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Robert Jesuele

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NOTES

The Development of Japanese Telecommunications Policy and Its Impact on United States Trade: The Movement Toward Market Liberalization

*Information is power, and economic information is economic power. Information has an economic value and the ability to store and process certain types of data may well give one country political and technological advantage over other countries. This in turn may lead to loss of national sovereignty through supranational data flows.*¹

I. INTRODUCTION

The Japanese approach information technology as the keystone of economic progress.² They perceive an information-intensive society of the 21st century propelled primarily by advances in telecommunications³ and the integration of telecommunications with computers. Natural resource limitations and the negative externalities of heavy industry are largely responsible for Japan's rapid development into a world leader in communications technology. Like many developed economies, Japan's telecommunications policy focuses on dominance

1. Louis Joinet, French Magistrate of Justice, Statement before the Organization for Economic Cooperation and Development Symposium on Transborder Data Flows and the Protection of Privacy, Vienna, Austria (Sept. 1977) quoted in Eger, *Emerging Restrictions on Transnational Data Flows: Privacy Protection or Non-Tariff Trade Barriers?*, 10 L. & POL'Y IN INT'L BUS. 1055, 1065 (1978).

2. Fishman, *Introduction to Transborder Data Flows*, 16 STAN. J. INT'L L. 1, 8 n.30 (1980).

3. Simple definitions of terms for the nontechnical reader will be provided throughout this Comment. Telecommunications is the transmission of signals of any kind by wire, radio, optical or other electromagnetic systems. SENATE COMM. ON FOREIGN RELATIONS, INTERNATIONAL TELECOMMUNICATIONS AND INFORMATION POLICY: SELECTED ISSUES FOR THE 1980's, S. REP. NO. 94, 98th Cong. 1st Sess. 53 (1983) [hereinafter cited as SELECTED ISSUES REPORT].

by the United States of the supply and use of information resources.⁴ In world markets the United States maintains a substantial lead in computer and communications technology.⁵ To curb the adverse effects of U.S. dominance, industrialized nations in Europe and the Far East have adopted regulations and procedures restricting information trade with foreign business.⁶ These nations are attempting to establish their own indigenous computer and communications industries and perceive United States competition as an impediment to such development.⁷ Additionally, restrictions have been placed on transborder data flows.⁸ Countries experience a loss of domestic revenue every time information is transmitted by, processed, and stored in foreign telecommunications and computer systems.⁹

A variety of non-tariff trade barriers (NTBs)¹⁰ protect Japan's computer and communications industries. These barriers decrease United States business' access to Japan's telecommunications market specifically through restrictive procurement practices, discriminatory technical standards, and the denial or limited use of privately leased lines.¹¹ Spurred by the divestiture of American Telephone & Telegraph (AT&T), Japan has enjoyed relatively unfettered access to the United States telecommunications market without reciprocal openness for U.S. firms in Japan. The complaint from the United States government and private sector has been that Japan is engaged in eco-

4. Fishman, *supra* note 2, at 8.

5. Bortnick, *International Data Flow Issues*, LIBRARY OF CONGRESS CONGRESSIONAL RESEARCH SERVICE, MAJOR ISSUES SYSTEM, Issue brief No. 1B81040, 3 (1979) *updated* (1984) [hereinafter cited as *Data Flow Issues*].

6. *Id.*

7. *Id.*

8. Transborder data flows are, generally, the flow of electronic information across national borders. Fishman, *supra* note 2, at 1.

9. *Data Flow Issues*, *supra* note 5, at 3.

10. Non-tariff trade barriers are virtually any measure, exclusive of tariffs, which distorts trade by causing internationally traded goods and services to be allocated so as to reduce potential real world income. Potential real world income is that level attainable if resources and outputs are allocated in an economically efficient manner. NTBs include such measures as import quotas, export subsidies and taxes, discriminatory government and private procurement practices, domestic subsidies, complex customs procedures, anti-dumping regulations, restrictive administrative, technical, or safety standards, restrictive business practices, foreign investment controls, selective monetary controls and discriminatory exchange-rate policies. R. BALDWIN, *NONTARIFF DISTORTIONS OF INTERNATIONAL TRADE* 5-12 (1970).

11. Spero, *Barriers to International Information Flows*, TELECOMMUNICATIONS NOV. 1983, at 68. See also, *United States-Japan Economic Relations, Hearings Before a Subcomm. on Asian and Pacific Affairs and on International Economic Policy and Trade of the House Comm. on Foreign Affairs*, 96th Cong., 2d Sess. 107-212 (1980) [hereinafter cited as *Economic Relations Hearings*].

conomic protectionism.¹² Protectionist barriers restrict competition and hamper trade.¹³ They pose a very definite threat to American business by curtailing its access to the world's second largest telecommunications market. Moreover, they inhibit the free flow of worldwide information and, in the long run, stifle innovation by limiting the free exchange of technologies.¹⁴ Continued obstacles to telecommunications trade are, in turn, detrimental to the United States economy because they perpetuate an increasingly weighty United States trade imbalance with Japan.¹⁵

12. See R. Samuelson, *Tokyo's Huge Trade Problem*, NEWSWEEK, March 11, 1985 at 66.

13. Generally, on a domestic level, protectionist barriers harm consumers through higher prices resulting from decreased competition. Internationally, protectionism threatens world trade by inviting merchandise imitation and retaliation by nations faced with trade barriers. *Id.* Unrestricted trade between the United States and Japan would benefit both countries by stimulating competition, expanding product choices, adding to available capital and technology and enhancing economic efficiency. It is also recognized that trade-distorting measures should be evaluated in terms of world income rather than the income level of a particular nation. Individual countries can raise their own income levels using non-tariff measures just as they do by import duties and other tariffs. However, if each country only considered its own trade interests, most countries would eventually end up poorer and world income as a whole would decline. R. BALDWIN, *supra* note 10, at 7.

14. Protectionist measures slow technological advance and are a drag on the global economy. Indirectly, they can foster policies and conditions that diminish output. This is caused by the protection from competition tending to breed monopolistic, market-sharing arrangements among producers and restrictive, inefficient policies among workers. In turn, this reduces market pressure to seek new and improved products and more efficient managerial techniques as well as pressure on workers to acquire higher levels of skill. The total effect of these repercussions can significantly impede worldwide economic welfare. R. BALDWIN, *supra* note 10, at 7. Trade barriers also inhibit joint participation in research and development and the sharing of technological innovation and ideas.

15. The United States trade deficit—the excess of total merchandise imports over merchandise exports—with Japan has increased dramatically in the past decade from \$1.86 billion in 1975 to \$36.8 billion in 1984. L.A. Times, Jan. 31, 1985, pt. I at 1, col. 5. Concern over this negative balance of payments lies in the effects it has on the United States economy. The most direct effect of a large trade deficit is the restraining influence it exerts on domestic economic growth. If the needs of United States businesses and consumers are being met by foreign suppliers rather than by domestic production, total income and employment in the United States declines. Similarly, if foreign demand is satisfied by foreign production rather than by United States exports, income and employment in the United States also suffer. Of course, imports of commodities that cannot be produced efficiently in the United States (e.g. oil) are necessary for the continued functioning of the economy, but when imports are not counterbalanced by exports the net result is a reduction in the flow of income within the United States economy. For a complete discussion of the factors affecting the trade balance and its economic effects see UNITED STATES CONG. BUDGET OFFICE, *THE U.S. BALANCE OF PAYMENTS AND THE U.S. ECONOMY: DEVELOPMENTS IN 1978 AND EARLY 1979* (1979).

Other economists claim, however, the focus by the United States on the trade imbalance with Japan is an unrealistic measure of a nation's overall economic performance. It is contended that the structural differences between the United States and Japanese economies are an important source of the imbalance, and that a better measure of a nation's economic perform-

The focus of this Comment will be on Japan's movement toward the promotion of free competition in its domestic telecommunications market. As background, a discussion of Japan's industrial policy and the basic structural differences between the United States and Japanese telecommunications industries is necessary. Specific emphasis is placed on the types of barriers encountered by United States business trying to enter the Japanese market, the effects of these barriers, and United States government action to overcome trade limitations. The bulk of the analysis will concentrate on three major events which the Japanese claim are designed to liberalize Japan's telecommunications market by decreasing government monopolization and promoting free competition: the Nippon Telephone & Telegraph Procurement Agreement,¹⁶ the Telecommunications Business Law,¹⁷ and the Nippon Telephone & Telegraph Company Bill.¹⁸ Finally, the present results of these policy changes will be examined, as well as their potential effect in increasing involvement by the United States in Japan's future procurement, implementation, and development of telecommunications technology.

A. *The Information Age*

Since World War II, research and development in electronic communication among countries has led to quantum leaps in technology and a sharp reduction in the cost of providing it.¹⁹ Undersea cables and communications satellites, obliterate the distance and geographic barriers that previously separated major trading countries.

ance is that nation's world current account for merchandise, goods, services, and capital. See, Note, *United States-Japan Trade Developments Under the MTN Agreement on Government Procurement*, 5 FORDHAM INT'L L.J. 139, 148 n.31 (1981). Nevertheless, the goal of deficit reduction provides impetus for bilateral negotiation:

From an economic point of view, a bilateral merchandise trade deficit should not be an object of great concern as long as a nation's worldwide current account is in rough balance. This economic truth, however, is a political falsity. . . . For millions of Americans this highly visible deficit erodes their support of open trade; it creates tensions which threaten to spill over into unrelated sectors of our bilateral relationship.

