evident in the popularity of the book *Nihon chinbot-su* (The Sinking of Japan) by Komatsu Sakyō (Tokyo 1973).

<sup>196</sup> See text accompanying notes 25 & 188 *supra*. Japan's vulnerability is not based solely on the need to import and export. Japan is not a favored customer of many of the nations that supply

The attitudes of which we speak, however, run far deeper than modern economic considerations such as dependence on foreign oil. They were evident in the Japanese historical experience long before such considerations became operative.<sup>197</sup>

The self-image of Japan as a small, vulnerable, and isolated country was well established by the mid-nineteenth century.<sup>198</sup> By that time too, the Japanese practice of dealing with foreigners at a distance had solid historical grounding. In earlier centuries, Japan had conducted many of its international economic, political and cultural contacts abroad; from the seventeenth century onward, it had restricted those contacts to a few closely controlled points on the edge of southwestern Japan. In the course of these dealings the Japanese had become accustomed to working in foreign languages and according to foreign customs. When the Westerners arrived in the 1850s, their insistence on using their own languages and customs corresponded rather well to the behavior that observant Japanese had come to expect of foreigners. What the Japanese found alarming in the arrival of the Western imperialists was the magnitude of their proposed intrusion into Japan, which seemed to constitute an intolerable assault on the concept of a safe and proper distance between "us" and "them." In response, the Japanese undertook vigorous and persistent attempts to protect themselves from the escalating foreign encroachment.<sup>199</sup>

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it with raw materials, some of which resent Japanese purchases of their nonrenewable resources, particularly at early stages of processing, or resent their own dependence on Japanese buyers. Krause & Sekiguchi, *supra* note 24, at 388. Further, Japan is located far from major industrial markets in Europe and North America. The nearest large states are the Soviet Union and the People's Republic of China, both of which cause Japan concern as reliable customers and suppliers. See Pempel, *Japanese Foreign Economic Policy: The Domestic Bases for International Behavior*, 31 INT'L ORG. 723, 726-29 (1977). Japan even has reason to be suspicious of the reliability of the United States, its largest trading partner. See notes 235-37 and accompanying text *infra*.

<sup>197</sup> For examples of older Japanese views of their island's vulnerability, see D. KEENE, *THE JAPANESE DISCOVERY OF EUROPE* (1969) and some of the translated documents in *SELECTED DOCUMENTS ON JAPANESE FOREIGN POLICY 1853-1868* (W.G. Beasley, ed., 1955).

<sup>198</sup> Originally Japan's sense of smallness sprang from persistent comparison with China, the foreign culture that most influenced its development during the millennium before the late 18th century. From the 1780s, however, Japanese began to receive reports of European activities in the surrounding seas, and commentators began to emphasize the size and power of such Western states as Russia and England. The Opium War of 1839-1842 led to heightened rhetoric about Japan's weakness, and since then the comparative frame of reference for national self-assessment has remained the West, for many years mainly England and Russia, but by the mid-twentieth century, the U.S. See sources cited in note 197 *supra*. See also G. LENSEN, *THE RUSSIAN PUSH TOWARD JAPAN: RUSSO-JAPANESE RELATIONS 1697-1875* (1959). The sense of national vulnerability as it existed in the 1840s is evident in comments of the political leaders of the time. See Totman, *Political Reconciliation in the Tokugawa Bakufu: Abe Masahiro and Tokugawa Nariaki, 1844-1852*, in A. CRAIG & O. SHIVELY, *PERSONALITY IN JAPANESE HISTORY 180-208* (1970).

<sup>199</sup> Many studies, both specialized and general, examine the history of Japanese foreign policy.

During the 1850s and 1860s foreign armadas, such as the "Black Ships" led by the American Commodore Matthew Perry, forced the Japanese government—the Tokugawa shogunate<sup>200</sup>—to agree to treaties of trade and diplomatic recognition, complete with the unequal clauses characteristic of the age of Western imperialism. Tokugawa leaders and advisors struggled to find ways of dealing with the intrusive foreigners. They sent Japanese traders abroad, hoping that their activities would satisfy the foreigners, as in the past, while leaving the domestic order essentially unchanged. When that did not suffice, they maneuvered to minimize the extent of foreign penetration. They attempted to restrict foreigners to a few trading ports and resisted Christian proselytizing. They introduced a variety of programs to train people in foreign languages and ways and sent them abroad to learn the secrets of Western power, in the hope of using those secrets to fend off the foreign incursion. They directed their greatest effort toward keeping foreigners away from the Emperor and his court in Kyoto, which were regarded as the very heart of "us."<sup>201</sup>

In 1868 insurgents overthrew the Tokugawa regime and established a new government nominally controlled by the young Meiji Emperor.<sup>202</sup> During the next three decades the Meiji regime devoted itself to increasingly complex efforts at developing national strength.<sup>203</sup>

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For general surveys, see the old, but detailed, textbook, C. YANAGA, JAPAN SINCE PERRY (1949) and the newer, more concise W.G. BEASLEY, MODERN HISTORY OF JAPAN (1963). A valuable recent reference work is JAPAN'S FOREIGN POLICY, 1868-1941: A RESEARCH GUIDE (J. Morley, ed., 1974). Its bibliography will guide readers to other sources, in both English and Japanese. For a recent study of the history of U.S.-Japanese relations, see C. NEU, THE TROUBLED ENCOUNTER: THE UNITED STATES AND JAPAN (1975). See also A. IRIYE, ACROSS THE PACIFIC: AN INNER HISTORY OF AMERICAN-EAST ASIAN RELATIONS (1967).