Economic Relations Hearings, *supra* note 11, at 150.

16. Agreement on Procurement in Telecommunications, Dec. 19, 1980, United States-Japan, T.I.A.S. No. 9961, *reprinted in* E. Asian Exec. Repts., Jan. 15, 1981, at 24-30 [hereinafter cited as NTT Agreement].

17. Telecommunications Business Law (Unofficial Translation), 1 Japanese Legislation of Telecommunications (1984).

18. Nippon Telegraph & Telephone Company Bill, Nippon Denshin Denwa Kabushiki Kaisha Law (1984).

19. Fishman, *supra* note 2, at 7.

Optical fibers²⁰ allow us efficient and economical transmission of large volumes of information at high speed with high quality. The fusion of computer and telecommunications technologies²¹ is the driving force behind the precipitous development which has thrust us into an "Information Age".²²

Each day we take a step further away from the one-way telephone communications of yesterday; from the limits of audio transmission toward worldwide visual transmission. The 21st century promises much intrigue as to how these new technologies will effect our lives. In the sphere of manufacturing, industrial robot networks will be developed, eventually leading to totally automated factories.²³ Full-capacity offices at home will reduce commuting costs and offer worker flexibility. The expansion of office automation will make the paper-less office a reality.²⁴ Through connection of home terminals to multiple data bases, in-home education, home theaters, home shopping and home banking will soon be possible.²⁵ Mailmen will vanish into obsolescence. Critical to this new post-industrial stage of development is the ability to put information to use for economic growth and development.

B. Maintaining the Lead

Today the United States is the world leader in communications

20. Fiber optics is the technology for transmitting light in thin, flexible glass fibers. It can be used to carry large amounts of information long distances with excellent transmission quality. SELECTED ISSUES REPORT, *supra* note 3, at 46.

21. See generally, Pyykkonen, *Computers in Communications*, TELECOMMUNICATIONS, Jan., 1985 at 67.

22. The history of man can be charted by four revolutions in communications development: (1) the acquisition of language, (2) the creation of written language, (3) the invention of printing, and (4) the development of telecommunications and broadcasting. The fifth revolution is an era spawned by the advances in the integration of telecommunications and computers. This era has been deemed the "Information Age," and is characterized by information-intensive society which benefits from the production, processing, and distribution of information. ENGINEERING BUREAU, NIPPON TELEPHONE & TELEGRAPH PUBLIC CORP., INFORMATION NETWORK SYSTEM: TOMORROW'S INTEGRATED TECHNOLOGY 4 (1984) [hereinafter cited as INS BOOKLET]. As early as 1977, approximately 46% of the American work force is comprised of information-related workers, as opposed to persons pursuing trades, entrepreneurial ventures, farm or factory work. Today more than half of the United States Gross National Product is tied to the production of information and technological goods and services. See M. PORAT, THE INFORMATION ECONOMY: DEFINITION AND MEASUREMENT 121 (U.S. Dept. of Commerce, Office of Telecommunications Special Publication 77-12(1) (1977)).

23. INS BOOKLET, *supra* note 22, at 5.

24. *Id.*

25. *Id.*

and computer technology. Data processing²⁶ and transmission services developed in the United States have become vital to the daily functioning of international activities from health services to transportation to finance and credit.²⁷ Information is no longer merely facts, statistics, academic knowledge, scientific data or daily news; it now includes such things as remote satellite sensing of natural resources,²⁸ electronic impulses probing outer space or the depths of the sea, and numeric digits for electronic transferring of funds to and from bank accounts.²⁹ It has become a marketable commodity for production, sale, and consumption.³⁰ The marriage of computer and telecommunication technologies has generated an unprecedented investment boom in communications equipment and facilities.³¹ Billions of dollars of international trade depend upon the burgeoning communications industry, and upon government policies that regulate communications activities.³² With the volume of sales at stake, there is considerable concern about the trade-restrictive effects of non-tariff barriers.³³ Since information industries are rapidly becoming a significant component of a favorable United States balance of payments, the need to abolish or at least mitigate the effects of these barriers is imperative. Additionally, American business may not be able to maintain its competitive edge if precluded from full participation in the key markets. Absent government subsidies, the cost of research

26. Data processing is the mechanical or electronic handling of data, sorting, collating, performing mathematical steps, storing, erasing or printing. SELECTED ISSUES REPORT, *supra* note 3, at 45.

27. Eger, *supra* note 1, at 1060.

28. See generally, Comment, *Municipal Law Regulation of Remote Sensing in Outer Space*, 7 LOY. L.A. INT'L & COMP. L.J. 93, 93-96 (1984).

29. Eger, *supra* note 1, at 1061.

30. *Id.*

31. Fishman, *supra* note 2, at 7.

32. For example, U.S. exports of information-based services are estimated to be in excess of \$30 billion; total U.S. exports of all services being approximately \$60 billion in 1982. Feketekuty & Hauser, *A Trade Perspective of International Telecommunications Issues 1* (1984) (unpublished manuscript). It should be noted that data collection is particularly poor in the services field, and these figures have been extrapolated from aggregate data available from the International Monetary Fund and include inter-company exports of information services. The worldwide market for communications equipment in 1984 was about \$60 billion, and sales of hardware alone are expected to grow to \$88.4 billion by 1988. *Telecommunications: The Global Battle*, BUSINESS WEEK, Oct. 24, 1984 at 127. Some sources estimate the combined computer and telecommunications market for equipment and services will be as much as \$500 billion by 1990. Spero, *Information: The Policy Void*, 48 FOREIGN POLICY 139, 145 (1982).

33. Feketekuty, *supra* note 32, at 7.

and development of new technological breakthroughs may well exceed the benefit derived from sales.

II. BACKGROUND—JAPAN'S INDUSTRIAL POLICY

In the wake of World War II, Japan was faced with the world's highest population density, virtually no natural resources, deficient capital accumulation, and lagging technology.³⁴ In forty years it has restructured and grown to become one of the world's leading economic and technologically advanced societies. The development of heavy and chemical industries in the 1960's helped Japan strengthen its competitiveness in world markets.³⁵ By the mid 1970's the standard of living in many respects paralleled Western industrialized nations.³⁶ However, serious environmental pollution problems caused a reevaluation and transformation of the industrial policy.³⁷ In 1971, the Industrial Structure Council created the "Vision of MITI Policies in 1970's"³⁸ which proposed a shift to a knowledge-intensive industrial structure.³⁹ Accordingly, the 1970's saw increased growth in high technology industries such as computers and electronics. Industries less dependent on research, development, and technical innovation began tapering off.⁴⁰

The basic philosophy underlying Japan's industrial policy is the principle of free competition, in the interests of ensuring maximum efficiency of the market mechanism.⁴¹ Theoretically, problems in achieving optimal resource allocation from a long-term, dynamic perspective cause a relaxation of a pure *laissez faire* economy and the need for government intervention.⁴² Practically, government regulation is often fashioned to foster the growth of developing industries until they are able to compete internationally. Regulations also prescribe policy goals for business to promote the general welfare of Jap-

34. THE JAPAN INSTITUTE OF INTERNATIONAL AFFAIRS, THE WHITE PAPERS OF JAPAN 1982-1983, ANNUAL ABSTRACT OF OFFICIAL REPORTS AND STATISTICS OF THE JAPANESE GOVERNMENT 183 (1984) [hereinafter cited as WHITE PAPERS].

35. *Id.* at 185.

36. *Id.*

37. *Id.*

38. JAPAN MINISTRY OF INTERNATIONAL TRADE AND INDUSTRY, THE VISION OF MITI POLICIES IN THE 1970's (Tokyo 1971).

39. WHITE PAPERS, *supra* note 34, at 185.

40. *Id.*

41. *Id.* at 184.

42. *Id.*

anese society. The telecommunications industry is a paragon of this structure.

The formal legal structure of business/government relations in the United States and Japan is similar.⁴³ Policy is formed through a mixture of formal hearings and informal consultations.⁴⁴ However, different political and social attitudes toward business and economic growth in Japan make informal interaction much more common. While United States bureaucratic policy-making can be characterized as adversarial, the Japanese take a more consensual, bipolar approach.⁴⁵ The two interests represented, business and government, usually have complementary long-term goals and the latitude to reach a compromise maximizing both interests.⁴⁶ The Japanese Ministry of International Trade and Industry (MITI) seeks to avoid conflict on short-term interests by maintaining an ongoing interaction between its bureaus and particular industries.⁴⁷ Through a policy of constant dialogue, MITI's policies and decisions are often amenable to industry, while serving larger government goals. A key factor in the mutual understanding between business and bureaucracy is a genuine national commitment to the goal of economic growth.⁴⁸ This cooperative relationship between government and business has led to the controversial phrase "Japan, Inc."⁴⁹ When conflicts to arise, MITI has statutory authority to enforce its policies against unwilling firms or industries. MITI is authorized to administer 109 separate laws.⁵⁰ These laws enable it to establish institutions, control and develop industry, regulate prices and market operations, provide quality control, regulate patents, and participate in environmental protection.⁵¹

43. B. RICHARDSON & T. UEDA, *BUSINESS AND SOCIETY IN JAPAN*, 195 (1981).

44. *Id.*

45. *Id.*

46. *Id.* at 195-96.