<sup>200</sup> From 1603 until 1867 Japan was dominated by a government headed by a hereditary line of rulers named Tokugawa and holding the title *shōgun*. The shogun resided in Tokyo (then called Edo) and ruled through some 250 *daimyō*, or feudal lords, who governed their own fiefs in line with regulations issued by the shogunate. The emperor, who nominally appointed the shogun, lived in Kyoto as a powerless symbol of national authority.

<sup>201</sup> Foreign affairs in the final years of the Tokugawa shogunate are covered in W.G. Beasley, ed., note 197 *supra*. See also Totman, *From sakoku to kaikoku: The Transformation of Foreign Policy Attitudes, 1853-1868*, 35 MONUMENTA NIPPONICA 1 (1980). A sound general study of those years in Japanese history, including a good bibliography, is W.G. BEASLEY, THE MEIJI RESTORATION (1972).

<sup>202</sup> In 1868 the forces of some insurgent *daimyō*, see note 200 *supra*, overthrew the Tokugawa shogunate, claiming that they were restoring to the emperor authority that had been usurped by the founder of the Tokugawa line, Tokugawa Ieyasu. The insurgents established their headquarters in Tokyo, "the eastern capital"—as Edo was renamed—and over the next three decades developed a parliamentary government with a cabinet subject to the Emperor, who was made the locus of sovereignty. See generally G. AKITA, FOUNDATIONS OF CONSTITUTIONAL GOVERNMENT IN MODERN JAPAN, 1868-1900 (1967).

<sup>203</sup> The policies of the Meiji regime have been studied extensively. On foreign relations, in

These efforts were part of a multifaceted strategy to preserve Japan's national autonomy by keeping foreigners at arm's length, thus maintaining the social distance between "us" and "them" that the Japanese considered essential to a well-ordered world. The task required massive political and military reorganization and the conscious promotion of industrial development, supplemented by a series of more specific steps designed to minimize foreign penetration. Attempts were repeatedly made to negotiate an end to the unequal treaties that so impugned Japanese honor and gave foreigners such advantages in Japan. The foreign treaty ports were prevented from expanding (as similar enclaves were expanding in China) by vigorous development of indigenous commercial and coastal shipping institutions. As rapidly as possible overseas trading organizations were established to carry on trade abroad, thereby reducing foreigners' demands within Japan.

Aware that they could not deal successfully with the Westerners if they did not understand the sources of their strength,<sup>204</sup> the Meiji leaders sent more students and officials abroad to study. They hired foreign advisors, paid them lavishly, picked their brains, and dismissed them. Western ways were studied and discussed with an intensity that evidenced the widespread fear of foreign cultural domination.<sup>205</sup> Whereas emigration was expedited, immigration was actively discouraged on the grounds that Japan was too small, too poor, and too overcrowded to

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addition to sources cited in note 199 *supra*, see F.C. JONES, note 189 *supra*. For a standard reference on economic development, see W. LOCKWOOD, *THE ECONOMIC DEVELOPMENT OF JAPAN: GROWTH AND STRUCTURAL CHANGE, 1868-1938* (1954). For a discussion of Japanese concern about foreign cultural domination during the Meiji era, see K. PYLE, *THE NEW GENERATION IN MEIJI JAPAN; PROBLEMS IN CULTURAL IDENTITY, 1885-1895* (1969).

<sup>204</sup> "Knowing the enemy" was a classical Confucian dictum, employed over and over again. In early 1846, for example, the great *daimyō* Tokugawa Nariaki thundered at the shogunal leader, "knowing one's enemy and oneself, in a hundred battles there will be no danger." See Totman, *supra* note 198, at 187.

<sup>205</sup> As an example of this movement, John Henry Wigmore, former Dean of the Northwestern University School of Law and preeminent American scholar of evidence, was brought to Japan as a young man to teach Anglo-American law. See J. ROLFE, *JOHN HENRY WIGMORE: SCHOLAR, AND REFORMER 21-31* (1977). The interest in Western law was part of the general interest in things Western, but was also based on a desire to obtain the agreement of the Western powers to abrogation of the treaties granting them extraterritorial rights in Japan.

To help neutralize the alien ideologies being intensively studied, great effort was devoted to formulating and propagating domestic dogmas and theories of state and society. This effort drew heavily on Tokugawa-era writings about the Japanese imperial legacy (*kokugaku*), and vigorous programs of nationalist indoctrination were undertaken in the newly-formed armed forces and public school system. On this Tokugawa intellectual legacy, see S. MATSUMOTO, *MOTOORI NORINAGA, 1730-1801* (1970); D. EARL, *EMPEROR AND NATION IN JAPAN: POLITICAL THINKERS OF THE TOKUGAWA PERIOD* (1964); H.D. HAROOTUNIAN, *TOWARD RESTORATION: THE GROWTH OF POLITICAL CONSCIOUSNESS IN TOKUGAWA JAPAN* (1970). On Meiji-era political consciousness, see K. PYLE, *supra* note 203.



accept more people and that foreigners could not really adapt to life in Japan anyway.<sup>206</sup>

By 1900, this curious congruence of foreign and Japanese attitudes had produced a settled pattern of interaction. Westerners tended to deal with Japanese on basically Western terms and in Western languages, without significant penetration of Japanese society. Out of both choice and necessity, Japanese tended to deal with foreigners in foreign tongues and according to foreign ways, abroad if possible, or at the shoreline. It was an unequal relationship characteristic of Western imperialism, but it survived into the 20th century despite the decline of Western imperialism in Asia. On the Japanese side, it survived not only because it met the strong need for autonomy and ethnic certitude we have described, but also because it produced significant economic benefits. Not only could Japan retain control of its own domestic market, it could also follow and exploit foreign learning, while most foreigners were unable to monitor technological and other advances made in Japan. On the American side, it survived because all the political, economic and technical evidence for decades supported the gratifying belief that others, such as the Japanese, could learn much from the United States while Americans could learn nothing of consequence from them, and therefore had no need to gain a closer understanding of them.

Historically, the pattern of dealing we have described was firmly enough established to survive the general decline of Western prestige in Asia during World War I.<sup>207</sup> It was temporarily shored up by the Mandate system of the League of Nations, which enabled the victors to inherit the colonies of the vanquished, and by the Washington Conference system, which helped stabilize the Western presence in East Asia despite the turmoil in China, thereby perpetuating the notion that the old order was intact and the attitudes that informed it still

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<sup>206</sup> One of the most dramatic dissimilarities between any two societies is the sharp contrast between the belief shared by many Japanese that Japan is unique and that foreigners can never really become Japanese or understand Japan, and the quasi-universalistic American belief that Americans are "just folks" like everyone else and that anyone, if he tries hard enough, can become an American. For thoughtful examination of Japanese attitudes toward foreigners, see E. REISCHAUER, *THE JAPANESE* (1977).

<sup>207</sup> During World War I European merchants were displaced in Asia by Japanese; the involvement of the Europeans in their own fratricidal venture caused them to cease supplying their colonies. Even though the Europeans temporarily regained their market role after 1918, they never restored their prestige in Asia. It had been destroyed by the evidence that the Europeans, far from being the wave of humanity's future, were not even able to keep their own house in order. The result was the rapid growth of nationalist movements throughout Asia during the 1920s and thereafter.

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During the 1930s and 1940s, Japan attempted to drive the Westerners out of East and Southeast Asia, replacing them with a Japanese-led "Greater East Asia Co-Prosperity Sphere," and destroyed the remnants of European power in the area despite brief Dutch, French and British efforts in the late 1940s to reassert themselves in Indonesia, Indo-China, and India. Japan's success, however, had the entirely unintended result of bringing the United States into a preponderant role in the western Pacific.<sup>209</sup>

As the triumphant Americans poured into Japan in late 1945, it appeared that Japanese and Americans would at last be forced to develop a new way of dealing with one another. The Americans, the occupying power, would establish themselves in Japan and come to understand the country. The Japanese, the defeated power, would be forced to accept the incursion of foreigners into their domestic life. In reality, however, matters worked out differently. The Americans—supported as never before by evidence of their superiority—undertook a massive program of social engineering designed to convert Japan into a peace-loving democratic society on Western models,<sup>210</sup> meanwhile continuing to use their own language, adhering to their own customs, and consciously limiting contact with Japanese society. The Japanese, crushed by the magnitude of their defeat, accommodated the conquerors' demands, but relied upon the language barrier and their own sense of propriety to preserve some approximation of the proper distance between "us" and "them."

Japan survived the American occupation of 1945 to 1952 and learned a great deal that was useful, whereas the Americans, considering the richness of the opportunity, learned remarkably little in return. They were scarcely more prepared to do business in Japan in 1950 than they had been in 1930 or even 1910.

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<sup>208</sup> The best study of 1920s East Asian diplomatic affairs is A. IRIYE, *AFTER IMPERIALISM: THE SEARCH FOR A NEW ORDER IN THE FAR EAST, 1921-1931* (1965).

<sup>209</sup> Works on the Pacific War are numerous. See, e.g., J. MORLEY, *supra* note 199. On the Japanese empire, see F.C. JONES, *JAPAN'S NEW ORDER IN EAST ASIA, ITS RISE AND FALL, 1937-1945* (1954). For the orthodox view of the origins of the war, see H. FEIS, *THE ROAD TO PEARL HARBOR* (1950). For a recent and original interpretation, see A. IRIYE, *POWER AND CULTURE, THE JAPANESE-AMERICAN WAR, 1941-1945* (1981).

<sup>210</sup> On the American occupation, see the generally favorable assessment in K. KAWAI, *JAPAN'S AMERICAN INTERLUDE* (1960) and the critical journalistic account in H.E. WILDES, *TYPHOON IN TOKYO* (1954). On the dominant Japanese political figure during the occupation, a recent study is J.W. DOWER, *EMPIRE AND AFTERMATH: YOSHIDA SHIGERU AND THE JAPANESE EXPERIENCE, 1878-1954* (1980). A critical study of the war crimes trials in Tokyo is R.H. MINEAR, *VICTORS' JUSTICE: THE TOKYO WAR CRIMES TRIAL* (1971).