47. *Id.* at 196. In addition to formulating industrial policy, the Ministry of International Trade and Industry (MITI) is responsible for drafting and implementing policies in related areas such as international trade, energy, and technological development. MITI also plays an important role in creating basic government policies at the cabinet level, and ensures these policies comport with industrial policy. MITI is divided into two divisions, the "vertical division" and the "horizontal division." Each division is comprised of various subdivisions. Each vertical division is designed to eliminate obstacles to the development of a specific industry sector. Horizontal divisions handle common industry issues such as long term business and economic trends, trade, industrial location, and pollution. WHITE PAPERS, *supra* note 34, at 189.

48. B. RICHARDSON, *supra* note 43, at 198.

49. *Id.* at 195.

50. *Id.* at 197.

51. *Id.*

Current policy goals focus on enhancement of the general public welfare vis-a-vis maximizing the vitality of private enterprise through the promotion of information-intensive industries.⁵² The Japanese Government plays a key role in the fulfillment of these objectives. For instance, it assists in the early stages of technological development, when the financial or technical resource risks might be too high for private firms.⁵³ Although Japan is beginning to promote international cooperation in the form of joint venture R & D projects, it still is subject to accusations of employing an "industrial targeting policy" by fostering export industries.⁵⁴ This policy is purportedly designed to bring about the domination of United States and world markets through the enactment of trade protection measures and lavish government subsidies to promote its high technology industries.⁵⁵ Japan denies these allegations. It claims that it is merely striving to improve its economy under an open market system and that subsidies given by its government are no larger than those of Western countries.⁵⁶

III. THE TELECOMMUNICATIONS INDUSTRY

Recent legislative developments in Japan have begun a restructuring of the country's telecommunications industry toward a freer market system.⁵⁷ However, recognizing the traditional structural differences between the United States and the Japanese telecommunica-

52. WHITE PAPERS, *supra* note 34, at 187. The "Vision of MITI policies in the 1980's," submitted by the Industrial Structure Council in March 1980, outlines Japan's three general policy goals for this decade: (1) Making a due contribution to the development of the world economy, including the maintenance of free trade, the promotion of an international division of labor, and comprehensive economic cooperation with developing countries; (2) Lessening Japan's dependence on foreign energy supplies; and (3) Balancing the drive for economic growth against efforts to improve the quality of life. *Id.* at 185-87.

53. WHITE PAPERS, *supra* note 34, at 188.

54. *Id.* at 194.

55. *Id.*

56. *Id.* at 194-95. Japan counters United States criticisms of prodigious government subsidies by claiming that U.S. government subsidies for R & D, exclusive of defense spending, were four percent higher in 1982 than were Japanese subsidies in 1983. Additionally, Japan claims that while the United States economy basically operates on a free market system, the Federal Government plays an important role in financing high technology areas such as telecommunications, semi-conductors, and computers. "A case in point is the tax incentives offered to United States industry for equipment investment and R & D spending." *Id.* at 193-95.

57. In December, 1984 Japan's Diet passed two pieces of legislation to revitalize and strengthen the telecommunications industry by allowing it to compete in the private sector. The Nippon Telephone and Telegraph Company Law mandates the privatization of Nippon Telephone and Telegraph which had historically been a government-owned monopoly. The Telecommunications Business Law is aimed at securing the participation of the domestic and foreign private sectors by facilitating a system designed to allow new entries into the field of

tions industry assists in understanding the problems being confronted by United States businesses today. Secondly, it provides a foundational yardstick to measure change. Of primary importance is the role of Japan's national government as the chief policy-making authority, as the largest user of information resources, and as a supplier of telecommunications facilities.⁵⁸

The renaissance of Japan's telecommunications business operations occurred in 1952 with the government reorganization of telecommunications services.⁵⁹ Nippon Telephone & Telegraph Public Corporation (NTT)⁶⁰ was given exclusive authority to provide domestic communication services, while Kokusai Denshin Denwa Co., Ltd. (KDD)⁶¹ was deemed the exclusive international carrier. Competition in communications was nominal to nonexistent because the provision of domestic service was organizationally separated from international service.⁶² In 1971, data communications obtained legal recognition with the revision of the Public Telecommunication Law.⁶³

telecommunications. See *infra* notes 195-240 and accompanying text for a discussion of the new legislation.

58. See *infra* note 60.

59. Gershon & Gawdun, *Reform of Japan's Telecommunications Operations*, TELECOMMUNICATIONS Dec. 1984 at 82.

60. The reader of this Comment should note that much of the data reported regarding NTT's size and function reflects NTT's status prior to its 1985 privatization. While many of NTT's functions will continue to remain the same, changes in organizational structure and size should be anticipated. See *infra*, notes 199-217 and accompanying text. Before NTT's privatization, NTT was the world's largest telephone company, after the divestiture of AT&T, and supplied Japan with all its domestic telecommunications services. In addition to providing telephone service for more than 58 million subscribers, NTT provided telegram, telex, data communications and processing services through over 2,000 central offices in Japan. Founded in 1952, NTT had approximately 330,000 employees and annual revenues of over \$18 billion in 1984. NTT has had no manufacturing division, and, therefore, purchased close to \$3 billion in telecommunications and related products each year. As a government-owned monopoly, it was the largest supplier of computer services in the country and set the rules for competing in the Japanese telecommunications market. In tandem to providing these services in Japan, NTT still operates four Research & Development laboratories and seven overseas offices. In its four electrical communication laboratories, NTT is conducting extensive research on digital telecommunications, optical fiber technology, Large Scale Integrated circuits, satellite communications, and computer technology of the future. See, *High Technology Gateway: Foreigners Demand a Piece of NTT's \$3 Billion Market*, BUS. WK., Aug. 9, 1982 at 40. See also NIPPON TELEGRAPH & TELEPHONE PUBLIC CORPORATION, 1982/1983 ANNUAL REPORT (1983).

61. KDD is a private corporation. The Japanese Ministry of Posts and Telecommunications (MPT) oversees both KDD and NTT.

62. Markoski, *Telecommunications Regulations as Barriers to the Transborder Flow of Information*, 14 CORNELL INT'L L.J. 287, 294 (1981).

63. ORGANISATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, 3 Policy Implications of Data Network Developments in the OECD Area 44 (Paris 1980). Data communications now represented a new type of telecommunications which made it possible, in the course

The revision gave NTT and KDD the authority to handle on-line data processing as a form of telecommunication services.⁶⁴ The telecommunications system was based on a policy of assuring NTT's continued monopolization of the public telecommunications business. NTT's exclusive authority precluded foreign competition from supplying Japan's domestic communications needs because NTT purchased its goods and services solely from Japanese companies. This monopolistic structure made it possible for the rapid post-war recovery, and enabled the country to develop universal service.⁶⁵ As a powerful branch of the government, NTT could implement policies and goals that limited or conflicted with the provision of economical and efficient telecommunications services.⁶⁶ It is still free to structure technical standards, tariffs, and non-tariff regulations to achieve the government's economic and political goals. This is done for the purpose of inhibiting the access of foreign competition to the Japanese market and the free flow of information across national borders.⁶⁷

In contrast, the United States private sector has historically served the telecommunications and related equipment needs of consumers.⁶⁸ Before its divestiture, American Telephone & Telegraph (AT&T) had a virtual private monopoly on the U.S. telecommunications market, with the Bell companies captive customers to Western Electric. The break-up of AT&T enabled the Bell companies to buy on a worldwide basis and broke the United States market wide open to other countries. The effect was like that of a unilateral trade concession.⁶⁹ Today, telecommunications services and products required by U.S. industry are provided by hundreds of regulated and unregulated organizations.⁷⁰ Authority to regulate is divided among several government agencies. The major participants in formulating international telecommunications and information policy are the Federal Communications Commission (FCC), the National Telecommunications and Information Administration of the Department of Commerce (NTIA), the Department of State, and the United States Trade

of transmission, to change the contents of data for a specific purpose, using telecommunications facilities to store, add to, and retrieve data. *Id.*

64. *Id.*

65. Gershon & Gawdun, *supra* note 59, at 82.

66. Markoski, *supra* note 62, at 295.

67. *Id.*

68. *Id.* at 289.

69. *Telecommunications Trade Act of 1984: Hearings Before the Subcomm. on International Trade of the Senate Comm. on Finance, 98th Cong., 2d Sess. 38 (1984).*

70. Markoski, *supra* note 62, at 289.

Representative (USTR).⁷¹

The FCC is responsible for regulating all interstate and foreign communication by means of radio, television, wire, cable, and satellite.⁷² Part of its duty is to regulate common carriers in interstate and foreign communications.⁷³ In addition to these responsibilities, the FCC participates in a consultative capacity with foreign telecommunications authorities.⁷⁴ Thus, while NTT, as a government owned monopoly, could adopt policies in furtherance of its own business needs or the goals of its government, the FCC has no such authority.⁷⁵ The NTIA has been delegated broader authority in domestic and international telecommunications policymaking and operations.⁷⁶ It serves as the principle advisory and policymaking authority in the telecommunications area.⁷⁷ In the Department of State, the Secretary of State provides the more generalized function of advising the President on

71. SENATE COMM. ON COMMERCE, SCIENCE, AND TRANSPORTATION, 98TH CONG., 1ST SESS., LONG-RANGE GOALS IN INTERNATIONAL TELECOMMUNICATIONS AND INFORMATION—AN OUTLINE FOR UNITED STATES POLICY 70 (Comm. Print 1983) [hereinafter cited as LONG RANGE GOALS].