In subsequent decades Japanese and Americans have continued to deal with one another in the established way.<sup>211</sup> On the American side, at least until the 1960s, the global pre-eminence of the United States permitted government and business officials to continue taking for granted that the relationship should be conducted as in the past. On the Japanese side, as rapidly as the end of the occupation and post-war recovery permitted, the government pursued a number of policies designed to restore the proper distance between Japan and the outside world. Japan continued to discourage immigration and facilitate emigration. It restricted foreign investment, pursued a policy of planned industrial development, and instituted agricultural policies intended to assure a sufficient supply of basic foodstuffs. It trained people to handle foreigners in the established manner and supported vigorous programs of study abroad in order to obtain access to the most modern learning. It developed elaborate institutions to promote trade and acquire state-of-the-art technology, notably JETRO, the Japan External Trade Organization. When diplomatically feasible it tried to minimize imports inconsistent with its economic goals. Much of its international economic activity was conducted abroad by Japanese firms, often trading companies that acted as intermediaries, effectively screening Japanese and foreign producers and consumers from one another.<sup>212</sup>

Only in light of this historical pattern of relations, shaped by the meshing of very different Japanese and American attitudes, can one understand the closed market issue in its current complexity. Recommendations for dealing with the issue must take full account of the pattern and the attitudes on both sides that created and sustained it.

#### IV. SOME GENERAL RECOMMENDATIONS

Our analysis of the closed market issue leads to recommendations addressed both to Japan and to the United States.

As to the former, we are reluctant to join the chorus of foreigners, sympathetic and otherwise, that bombards Japan with suggestions, recommendations and demands for changes in its public policies.<sup>213</sup> We

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<sup>211</sup> An introduction to Japanese history with a good survey of postwar Japanese developments and an up-to-date bibliography is E.O. REISCHAUER, *JAPAN, THE STORY OF A NATION* (3d ed., 1981).

<sup>212</sup> For a thorough analysis of the operation of the Japanese general trading companies, see A. YOUNG, *THE SOGO SHOSHA: JAPAN'S MULTINATIONAL TRADING COMPANIES* (1979). See also Coie, *Establishing American Trading Companies*, 2 NW. J. INT'L L. & BUS. 277 (1980).

<sup>213</sup> Our reluctance to tell a foreign nation what its national interest requires was shared by the Wise Men. To avoid having either side dictate to the other, chapters of the Report addressed primarily to one nation—such as the chapter on the Japanese market—were drafted first by the

will, however, indicate the sorts of Japanese policies on foreign access which our analysis suggests are appropriate.

Several considerations point to the conclusion that the Japanese government should continue its notable progress in reducing first and second level restraints on foreign trade and investment: continuing to expand and ultimately eliminating as many import quotas as possible; liberally implementing the new Foreign Exchange and Foreign Trade Control Law; and continuing to modify the operation of its product standards, customs, state trading, government procurement and similar systems to minimize their restrictive and discriminatory effects.<sup>214</sup> Although the details of particular obligations and exceptions are beyond the scope of this Article, Japan has legal, or at least moral obligations to liberalize its official restraints under the General Agreement on Tariffs and Trade (GATT), the GATT Codes agreed on during the Tokyo Round, the OECD Treaty, the U.S.-Japan Treaty of Friendship, Commerce and Navigation, and other bilateral and multilateral agreements.<sup>215</sup> As a matter of policy as well as law, Japan's economic success, particularly in exporting, vests it with responsibility to share

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representatives of that nation, then reviewed and discussed by the remaining members. Interview with Robert S. Ingersoll, note 15 *supra*.

<sup>214</sup> Cf. WISE MEN'S REPORT, *supra* note 3, at 57-63.

<sup>215</sup> Article XI of the GATT prohibits, subject to numerous exceptions in that and other articles, the use of quotas to restrict imports from GATT contracting parties. It is the U.S. position that at least some Japanese quotas are prohibited by GATT. See [1981] 363 INT'L TRADE REP. U.S., EXPORT WEEKLY (BNA) at C-1 (reporting testimony of Sec'y of Commerce Malcolm Baldrige).

Among the GATT codes on non-tariff measures negotiated during the MTN and signed by both the United States and Japan are agreements aimed at reducing the protective effect of standards systems, *see* notes 137-148 and accompanying text *supra*; government procurement systems, *see* notes 115-136 and accompanying text *supra*; and customs valuation, *see* Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade, *reprinted in* GENERAL AGREEMENTS ON TARIFFS AND TRADE, BASIC INSTRUMENTS AND SELECTED DOCUMENTS, 26th Supp. at 116 (1980).