72. The FCC was created by the Communications Act of 1934 as an independent regulatory agency responsible directly to Congress. Communications Act of 1934, 47 U.S.C. § 151 *et seq.* The FCC is not part of the Executive Branch nor is it necessarily bound to Administration policies. It was created:

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the National defense . . . promoting safety of life and . . . securing a more effective execution of this policy by centralizing authority. . . .

47 U.S.C. § 151 (1976).

73. LONG RANGE GOALS, *supra* note 71, at 73-74. The FCC fulfills its international telecommunications responsibilities by approving construction and operation of communications facilities, service offerings, and the tariffs or rates charged. It does this by allocating and assigning radio frequencies to non-Federal government users and by participating in international negotiations and conferences. The agency also establishes rules and regulations for international telecommunications and influences United States policy and reactions of foreign entities through speeches and statements of the Chairman and Commissioners. *Id.* at 74.

74. Markoski, *supra* note 62, at 293.

75. *Id.* at 295.

76. LONG RANGE GOALS, *supra* note 71, at 70. NTIA was formed in 1978 as successor to both the Executive Office of Telecommunications Policy and the Office of Telecommunications in the Commerce Department. *See*, 3 C.F.R. 197 (1977 comp.); 3 C.F.R. 158 (1978 comp.).

77. Among NTIA's significant international policymaking responsibilities are to: (1) serve as the President's principal advisor on telecommunications policies; (2) develop plans, policies, and programs which relate to international telecommunications issues, conferences, and negotiations, and coordinate participation in such conferences and negotiations; (3) provide for the coordination of the telecommunications activities of the Executive Branch; (4) develop telecommunications policies pertaining to the Nation's economic and technological

the overall direction, coordination, and supervision of United States foreign relations.⁷⁸ International telecommunications is treated as a minor subset of this function.⁷⁹ Additionally, the Department of State heads or names the heads of United States delegations to international telecommunications conferences and negotiations.⁸⁰ The United States Trade Representative, a Cabinet-level official with the rank of Ambassador, is responsible "for developing, and for coordinating the implementation of, United States international trade policy. . . ."⁸¹ He serves "as the principle advisor to the President on international trade policy and [advises] the President on the impact of other policies of the United States Government on international trade. . . ."⁸² The USTR also has the "lead responsibility for the conduct of international trade negotiations."⁸³

Instead of providing a clear demarcation in international telecommunications policymaking authority, Congressional and Executive authorizations create ambiguities in areas of overlap.⁸⁴ This has led to a characterization of the United States government as "fragmented" and "ineffective" in dealing with these issues.⁸⁵ For example, the FCC, as an agency independent of Executive Branch control, may effectively establish international policy on its own which may advance or thwart Administration policies.⁸⁶

advancement; and (5) ensure the Executive Branch views on telecommunications matters are presented to the FCC and Congress. *See*, Exec. Order No. 12046, 3 C.F.R. 158 (1978 comp.).

78. LONG RANGE GOALS, *supra* note 71, at 72.

79. *Id.* Executive Order 12046 of 1978 grants the Secretary of State "primary authority for the conduct of foreign policy, including the determination of United States positions and the conduct of the United States participation in negotiations with foreign governments and international bodies." The Order also authorizes the Secretary to oversee the Communications Satellite Corporation. Exec. Order No. 12046, §§ 5-201, 5-202, 3 C.F.R. 158, 164 (1978).

80. LONG RANGE GOALS, *supra* note 71, at 72-73.

81. *Id.* at 74-75.

82. *Id.* at 75.

83. *Id.*

84. *Id.* at 71.

85. Private industry complains of "fragmented, ambiguous grants of authority, and consequent problems of lack of coordination, myopia, and lack of accountability." *Id.* at 81.

86. *Id.* As international telecommunications grows, the significance of FCC policy decisions increases, not only in the area of telecommunications, but also in its impact on national security, trade, and foreign policy. *Id.* at 82. The General Accounting Office (GAO) stated that FCC authority has transcended its traditional areas of expertise to consider foreign affairs, national security, and foreign policy. As an example of this the GAO cites proceedings in which the FCC reviewed AT&T's proposed award of a contract for fiber optic cable to Western Electric instead of to a lower bidding Japanese company. Although the foreign policy and trade issues were discussed with the Department of State, Commerce, and USTR, the final decision rested with the FCC. GENERAL ACCOUNTING OFFICE, THE FEDERAL COMMUNICA-

The monopolistic structure of the Japanese system, when combined with the dissimilar and fragmented role of United States government, has left United States business in a weak bargaining position. During the 1970's there existed no coherent policy to assist businesses in overcoming trade barriers or to mitigate the potential financial losses.⁸⁷ Companies faced with the arbitrary or discriminatory government actions have had few, if any, remedies.⁸⁸ Federal agencies were slow in responding to specific problems brought to their attention, and often address them on a haphazard, ad hoc, basis or sometimes completely ignored them.⁸⁹ As a result, United States enterprise was either precluded from investing in the Japanese market altogether, restricted from investing certain types of technologies, or inhibited from utilizing its overseas facilities in conjunction with expenditures in Japan. The 1980's have brought about a heightened awareness of these trade restrictive policies. Governmental agencies have actively pursued bilateral negotiations with Japan in an effort to liberalize trade and increase access to the Japanese telecommunications market.⁹⁰ Concurrent Congressional attention has begun to assist U.S. business in developing a more aggressive stance toward these barriers and helped to define the Government's role in this trade conflict.⁹¹

IV. JAPANESE TRADE AND INVESTMENT BARRIERS

Telecommunications trade and investment barriers can be divided into three broad categories.⁹² The first category consists of barriers arising out of traditional regulatory schemes in a new technological setting.⁹³ In Japan, technological advances pose a dilemma between the preservation of NTT as the government's commu-

TIONS COMMISSION'S INTERNATIONAL TELECOMMUNICATIONS ACTIVITIES, REPORT TO THE CHAIRMAN, HOUSE SUBCOMM. ON GOVERNMENT INFORMATION AND INDIVIDUAL RIGHTS 3 (Apr. 19, 1982). Since there is no statute mandating the FCC's deference to Executive Branch views, the FCC is obliged to balance the diversity of considerations on an ad hoc basis. LONG RANGE GOALS, *supra* note 71, at 83.

87. Feketekuty & Aronson, *Meeting the Challenges of the World Information Economy*, 7 THE WORLD ECONOMY 63, 69 (1984).

88. HOUSE COMM. ON GOVERNMENT OPERATIONS, INTERNATIONAL INFORMATION FLOW: FORGING A NEW FRAMEWORK, H.R. REP. NO. 1535, 96th Cong., 2d Sess. 5-6 (1980) [hereinafter cited as FORGING A NEW FRAMEWORK].

89. *Id.*

90. *See infra* notes 132-194 and accompanying text.

91. *See infra* notes 241-252 and accompanying text.

92. LONG RANGE GOALS, *supra* note 71, at 169.

93. *Id.*

nications monopoly and the pressure for greater economic efficiency and more open competition. Traditional regulatory objectives are threatened by the increased freedom to experiment with new applications of technology.⁹⁴ The United States' more rapid adoption of pro-competitive policies has resulted in a clash of expectations between United States firms and foreign telecommunications administrations.⁹⁵ Second, barriers arise from socio-political concerns about the impact of new technology.⁹⁶ Such concerns include privacy, cultural integrity, and national security. Finally, countries use telecommunications regulations to promote infant industries and limit foreign competition in information-intensive sectors.⁹⁷ While the list of specific types of non-tariff barriers is long,⁹⁸ Japan's most egregious trade obstacles take two general forms: (1) limitations on the use of leased lines and, (2) restrictive procurement practices.

A. Private Leased Line Restrictions

The leased line issue involves communication lines leased by suppliers of data-processing or data-based services. Generally, Japan's private-line policy has been far more stringent than that of the United States. A variety of restrictions limit resale and shared use of private lines,⁹⁹ as well as interconnection between private lines and the public switched network.¹⁰⁰ Restrictions create significant problems for firms providing data processing and other information-based services in Japan. In the past, Japan's Ministry of Posts and Telecommunications (MPT), through the international telecommunications authority, KDD, required foreign vendors to perform data processing in

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.* at 169-70.

98. In telecommunications and information trade, NTB's may take the form of (1) restrictive government procurement policies; (2) restrictions on the use of leased lines; (3) discriminatory technical standards for data communication services; (4) unreasonably high rates for international services; (5) restrictions on the use of foreign data processing facilities; (6) national security restrictions; (7) national assertions of data ownership; or (8) privacy laws. *Id.* at 170-71. This list is not exhaustive.

99. Private line service is a telecommunications service used by high volume or special needs customers which offers a link between specific points solely for that customer's private use during specific time periods. SELECTED ISSUES REPORT, *supra* note 3, at 51. So, firms leasing communications lines to transmit data may be prohibited from reselling or sharing the use of their lines in an effort to reduce their costs.

100. LONG RANGE GOALS, *supra* note 71, at 170. In Japan, the interconnection between public and private networks is referred to as the Interconnect Market.

local computer centers before transmission was permitted over leased lines. Such discrimination against foreign data processing companies protected local industry, and prevented the undermining of NTT's monopoly control while assuring it higher revenues.¹⁰¹ A case in point is the Control Data controversy.

Control Data, a United States corporation, is a world supplier of data processing systems, equipment, and services. Its data processing services include general timesharing,¹⁰² remote access and data based management systems.¹⁰³ These services use telecommunications as the transportation medium between Control Data's computer centers in the U.S. and facilities located throughout the world on its customers' premises. In 1976, after two years of delay by the Japanese, Control Data entered into a contract with Japan's international carrier, KDD.¹⁰⁴ The contract was to provide for private leased line service to transmit data between Japan and the United States at a flat monthly rate, subject to some restrictions. However, one of the restrictions was a limitation on the transfer of data between Control Data's processing center in the U.S. This limitation was based on a definitional matter. KDD viewed this data transfer as "message-switching," which was prohibited by Japanese law.¹⁰⁵ Data transfer did not, however, constitute message-switching under United States law or the applicable international convention.¹⁰⁶

101. Feketekuty & Hauser, *supra* note 32, at 13.

102. Timesharing is a non-profit arrangement where several users collectively subscribe to a private line service of an established carrier and in turn share the costs of obtaining services. SELECTED ISSUES REPORT, *supra* note 3, at 52.

103. *International Data Flow, Hearings Before a Subcomm. on Government Information and Individual Rights of the House Comm. on Government Operations, 96th Cong., 2d Sess. 35 (1980)* [hereinafter cited as *Data Flow Hearings*] (statement of Philip C. Onstad, Manager of Telecommunications Policy, Control Data Corp.) [hereinafter cited as Onstad Statement].

104. Onstad Statement *supra* note 103, at 47. At that time, all Control Data's telecommunications services ran between its computer centers in the United States and Europe to the hundreds of customer terminals around the world. *Id.* at 35. Since exclusive authority for international telecommunications was vested in KDD, it had to approve all aspects of a facility or service prior to institution of any service. Successful completion of approval negotiations was prerequisite to the provision of telecommunications services. *Id.* at 47.

105. *Id.* at 48.

106. The International Telephone and Telegraph Consultative Committee (CCITT) is the appropriate international convention. As a branch of the International Telecommunication Union (ITU), CCITT is responsible for drawing up texts concerning public correspondence services for the ITU. The ITU is a specialized agency of the United Nations, which plays a key role in establishing the technological infrastructure that permits transborder data flow. It adopts protocols, formats prescriptions for data networks and regulations for international leased lines for data transmission. ITU Administrative Regulations, which may be both technical and operational, when drawn by Administrative Conferences have treaty force between

By reducing the number of computer bases in the United States from which Control Data could draw, the company was severely limited in the services it could offer in Japan. It was also precluded from providing a full range of backup and security functions for the services it did offer. This significantly curtailed Control Data's ability to compete in the Japanese market.¹⁰⁷ Subsequently, Control Data sought alternative avenues of recourse to remedy the situation.¹⁰⁸ Discussions with KDD and a host of international and United States Government trade and commerce agencies proved futile. After years of getting no significant results from its actions, Control Data decided to bear the additional expense of establishing separate processing facilities in Japan; a development which had the pendant affect of decreasing a United States exports of data services to Japan.

Similar restrictions were encountered by Tymshare Inc., a leading firm in remote access computer services throughout the United States, Canada, and overseas. In 1976, Tymshare and its Japanese affiliate were initially encouraged by the Japanese Government's swift approval of both the formation of a joint venture in Japan and permission to transfer adequate funds to finance the business.¹⁰⁹ However, within a few months prior to startup, after staff had been hired, office space rented, and financial commitments made, KDD refused to approve the dedicated transpacific telephone line which Tymshare had ordered from them.¹¹⁰ The communication link was vital since the basic computer service was to be provided from United States based computers to Japan via the transpacific line. During the ensuing sixteen months, KDD delayed by conducting extremely detailed inspections of Tymshare's equipment centers and proprietary software, and demanded special modifications of standard computer services.¹¹¹ When KDD finally approved the telephone line it was under highly restrictive conditions seemingly intended to provide the "maximum conflict and inconvenience possible."¹¹² Facing the alternative of

member nations. See *Transnational Corporations and Transborder Data Flows: Progress Report*, 9 U.N. Commission on Transnational Corporations, Agenda Item 9(b)1, 15 U.N. Doc. E/C. 10/12 (1983).

107. Onstad Statement, *supra* note 103, at 48-49.

108. *Id.* at 50-53.

109. *Data Flow Hearings*, *supra* note 103, at 72 (Statement of Mr. Warren E. Burton, Vice President, Government Affairs, Tymshare Inc.) [hereinafter cited as Burton Statement].

110. *Id.* at 73.

111. *Id.* at 73-74.

112. *Id.* at 74. One condition imposed was that the requested circuit be connected only to certain specified computer systems at one specific computer center in the United States. Addi-

complete exclusion from the Japanese market, Tymshare acceded to KDD's demands. As in the Control Data situation, these restrictions significantly reduced Tymshare's competitiveness.¹¹³

During the sixteen month waiting period Tymshare worked extensively with the Department of State, Department of Commerce (including the Trade Facilitation Committee and the NTIA), FCC, USTR, and the Executive Office of the President.¹¹⁴ The firm concluded that these agencies were generally reluctant to get involved and refused to acknowledge responsibility or authority to provide assistance in these matters.¹¹⁵ Finally, nearly four years after Tymshare's initial request for services, Japan's Minister of Posts and Telecommunications authorized KDD to negotiate removal of the restrictions. This permitted the company access to multiple computer processing centers in the United States via international telecommunication access lines leased from KDD.¹¹⁶ The Control Data and Tymshare cases raise the issue of the extent to which private companies are allowed to compete in a monopolistic communications market.¹¹⁷ Although flagrant trade barriers such as these have been reduced, Japan's telecommunications procurement practices continue to exclude United States firms from competing freely.

tionally, Tymshare could not connect to any public network in the United States, including Tymnet Inc., its affiliate. *Id.* at 74-75.

113. Markoski, *supra* note 62, at 312.

114. *Data Flow Hearings*, *supra* note 103, at 75. The State Department, the leading representative of economic and legal policy positions abroad, had few people who could handle these information trade issues. Those who were responsible in these areas had to oversee a wide range of information policy matters. Spero, *supra* note 32, at 151. The Trade Act of 1979 requires the Office of the USTR to follow an extensive administration process, culminating in a review by the President, if a party files a formal complaint with respect to foreign trade restrictions. 19 U.S.C.A. §§ 2411-2414 (West 1980). Markoski, *supra* note 62, at 313 and 316 n.144. Some claim that the USTR's resources are inadequate to appropriately deal with communications trade issues within its mandate. Spero, *supra* note 32, at 151. The Joint United States-Japan Trade Facilitation Committee was established in September 1977 to encourage increased Japanese imports through cooperation in trade development activities and in the resolution of market access problems. *See* 43 Fed. Reg. 23,628 (1978); Markoski, *supra* note 62, at 313 n.129.

115. Burton Statement, *supra* note 109, at 76. The reluctance of government agencies to address these problems stemmed largely from the ambiguities in the delegation of policy-making authority for international telecommunications. SELECTED ISSUES REPORT, *supra* note 3, at 18. Another reason had been the inability of businesses to recognize the problems because of poor communication between the technical managers and senior corporate policy makers. Spero, *supra* note 11, at 67.

116. Markoski, *supra* note 62, at 317.

117. Feketekuty & Aronson, *supra* note 87, at 73.

B. Hardware and Software Procurement

Japan's procurement policies constitute the most serious trade barriers to the foreign telecommunications industry. These policies also provide protection for data-processing and other domestic information industries. As a government owned monopoly, NTT was under little competitive pressure to buy cost effective equipment. Consequently, in the interest of assisting Japanese industry, NTT satisfied the nation's equipment needs by contracting work out to special domestic producers.¹¹⁸ In the typical Japanese tradition, most of NTT's business was distributed among 200 to 300 companies.¹¹⁹ About 50% of total sales went to only four firms: NEC Corporation, Fujitsu Limited, Oki Electric, and Hitachi. These four, together with about 17 medium-sized companies, controlled about 80% of the domestic Japanese telecommunications equipment production. (This collection of companies is referred to as the "Denden Family"). The close relationship between NTT and its suppliers stems, in part, from their long working alliance and practice of cooperating on joint research and development projects. Additionally, many of these "family" company directors are former NTT executives who act in advisory positions after retiring from NTT.¹²⁰ Japan's restrictive procurement practices have distorted international trade in telecommunications equipment and precluded United States producers from tapping Japan's market.¹²¹ Evidence of this lies in the radical trade imbalance between the United States and Japan in 1984. For example, in 1984, Japan shipped \$2.1 billion of telecommunications products to the U.S. (an increase of 49% from 1983), while the United States sold just \$193 million worth to Japan.¹²² Even after NTT's privatization, it is still responsible for developing and maintaining close relationships with major national manufacturers of electronic and telecommunications equipment.¹²³ However, since NTT now accounts for a minority (about 40%) of Japan's telecommunications purchases, it is beginning to play a smaller role in procurement, leav-

118. Harada, *Changes in the Japanese Telecommunications Industry and the Opportunities Created for Foreign Firms in Japan*, Conference Paper, Pacific Telecom Council 7th Annual Conference, Jan. 13-16, 1985, at 110 [hereinafter cited as PTC Conf. Paper].