On joining the OECD in 1963, Japan stated its intention to adhere to the Code of Liberalization of Current Invisible Operations and the Code of Liberalization of Capital Movements. It did so only with many reservations, *see* text accompanying note 86 *supra*, one of which categorically excluded foreign direct investment. While these reservations enabled Japan to avoid breaching any legally binding obligation, "Japan has clearly committed herself to liberalize . . . and her performance since has been largely considered as a violation of the spirit, though not the letter, of those commitments." *See* D. HENDERSON, *supra* note 84, at 283-86; Pearl, *supra* note 84, at 247-48.

Article VII of the Treaty of Friendship, Commerce and Navigation between Japan and the United States, 4 U.S.T. 2003, T.I.A.S. No. 2863, requires each party to grant nationals and companies of the other party "national treatment" with respect to all types of business activities. The Treaty, and certain Protocols thereto, provide several exceptions, notably one for the balance of payments problems. The United States has for years alleged that Japan was in violation of its national treatment obligation because of its restrictions on foreign investment. *See* D. HENDERSON, *supra* note 84, at 232-83; Pearl, *supra* note 84, at 248-53.

with other trading nations the risks of managing a national economy in an interdependent world. The Japanese have come too far as an economic power to remain officially sheltered from the world economy in any substantial way. Indeed, as a nation unusually dependent on imports and therefore on the exports needed to pay for them, Japan's logical role in the international economic community is not as a grudging observer of international rules but as one of the primary defenders of open national markets and the postwar liberal trading system.<sup>216</sup> The Japanese commitment to the liberal trading system as a matter of principle has always been weak,<sup>217</sup> largely because Japan had no hand in shaping the system and was partially excluded from it for many years.<sup>218</sup> Today, however, the open trading system is of paramount importance to Japan, and the Japanese may be forced to take the lead in supporting and strengthening the system, out of simple self-interest if not from any emotional attachment.<sup>219</sup> Japan must decide for itself if the affirmative diplomacy this role would require seems consistent with its national interest,<sup>220</sup> but it cannot hope to play the role without first removing official restraints on access to its own economy as fully as any other major trading nation.<sup>221</sup> Despite the progress made to date, it has not yet reached that goal.

Further market liberalization will undoubtedly be difficult for the Japanese government, politically, economically and—given the attitudes and historical experience we have described—emotionally. One useful approach to reconciling at least its domestic economic and political needs with further market liberalization is suggested by a recommendation in the Wise Men's Report. The Report urges Japan, in pursuing the goal of secure food supplies, to consider establishing a

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<sup>216</sup> WISE MEN'S REPORT, *supra* note 3, at 6-8, 55-56.

<sup>217</sup> Japanese quotas predominantly affect the agricultural sector. The Wise Men's Report includes several suggestions for the rationalization of Japanese agriculture to obviate the need for some of the current quotas and other devices of agricultural protectionism. *Id.* at 81-87.

<sup>218</sup> Japan did not accede to the GATT until 1955. When Japan joined, 15 contracting parties refused to apply GATT rules in their trade with Japan, as permitted by GATT Art. XXXV, "greatly reducing the value of GATT membership to it." J. JACKSON, *WORLD TRADE AND THE LAW OF GATT 100-02* (1969). See generally Article XXXV: Application to Japan, GATT Doc. L/1545, reprinted in *GENERAL AGREEMENTS ON TARIFFS AND TRADE, BASIC INSTRUMENTS AND SELECTED DOCUMENTS 69* (10th Supp. 1962).

<sup>219</sup> See *Japan's Trade Role*, Wall St. J., May 4, 1981, at 24, col. 1.

<sup>220</sup> The Wise Men find that Japan's present international role is not commensurate with its economic size or with the global reach of its interests, and believe that "Japan's own national interests require it to take up a larger burden in maintaining a liberal international economic order and international stability." WISE MEN'S REPORT, *supra* note 3, at 6-7. Other observers regularly comment on Japan's lack of an affirmative foreign policy. See, e.g., N.Y. Times, Aug. 27, 1981 at A-22, col. 1.

<sup>221</sup> *Japan's Trade Role*, note 219 *supra*.

contingency grain reserve, rather than relying exclusively on quotas and other instruments of agricultural protectionism.<sup>222</sup> This specific recommendation suggests a more general approach: when the Japanese government is faced with a bona fide economic problem, such as dependence on imported food, or an internal political problem, such as demands for income stability by producers of agricultural commodities, and the solution could have international repercussions, it might as a general policy adopt whatever solution appears to be the least distortive of international trade and capital movements. Japan could gain valuable international goodwill by adhering to such a policy and even urging its adoption by other nations; trade friction would be substantially reduced if this approach were followed throughout the international community.

As to "third level" barriers, we believe that the Japanese have no obligation to change their customs and practices, their manner of doing business or their language to make it easier for foreigners to do business in Japan.<sup>223</sup> The Japanese government and some private Japanese firms have begun to address the problem of cultural barriers where it really lies—abroad—by financing programs of study in Japanese language, society, law and business at foreign universities and cultural institutions.<sup>224</sup> This long-range approach should in time bear fruit.

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<sup>222</sup> WISE MEN'S REPORT, *supra* note 3, at 86-87. The Report includes several other recommendations for rationalizing Japanese agriculture and for dealing with the problem of dependence on imported food, including the conclusion of purchase-supply agreements with the U.S. *Id.* at 82-87. *Cf.* F. SANDERSON, *supra* note 82, at 84-93 (several proposed solutions to problem of security of food supplies).