119. *Id.*

120. *Id.*

121. LONG RANGE GOALS, *supra* note 71, at 159-60.

122. *Facing Off With Japan*, FORTUNE, Apr. 29, 1985 at 8.

123. Feketekuty & Aronson, *supra* note 87, at 69.

ing more room for foreign competitors.¹²⁴

Discriminatory product application, testing, and importation standards and procedures, which favor national business, pose significant barriers to foreign equipment suppliers.¹²⁵ Discriminatory standards may take the form of bid qualifications specifying a particular technology used by a favored supplier (and merely going through the motions of the bidding process). The MPT may simply refuse to accept products tested abroad or require time consuming and expensive testing and inspection within Japan.¹²⁶ In the telecommunications field, the Japanese are excellent at implementing non-transparent standards and subjecting foreign suppliers to a maze of approving authorities. United States firms are also excluded by not being informed of opportunities which exist in the Japanese market, or of the appropriate application or bidding procedures. While the recent wave of legislation has begun to wipe out the effects of these protectionist measures, United States companies are still said to face a "cumbersome and inherently discriminatory system."¹²⁷

Part of the problem is that the United States suffers from a lack of bargaining power in negotiating for a reduction of barriers; i.e. trade restrictions in the United States that can be exchanged for reduced barriers in Japan.¹²⁸ Most United States trade barriers exist in declining, not growing, industries. In telecommunications the United States was the first nation to replace the government-regulated monopoly with a more competitive structure. Through the divestiture of AT&T, the United States has opened up its markets to a world of competition. On a national level we have retained little negotiating leverage. Since the American market remains open, there is no incentive for Japan, or other countries, to open theirs; except in the name of freer trade. Until recently, the U.S. government has not perceived a

124. *Telecommunications Trade, Hearing before the Subcomm. on International Trade of the Senate Comm. on Finance*, 98th Cong. 2d Sess. 29 (1984) (statement of Lionel Olmer, Under Secretary of International Trade, Department of Commerce).

125. LONG RANGE GOALS, *supra* note 71, at 159.

126. Feketekuty & Aronson, *supra* note 87, at 70. Telecommunications services can also be priced to discriminate against foreign users. An example of discriminatory pricing can be seen in the Tymshare case. If Tymshare had subscribed to a new KDD communications service—instead of using present fixed cost, dedicated telephone line—they would have been permitted to offer and sell their full range of services in Japan. Tymshare estimated the costs of this to be about 10 times greater than the fixed cost, dedicated telephone lines. FORGING A NEW FRAMEWORK, *supra* note 88, at 13.

127. L.A. Times, Mar. 9, 1985, § 4, at 1, col. 1 (Statement of Commerce Under Secretary Lionel Olmer appearing before the Senate Finance subcommittee on International Trade).

128. LONG RANGE GOALS, *supra* note 71, at 160.

need to intervene to promote America's telecommunications or computer industries.¹²⁹ As a result the Japanese have taken advantage by entering the United States market without a reciprocal opening of their own market.¹³⁰ It is not surprising, therefore, that attempts by the United States to bargain for more liberal procurement practices and technical standards have been relatively unsuccessful.¹³¹

V. TOWARD LIBERALIZATION

Three primary forces seem to be at work in promoting a freely competitive telecommunications market in Japan: Japanese consumers, Japanese private enterprise, and exporting nations (predominantly the United States). Simply stated, Japanese industry and the consumer have suffered from the stronghold which NTT has had on the communications market. Since telecommunications equipment and services were sold only through NTT, who contracted exclusively with companies within the communications "family,"¹³² a large portion of the private sector was prevented from competing on a national level. This lack of competition created higher prices for purchasers of telecommunications equipment and services.¹³³ Recognizing the vanguard role telecommunications will play in the structure of a highly organized, information-oriented society, the Japanese Ministry of Posts and Telecommunications recently set forth "Long Term Goals of Telecommunications [in the] 21st Century."¹³⁴ The main themes of this policy are: (1) given prime importance to the peoples' interest, (2) promoting free competition, and (3) achieving an advanced telecommunications system.¹³⁵ The Posts and Telecommunication Advi-

129. *Id.*

130. *Id.*

131. *Id.*

132. U.S. GENERAL ACCOUNTING OFFICE, GAO/NSIAD-84-2, ASSESSMENT OF BILATERAL TELECOMMUNICATIONS AGREEMENTS WITH JAPAN, 2 app. I (Oct. 7, 1983) [hereinafter cited as GAO ASSESSMENT].

133. For example, the price of telephone installation in a family home prior to NTT's Privatization was about \$400. Telephone interview with Shizu Munekata, Director of Public Affairs California Office, Nippon Telephone & Telegraph Public Corp. (Feb. 8, 1985).

134. Koyama, *Social Requirements Lead to New Telecommunication Networks*, BUS. JAPAN, Apr. 1984, at 45, 47-49.

135. *Id.* Among the steps the Ministry is considering in hope of achieving advanced telecommunications systems and promoting free competition are the following: (1) constructing a nationwide Information Network System (INS) utilizing existing metallic cables and new fiber optic systems; (2) establishing new laws and regulations to: (a) facilitate emergence of new telecommunications entities; (b) plan long term economic guidelines to deal with the influence of advanced telecommunications on society; (c) give tax incentives for research and development projects; (d) minimize the conditions required for competition in order to encourage

sory Council sees the expansion of telecommunications and information technologies into all facets of business and personal activities as the means to an enhanced and prosperous economic and social structure.¹³⁶

A. *Nippon Telephone & Telegraph Procurement Agreement*

A positive sign of Japan's willingness to increase the competitiveness of its telecommunications market came in December, 1980 with the signing of the NTT Procurement Agreement.¹³⁷ This bilateral agreement granted mutual reciprocal market opportunities between the United States and Japan in the telecommunications field.¹³⁸ The agreement committed NTT to procure its needs based on competitive bidding without discriminating against United States manufacturers.¹³⁹ In addition to offering the United States access to NTT's telecommunications purchases, the agreement was designed to liberalize Japan's domestic interconnect market.¹⁴⁰

creativity and technological progress; and (e) to create new standards for communication, safety, and reliability; and (3) connecting networks of existing enterprise with those of newcomers. *Id.*

136. *Id.* at 45. New developments in Japan's telecommunications research toward what is deemed the "industrialization of information" is envisioned to pervade all facets of the social structure. Technological advances are designed to serve "information-oriented industries" represented by office and factory automation, "information-oriented homes" represented by home security and home shopping, and "information-oriented society" represented by the communication system for administrative information. *Id.*

137. Telecommunications Procurement Agreement, Dec. 19, 1980, United States-Japan, T.I.A.S. No. 9961 [hereinafter cited as NTT Agreement or Agreement]. The Agreement became effective January 1, 1981 for a three year period.

138. The NTT Agreement consisted of an exchange of letters between the Japanese Representative for External Economic Relations, Dr. Saburo Okita, and the United States Trade Representative, Ambassador Reuben O'D. Askew. The Agreement expressed the hope of an open and competitive procurement policy to "work toward reciprocal and worldwide liberalization of procurement in the field of telecommunications." NTT Agreement, *supra* note 137, at 4 (letter of Dr. Saburo Okita, para. 6).

139. The letter from Dr. Okita to Ambassador Askew stated in part: "It is the policy of the Government of Japan to provide non-discriminatory and competitive opportunities in its procurement operations and to guide Government-affiliated agencies such as the Nippon Telegraph and Telephone Corporation (NTT) to do likewise. It is our objective to achieve an open, transparent, and competitive telecommunications market." NTT Agreement, *supra* note 137, at 2 (letter of Dr. Saburo Okita, para. 2). The new NTT procurement procedures were attached to this letter. *Id.* at 5-19 (Attachment I).

140. The interconnect market generally consists of terminal equipment connecting customers to a telecommunications system. The market is primarily customer-provided. This means manufacturers, subject to NTT inspection and approval, can sell directly to Japanese consumers. NTT's definition of interconnect equipment, however, has traditionally been narrower than the U.S. definition. For example, NTT does not include basic instruments, such as

The NTT Agreement was entered into as part of the Government Procurement Code,¹⁴¹ which sought to eliminate non-tariff trade barriers encountered by foreign suppliers in government procurement contracts. The Code was enacted pursuant to discussions at the Tokyo Round of Multilateral Trade Negotiations (MTN)¹⁴² conducted under the auspices of the General Agreement of Tariffs and Trade (GATT).¹⁴³ During discussions concerning the scope of the Government Procurement Code, a dispute arose between the United States and Japan as to whether the NTT was an entity included under the coverage of the Code.¹⁴⁴ Japan was reluctant to include NTT.¹⁴⁵ Finally, yielding to the United States' pressure that NTT was the only

the first telephone in a home or office, as part of the interconnect system. GAO ASSESSMENT, *supra* note 132, at 14, app. II.

141. Agreement on Government Procurement, Apr. 12, 1979 T.I.A.S. No. 10403 preamble, para. 1 [hereinafter cited as Procurement Code or Code], reprinted in AGREEMENTS REACHED IN THE TOKYO ROUND OF MULTILATERAL TRADE NEGOTIATIONS, H.R. DOC. NO. 153, 96th Cong., 1st Sess., pt. 1 at 67-189 (1979). The Procurement Code standardized methods of government procurement of capital goods and is designed to reduce or eliminate nontariff measures of their trade restricting or distorting effects. The code applies only to product purchases and excludes the purchase of services of signatory nations. Services incidental to products are regulated by the Code when the service does not exceed the cost of the product. Procurement Code, pt. I para. 1(a). See also Trade Agreements Act of 1979, 19 U.S.C. §§ 2511-2518. The Government Procurement Code is embodied in §§ 2511-2518 of the Trade Agreements Act.

142. The Tokyo Rounds sought the removal of NTBs through a system of codes of conduct which prescribed new rules and procedures requiring alteration and formalization of government and business behavior. This basis for these talks, which lasted over five years, are contained in the "Tokyo Declaration," which was set forth to "reduce or eliminate non-tariff measures or, where this is not appropriate, to reduce or eliminate their trade restrictive or distorting effects, and to bring such measures under more effective international discipline." General Agreement on Tariffs and Trade: Tokyo Declaration on Multilateral Trade Negotiations, Sept. 14, 1973, General Agreement on Tariffs and Trade (GATT) Press Release GATT/1134, para. 3(b), reprinted in 12 INT'L LEGAL MATS. 1533 (1973).

143. The General Agreement on Tariffs and Trade (GATT) was established in 1947 in a post-War effort to reduce trade obstacles in order to foster freer trade. The framework for negotiations was begun by a group of 22 countries in Geneva in 1947 to achieve "substantial reduction of tariffs and other trade barriers and to the elimination of preferences, on a reciprocal and mutually advantageous basis." The General Agreement on Tariffs and Trade, concluded October 30, 1947, 61 STAT A3, A7 T.I.A.S. No. 1700 U.N.T.S. 187, 188. GATT protocol has laid the foundation for international trade, now binding over 85 signatory countries and accounting for over 80% of international trade. See D. WILSON, INTERNATIONAL BUSINESS TRANSACTIONS 146-56 (2d ed. 1984).

144. This dispute took place from January to June, 1979. See UNITED STATES-JAPAN TRADE COUNCIL, COUNCIL REPORT, No. 6, at 3 (Feb. 8, 1980). For a full discussion of this controversial and acrimonious debate see Note, *United States-Japan Trade Developments Under the MTN Agreement on Government Procurement*, 5 FORDHAM INT'L L.J. 139, 169-70 n.187 (1981).

145. *Id.*

governmental entity whose procurements were sufficiently large and technologically advanced to provide the necessary reciprocity, Japan consented to the inclusion.¹⁴⁶ Believing the Code ignored quality control, Japan held the position that its need to maintain high quality prevented it from opening all contracts to competitive bidding.¹⁴⁷ Bilateral negotiations continued on this issue after the Tokyo Rounds. On December 19, 1980, the U.S. and Japan agreed to bring NTT's procurement procedures into conformity with the Government Procurement Code.¹⁴⁸

To open its procurement market for foreign competition, and still maintain the quality of its telecommunications system, NTT developed a five "Track" procurement procedure. This system places strict management and technical requirements on suppliers.¹⁴⁹ Track I covers nonpublic mainline communications equipment and is subject to bids by suppliers from all Code signatories.¹⁵⁰ Tracks II and III are most important to U.S. suppliers because they cover high technology and high dollar volume public telecommunications equipment, which U.S. firms sell competitively.¹⁵¹ Track II lists procedures for purchases of equipment available in the market, which can be used as is or modified to meet NTT's requirements.¹⁵² Track III covers telecommunications equipment unavailable in a suitable form in the marketplace and which requires development specifically for, or in cooperation with, NTT.¹⁵³ Telecommunications purchases in Track III accounts for over half of NTT's annual \$3 billion procurement budget.¹⁵⁴ Business arrangements under Track III often take the form of joint ventures between foreign private enterprise and NTT.

146. *Hearings on Implementation of the NTT Procurement Agreement Before the House Subcomm. on Telecommunications, Consumer Protection, and Finance of the Comm. on Energy and Commerce, 97th Cong., 1st Sess. 13 (1981) (Statement of W. Douglas Newkirk).*

147. *See NIHON KEIZAI SHIMBUN, INDUSTRIAL REVIEW OF JAPAN, 84-85 (1980).*

148. NTT Agreement, *supra* note 137.

149. *Id.* at 5-17 (Attachment I). These procurement procedures regulate all purchases other than those excepted by the Government Procurement Code.

150. *Id.* at 5 (Attachment I, para. 2). Track I covers (1) General Materials such as hardware, paper products, utility vehicles, telephone poles, as well as (2) High Technology Products such as data terminals, private branch exchange (PBX), and facsimile equipment. GAO ASSESSMENT, *supra* note 132, at 5, app. I.

151. *Id.* at 5-6 (Attachment I, para. 2). Covered under Tracks II and III are, *inter alia*, switching systems, carrier transmission equipment, radio units, on-line computer, cable and telephone apparatus, teletex terminals and automobile telephones. GAO ASSESSMENT, *supra* note 132, at 5, app. I.

152. *Id.*

153. *Id.* at 6, app. I.

154. *See BUS. WEEK, Dec. 29, 1980, at 50.*

In addition, NTT can use Track II-A and Track III-A to make follow-up purchases of any product purchased previously under Track II or III.¹⁵⁵

The major drawback to U.S. business is these Tracks involve procedures and requirements that often take months and sometimes years to complete in order to win a procurement contract. Under Tracks II and III, NTT is required to publish a detailed announcement in the Official Gazette (*Kampo*) of products it decides to purchase.¹⁵⁶ Interested firms responding on a timely basis receive the procurement documentation needed to submit an application.¹⁵⁷ Track I procedures require prospective suppliers to undergo an extensive prequalification process. A supplier must submit an application and several documents, including a resume, a summary and a company standing description of manufacturing facilities, financial statements, and business records.¹⁵⁸ NTT examines these documents, conducts any needed plant inspections, and obtains required product samples. To successfully qualify, a supplier must satisfy conditions regarding capitalization, creditworthiness, production, and quality.¹⁵⁹ Track II and III procedures are even more complex and time consuming. Docu-

155. GAO ASSESSMENT, *supra* note 132, at 6, app. I.

156. For a detailed list of the announcement information required by the Code to be published in the *Kampo*, see NTT Agreement, *supra* note 137, at 6-8 (Attachment I, para. 4) reprinted in Note, *International Trade: Government Procurement of Telecommunications Equipment*, 22 HARV. INT'L L.J. 464, 466 n.14 (1981). Essentially, the system operates as follows: Announcements of NTT's proposed purchases, as well as qualification procedures, are cabled to the Foreign Commercial Service to Washington, D.C. and disbursed via computer to United States firms. Announcements or Summary Announcements are simultaneously published in the Department of Commerce's *Commerce Business Daily* containing key information such as: (1) the subject matter of the procurement; (2) the time limit for submission of applications; and (3) the addresses where necessary documents and further information can be requested.

157. The Agreement sets forth detailed procedures for procurement announcements and for obtaining the procurement documentation needed to submit a bid application. What is not included in the Agreement, however, are any guidelines for the terms or conditions of information requested in the procurement documentation. The Agreement does not, in the interests of reducing overly complex or cumbersome requirements for final qualification, place any limitations on the economic and technical requirements, financial guarantees, or other information requested from suppliers. NTT Agreement, *supra* note 137, at 5-17 (Attachment I). But it does state that "NTT, in the process of qualifying/selecting suppliers, shall give equal treatment to all applicants whether foreign or domestic." *Id.* at 12 (Attachment I, para. 12).

158. See NIPPON TELEPHONE & TELEGRAPH PUBLIC CORPORATION SPECIAL REGULATIONS FOR HANDLING GOODS PURCHASE CONTRACTS art. I (English Translation).

159. *Id.* Track I procedures for U.S. suppliers are as follows: (1) a pre-qualification notice appears in *Kampo*; (2) a translated copy is sent to the United States for dissemination; (3) U.S. firms request pre-qualification documents from NTT; (4) NTT inspects the U.S. firm's credentials; (5) NTT sends notice of pre-qualification results; (6) NTT issues tender to the U.S. firms

mentation submitted on these tracks is scrutinized at all levels of the NTT decision making-process.¹⁶⁰ Further, NTT conducts rigid inspection of sample products for conformity with electrical, noise level, and durability standards and analyzes internal working parts.¹⁶¹

Although the NTT Agreement is designed to provide nondiscriminatory access to procurement opportunities, much discretion is left with NTT to favor domestic suppliers. For instance, the Code permits limitations on the number of suppliers if consistent with the efficient operation of the system, and allows NTT to conduct a "closed" selection process in Tracks II and III.¹⁶² The continued favoring of domestic industry is most problematic in Track III where joint research and development projects often create new technologies. In the interests of giving its own industry the competitive edge in new technologies, it is understandable why NTT would be compelled to award these contracts to Japanese firms. As a consequence, many more United States firms are establishing branch offices in Japan to facilitate the close cooperation needed in such joint projects.