<sup>223</sup> Since such cultural factors undoubtedly contribute to the damaging foreign perception of Japan as an unfairly closed society, however, *cf.* text accompanying note 163 *supra*, it might be in Japan's interest for its government, as a tactical matter, to take such real and symbolic actions as it can toward increasing the accessibility of Japanese society. Action might be aimed, for a start, at making the process by which the government itself makes decisions important to foreign business more open and understandable. WISE MEN'S REPORT, *supra* note 3, at 66.

The Wise Men suggest an innovative institution that the Japanese government might create in this spirit: a trade ombudsman. The ombudsman might be assigned such responsibilities as working to enlarge the international awareness of government agencies that have historically had exclusively domestic concerns, helping to resolve interagency disputes over trade measures, assessing the potential effect of proposed regulations on foreign trade and investment, and considering broad international economic policy issues as well as specific foreign complaints. In considering foreign complaints, the ombudsman would act much like the Japanese side of the Trade Facilitation Committee, *see* notes 40-49 *supra*, but unlike the TFC, its jurisdiction would extend beyond MITI, already one of the most internationally-minded ministries. *See* WISE MEN'S REPORT, *supra* note 3, at 67-68. So far, the Japanese government has not embraced the ombudsman proposal. Interview with Robert S. Ingersoll, *supra* note 15.

<sup>224</sup> Numerous American institutions have received program grants from public or private Japanese sources. Among the American universities receiving support for programs in law and business are Harvard, Columbia, the University of Michigan and the University of Washington.

Beyond that effort, the most important approach to the difficult problems emerging from the cultural collision between Japan and the United States will for the foreseeable future be a joint approach: an effort at sustained bilateral dialogue, involving many levels of government and society, aimed at building mutual understanding and confidence, and at preparing citizens of each country to function effectively in the society of the other. Such an effort is a major prescription of the Wise Men: they refer to it as "internationalizing" American and Japanese society.<sup>225</sup> Their Report suggests numerous ways to establish regular contact and consultation among representatives of the executive and legislative branches of government, to increase communication among business leaders, and to promote joint research and other programs among private educational and cultural institutions.<sup>226</sup> As we have already indicated, the Report itself is also an example of how well such a prescription can work. Enhancing and expanding the activities of bodies like the Economic Relations Group and other channels of two-way governmental and private contact, building on the commitment to discussion that already exists, may be the key to harmonious economic and cultural intercourse in the future.<sup>227</sup>

Most of our recommendations to the American side follow logically from those we have just addressed to Japan. We see no reason why the United States and other trading nations should not continue to urge Japan to do away with its remaining first and second level restraints on foreign economic activity—quotas, exchange controls, officially sanctioned NTB's and the like—although we will place important qualifications on that statement below. As to third level phenomena, however, we believe that it would be a major error for American policy to take on the task of convincing the Japanese not to be Japanese, with the misguided aim of making it "truly as easy [for Americans] to sell in Japan as in the United States."<sup>228</sup> The social and cultural characteristics of Japan, as difficult for foreigners to deal with as they may be, are not appropriate targets for external demands for change, certainly not for the kinds of negotiating tactics employed in

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Telephone interview with Francis B. Tenney, Executive Director, Japan-United States Friendship Commission, Washington, D.C., October 23, 1981. For a discussion of the importance of such programs, see WISE MEN'S REPORT, *supra* note 3, at 11.

<sup>225</sup> *Id.* at 9.

<sup>226</sup> *Id.* at 8, 9-11, 74-75, 87-88, 98-100.

<sup>227</sup> *Id.* at 67-68, 99-100.

<sup>228</sup> G.W. Miller, The United States, Japan and International Economic Uncertainties, Speech to the Japan Society, Oct. 16, 1980, reprinted in 28 JAPAN SOCIETY NEWSLETTER, No. 4 (1980) at 2-5. G. William Miller was then Secretary of the Treasury.

the past against explicit Japanese trade barriers. The burden of dealing with "third level" social and cultural problems and with whatever "fourth level" resistance to foreign penetration inheres in Japanese society falls squarely on American shoulders.

To carry this burden, the United States will have to pursue a strategy that has only a long-term relationship to trade policy: providing adequate training for those who will be dealing with Japan. The U.S.-Japan relationship, both economic and political, is too complex and too important to be managed by generalists.<sup>229</sup> Just as Japanese government officials and businessmen learn English and prepare expressly for dealing with Americans, so American government and business people who are to deal with the Japanese must develop the professional skills specifically required for such dealings: the ability to work easily in a Japanese context, functional use of the language and familiarity with Japanese customs and values. Knowledge about international trade or political relations in the abstract and experience in trading or dealing with other countries may be useful, but neither constitutes sufficient preparation for dealing with Japan.

This strategy is not simply a matter of providing additional courses in Japanese language and culture: some shedding of ethnocentric assumptions may be required. Americans cannot expect the Japanese—or anyone else, for that matter—to struggle to learn the English language and American mores in order to do business in the United States, and then to welcome into their community Americans unwilling to make comparable efforts. The American desire to penetrate Japan's economy cannot be satisfied within the unbalanced pattern of past relations. Fortunately, substantial numbers of young Americans familiar with Japanese language and customs are beginning to enter careers in law, business, and government, and increasing numbers of educational institutions are becoming capable of conveying such familiarity—many, ironically, funded from Japanese sources. Efforts within the United States to further these trends, though initially costly, will pay handsome rewards.<sup>230</sup>

Increased willingness to master the language and culture of foreign nations will pay dividends in relations with trading partners other than Japan. Although the United States has not yet developed trade relations with any other non-Western country on the scale of its rela-

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<sup>229</sup> Cf. D. HENDERSON, *supra* note 84, at 39.

<sup>230</sup> The WISE MEN'S REPORT, *supra* note 3, contains a number of recommendations for training specialists in both countries and for increasing each country's general knowledge and awareness of the other. *Id.* at 9-11, 98-99.



tions with Japan, non-Western trade is already of great significance to the United States, and its importance is increasing. As the United States expands its economic activities in the nations of Asia and other parts of the world whose societies differ markedly from the familiar cultures of Europe, social and cultural barriers to trade and investment—perhaps different from those in Japan, but equally unfamiliar—will increasingly be encountered. One can predict, for example, that this will be the experience of the United States as its economic contacts with the People's Republic of China continue to grow.<sup>231</sup> In such other non-Western societies, as in Japan, it will be crucial for Americans to abandon their historic prejudices and be prepared to learn about and adapt to local cultures if they wish to do business successfully.

This discussion of "third level" barriers has considerable relevance to American policy toward Japan's first and second level restrictions on trade and investment. Although we believe the United States is justified in urging Japan to continue the removal of these restraints, we are concerned lest amicable U.S.-Japan relations be sacrificed in a drive for further liberalization. Two developments give rise to this concern. First, because of the progress already made in dismantling purely protectionist Japanese trade barriers, American trade policy must now address some of the official rules, practices and institutions that reflect private social structures and cultural attitudes as well as official calculations of economic or political advantage. The Japanese distribution system is the example used above; other phenomena may display a similarly mixed official and private character. To follow the recommendations of this Article, American trade officials will have to separate the protectionist and discriminatory elements of public policy supporting an institution like the distribution system from its social and cultural elements, foregoing demands for change in the latter. Sophistication and restraint will be required, and occasional overreaching is bound to occur.

The second development may lead to problems even in negotiations over such straightforward official restrictions as import quotas. As noted at the beginning of this Article, many trade disputes between the United States and Japan have become unusually politicized and bitter. Among the reasons for this are the sheer magnitude of the economic relationship and the importance to both sides of the transactions

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<sup>231</sup> For a discussion of certain historical and cultural influences on current attitudes toward law and business in the People's Republic of China, see, Alford & Birenbaum, *Ventures in the China Trade: An Analysis of China's Emerging Legal Framework For the Regulation of Foreign Investment*, 3 NW. J. INT'L L. & BUS. 56 (1981).

involved in the disputes—Japanese auto exports and American agricultural exports, for example.<sup>232</sup> Japan's attitudes may have contributed to the situation, as we have indicated. American high pressure tactics, however, exemplified by the one-sided institutions and negotiations described in Part I, have made a major contribution to the bitterness of trade disputes by leading many Japanese to think of the United States as arrogant and presumptuous.<sup>233</sup> American demands are seen as "bullying" and, naturally, provoke Japanese resistance. This resistance feeds an American stereotype of the Japanese as "stubborn" and leads to even stronger American pressure, in a true vicious circle.<sup>234</sup> Continuation of the same tactics is likely to produce even greater resentment and resistance in the future, as younger Japanese, less accustomed than past generations to acceding to American demands, assume positions of leadership. Resistance will increase even further to the extent that Japanese social and cultural phenomena are implicated in trade negotiations.

To deal with these developments, American trade policy toward Japan must exhibit at least four qualities in greater measure than it has to date:

*Sensitivity.* The United States must recognize the real and substantial progress that has been made in opening a traditionally self-contained society, at a pace that has caused "future shock" for many Japanese; the very real economic concerns that support Japanese feelings of vulnerability and desires for self-sufficiency; the historical basis for Japanese resistance to foreign penetration; and the social and cultural underpinnings of many of the remaining barriers to foreign business in Japan.

*Patience.* The United States must recognize that further progress in removing impediments to trade will probably be slower than that already achieved, partly because so much has already been done, but primarily because further progress depends to a large extent upon basic changes in the way Japanese and Americans perceive and deal with one another.

*Reassurance.* To counter the Japanese sense of vulnerability, the United States must clearly demonstrate that it will be a reliable supplier and business partner.<sup>235</sup> For example, it cannot cut off sales of a major food staple without notice, as it did some years ago with soy-

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<sup>232</sup> WISE MEN'S REPORT, *supra* note 3, at 96-97.

<sup>233</sup> *Id.* at 101. See Hollerman, *supra* note 41, at 218-220.

<sup>234</sup> WISE MEN'S REPORT, *supra* note 3, at 100-01.

<sup>235</sup> *Id.* at 8-11, 69.

beans,<sup>236</sup> then ask Japan to reduce protection for important agricultural sectors. More generally, the United States must show greater willingness to consult with Japan as a partner and ally on major economic (and political) issues.<sup>237</sup>

*Reciprocity.* The United States must submit to the same risks of economic interdependence that it asks Japan to assume. It cannot, for example, demand greater access for American products while at the same time threatening quotas and demanding "voluntary" restraints on Japanese products. Protectionism in the United States undermines efforts on both sides to further Japanese liberalization.<sup>238</sup> Reciprocity must also figure increasingly in the form and content of economic diplomacy between the United States and Japan. The one-sided relationship pictured in Part I, based largely on American demands and Japanese acquiescence, will become increasingly inappropriate, increasingly costly, and increasingly unsuccessful.<sup>239</sup>

The change in attitude we call for is summed up in one of the Wise Men's most perceptive and far-reaching recommendations for the American side: ". . . the need is not to abandon efforts to influence Japanese policies, but to resist invitations to escalate, to be firm and persistent about United States aims without presuming to dominate Japanese behavior . . . ." <sup>240</sup>

## V. SOME RECOMMENDATIONS FOR LAWYERS

This Article has reviewed the substantial progress made over the last several years in reducing official barriers to foreign trade and investment in Japan. The greater openness of the Japanese market has already attracted new foreign economic activity, and it will continue to do so. The result will be more legal work. In acting for their clients, however, foreign lawyers will increasingly have to deal with second and third level barriers to foreign economic activity in Japan.<sup>241</sup> Many of the recommendations we have just addressed to American trade officials apply, *mutatis mutandis*, to these private lawyers. We believe the Bar will best serve its Western clients—at least in the long run, and

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<sup>236</sup> *Id.* at 86; UNITED STATES-JAPAN TRADE: ISSUES AND PROBLEMS, *supra* note 15, at 145-146.

<sup>237</sup> WISE MEN'S REPORT, *supra* note 3, at 8-9, 27, 74, 87-88.

<sup>238</sup> *Id.* at 69.

<sup>239</sup> *Id.* at 102-103.

<sup>240</sup> *Id.* at 101.

<sup>241</sup> Lawyers have also begun to confront barriers to their own activities in Japan. See Kosugi, *Regulation of Practice by Foreign Lawyers*, 27 AM. J. COMP. L. 678, 689-703 (1979) (analysis of regulation of foreign lawyers in Japan, prompted by then-current dispute over branch offices of U.S. and Hong Kong law firms opened in Tokyo).

probably in the short as well—by proceeding as we have advised here: overcoming social and cultural barriers by learning about Japan, and approaching dealings in Japan with sensitivity and patience.

One example of what we mean lies in the frequent complaint that the methods by which Japanese government and business make decisions are impenetrable to Westerners. Lawyers, whose training centers so strongly on the procedures for making and influencing public and private decisions, should be preparing themselves to help their clients understand and even take advantage of Japanese methods.<sup>242</sup> This approach will be far more rewarding than pressing Japan to change the manner in which its society reaches decisions. Another example lies in the complaint that Japanese negotiate, prepare contracts and other documents, and handle business disputes differently than Americans. Such differences should not be surprising. Lawyers, who are trained and experienced in negotiating and memorializing business transactions and in handling disputes, should be in the vanguard of learning that these are culturally-based phenomena and that there are different, equally valid ways of accomplishing such tasks. Lawyers should again be preparing themselves to utilize unfamiliar processes for the benefit of their clients. The need to do so will only increase in the future, as American business penetrates the People's Republic of China and other unfamiliar markets.

For those concerned with the legal system governing international economic relations, developments in Japan indicate that the system may be approaching another turning point in its history. The early rounds of GATT negotiations, for example, concentrated on tariffs, and the GATT process has all but eliminated them as a major trade barrier.<sup>243</sup> The last two rounds of negotiations also dealt with NTBs, and the Tokyo Round made significant progress on several NTB issues.<sup>244</sup> Many years of implementing and monitoring the commitments made during the Tokyo Round lie ahead, and much more can be done to reduce NTBs by expanding and refining the multilateral and bilateral procedures developed in Geneva, by enlarging the coverage of the Government Procurement Code, for instance. Our analysis suggests,

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<sup>242</sup> Cf. ARTHUR D. LITTLE, INC., *supra* note 59, at V-3-7.

<sup>243</sup> An early and incomplete official estimate of the results of the Tokyo Round in the field of tariffs was that the weighted average tariff rate on manufactured goods at all stages of processing had been reduced to less than five percent, although the weighted average on finished manufactures remained somewhat higher. GENERAL AGREEMENT ON TARIFFS AND TRADE, THE TOKYO ROUND OF MULTILATERAL TRADE NEGOTIATIONS: REPORT BY THE DIRECTOR-GENERAL OF GATT 120 (1979).

<sup>244</sup> See note 113 *supra*.

however, that much more difficult problems, based in culture and history and generally unsuited to traditional international negotiations, will be coming to the fore in the international trading system as Japan, the "new Japans" and other nations from the developing world assume a larger economic role. Multilaterally, as well as bilaterally, new rules and institutions to address these issues will have to be found, and as in the past, lawyers will play a central role in the quest.