The Interconnect Market Understanding,¹⁶³ which evolved from negotiations leading to the NTT Procurement Agreement, opened the door for the United States to compete in Japan's interconnect market.¹⁶⁴ The interconnect market is the segment of the domestic public telecommunications equipment market which is both NTT and customer provided.¹⁶⁵ It generally consists of terminal equipment con-

which have successfully pre-qualified; (7) U.S. firms submit bids; and (8) NTT awards the final contract. See Note, *supra* note 144, at 172 n.201.

160. GAO ASSESSMENT, *supra* note 132, at 6, app. I.

161. *Id.*

162. Note, *supra* note 144, at 176.

163. NTT Agreement, *supra* note 137, at 24-27 (Joint Statement, dated Dec. 19, 1980, concerning reciprocal liberalization of the interconnect market).

164. Although this Understanding is appended to the NTT Agreement documents, it was concluded separately from the NTT Agreement and, unlike the latter, has no termination date. Aggregate sales in the interconnect market approximate \$1 billion annually and constitute 35% of potential telecommunications sales to Japan. GAO ASSESSMENT, *supra* note 132, at 14 app. II.

165. Nippon Telegraph & Telephone Public Corp., Japan's Interconnect Market and NTT's Procurement Market 2 (1984) (available from NTT's Los Altos office) [hereinafter cited as Interconnect Document]. Most equipment is permitted to be customer-provided with the exception of primary telephones and coin operated telephones which are provided exclusively by NTT. See *supra* note 140. "In Japan, customers may purchase interconnect equipment directly from suppliers and connect it to the telecommunications network." However, NTT's approval for compliance with technical requirements is necessary in order to connect private leased-line equipment into Japan's telecommunications system. Two types of approval are used: Product-type approval and Individual document approval. The former involves inspection of certain types of equipment, and the latter is approval of a customer's connection of

necting customers to a telecommunications system.¹⁶⁶ Specifically, it is composed of telephones and telephone systems, facsimile equipment, PBXs,¹⁶⁷ and data terminal equipment.¹⁶⁸ The Understanding established a mechanism through which United States and other foreign firms can obtain NTT approval to sell products on Japan's interconnect market. To accomplish this, NTT revised its rules and regulations. It agreed to accept test data from foreign firms and laboratories to fulfill type-approval requirements and to inspect the customer's installations of equipment within two weeks of the inspection request.¹⁶⁹ The procedure for interconnection of customer-provided equipment is briefly as follows: First, a manufacturer must submit an Application for Type Approval Inspection to NTT. NTT then conducts a Type Approval Inspection and, if satisfied with the product, designates Type Approval. The manufacturer is then free to sell to the customer, who will interconnect the equipment to a domestic communications network. Installation must also be inspected and approved by NTT.¹⁷⁰

The Interconnect Understanding appears to be fulfilling its intended objective. Between January 1981 and April 1983, NTT approved all requests to sell or install United States-made interconnect equipment in Japan, involving 147 different type products from 40

particular equipment to a domestic telecommunications network. GAO ASSESSMENT, *supra* note 132, at 14 app. II. Denial of Individual document approval was the center of the Control Data and Tymshare controversies in the 1970's. These problems were alleviated when MPT authorized a deregulation for its international leased line carrier, KDD, thereby allowing the use of multiple processing centers overseas. See *supra* notes 102-17 and accompanying text.

166. GAO ASSESSMENT, *supra* note 132, at 14 app. II.

167. PBX is an acronym for Private Automatic Branch Exchange. It is "a private automatic telephone exchange that provides for the transmission of calls to and from the public telephone network. Some PBX's now contain microprocessors which make possible such services as direct-access inward dialing, automatic least-cost routing, speed calling, conference calling, and automatic ringing." SELECTED ISSUES REPORT, *supra* note 3, at 51.

168. Interconnect Document, *supra* note 165, at 6.

169. GAO ASSESSMENT, *supra* note 132, at 15 app. II. In the Interconnect Market Understanding Japan agreed: (1) NTT would make type-approval available for all classes of customer-provided equipment; (2) NTT would continue to publish all relevant documents and other information or requirements for having products accepted for type approval; (3) NTT would accept test data in any area from domestic and foreign firms in a non-discriminatory manner; (4) NTT would grant or deny approval expeditiously (normally within two months); (5) NTT would complete installation inspections within approximately two weeks of the inspection request; (6) NTT would hold a series of seminars to acquaint firms wishing to sell customer-provided equipment to the Japanese market; and (7) NTT would publish appropriate documents in English to facilitate sales by foreign manufacturers. NTT Agreement, *supra* note 137, at 24-27 (Joint Statement).

170. Interconnect Document, *supra* note 165, at 34.

United States firms.¹⁷¹ Of these, five firms had been granted type-approval to sell eleven types of equipment including headsets, telephone sets, PBX equipment, and acoustic couplers.¹⁷² Plantronics, Inc., after ten years of fruitless contact with Japanese officials from NTT, MITI and JETRO (Japanese External Trade Organization), suddenly received approval in March 1981 (three months after the Agreement took effect) to sell its telephone headsets to private industry in Japan.¹⁷³ Nevertheless, critics still contend that NTT's approval procedures are too cumbersome and costly. For example, one company spent about seven months and \$550,000 to obtain NTT type-approval for its PBX equipment.¹⁷⁴ It was required to modify the equipment to meet NTT's technical requirements and translate all technical manuals into Japanese. The consensus among American suppliers appears to be that NTT is acting in good faith and in accordance with the terms of the Agreement.¹⁷⁵ The Commerce Department notes, however, that the Japanese still rely on a number of non-tariff barriers associated with the interconnect market in areas not covered by the Agreement.¹⁷⁶

1. Impact of the NTT Agreement

The Nippon Telephone & Telegraph Procurement Agreement was renewed for another three year period on January 30, 1984. The renewal decision was a difficult one, primarily because sales to NTT were lower than anticipated during the initial three year term.¹⁷⁷ Sales "to NTT in 1981 and 1982 amounted to only about \$15.2 million and \$40 million respectively and were comprised of relatively low technology products."¹⁷⁸ In 1983, sales increased threefold to approximately \$142 million; still not considered significant in relation to

171. GAO ASSESSMENT, *supra* note 132, at 15 app. II.

172. *Id.*

173. *High Tech Gateway*, *supra* note 60, at 42.

174. GAO ASSESSMENT, *supra* note 132, at 15 app. II.

175. *Id.*

176. *Id.* at 16; L.A. Times, *supra* note 127.

177. While the NTT Agreement did not guarantee U.S. firms sales, it did guarantee sales opportunities. The success of the Agreement was measured by three sales performance factors: (1) significant sales in terms of value and volume; (2) sales of sophisticated telecommunications equipment; and (3) sales of product types leading to long term business relationships with U.S. firms. *Nippon Telephone & Telegraph Procurement Agreement: Hearing Before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce*, 98th Cong., 2nd Sess. 7 (Mar. 7, 1984) (Statement of Ambassador William E. Brock, United States Trade Representative) [hereinafter cited as Brock Statement].

178. *Id.* U.S. sales to NTT included some high technology items such as echo cancelers

the \$3 billion Japanese telecommunications market.¹⁷⁹ The results were also disappointing because most of the sales continued to be low technology areas, not in the large switching equipment area that would indicate a long-term relationship.¹⁸⁰

Three primary factors are responsible for sales not meeting U.S. Government expectations: (1) Insufficient time had passed to see meaningful results; (2) NTT experienced major start-up problems in implementing the agreement; and (3) United States firms were reluctant to take advantage of the NTT Agreement.¹⁸¹ Regarding the last factor, American firms must incur the high costs of maintaining in-country presence, translating documents, and often modifying its products to make sales to NTT.¹⁸² The consensus among United States businesses seemed to be that NTT's purchasing specifications were too rigid, bid deadlines were too short, and purchases were in lots too small to be commercially attractive.¹⁸³ Efforts to remedy these problems were taken by NTT in 1983 subsequent to a meeting between the United States Trade Representative, Ambassador William E. Brock, and the President of NTT, Dr. Hisashi Shinto.¹⁸⁴ Af-

and PBX's, but nearly half of the sales were in low technology products like magnetic tape. GAO ASSESSMENT, *supra* note 132, at 4 app. I.

179. Brock Statement, *supra* note 177, at 3; GAO ASSESSMENT, *supra* note 132, at 42.

180. Brock Statement, *supra* note 177, at 3.

181. GAO ASSESSMENT, *supra* note 132, at 4 app. I. U.S. industry officials predicted it would take at least three years to see significant levels of major sales to NTT. Suppliers needed time to study the new telecommunications system and learn how to deal with the new customer (then a government agency), and NTT needed time to assess the dependability of the suppliers and their products. Initially, NTT was divided in its support of the agreement. NTT officials acknowledged significant difficulties in implementing the Agreement's procurement procedures, and continued using generally discriminatory pre-Agreement procedures for products not having specifications. Of equal importance was the reluctance on the part of U.S. telecommunications firms, particularly smaller and medium-sized firms, to invest in the Japanese market. Many were waiting for large multinational corporations to penetrate the market before making substantial investments. *Id.* at 4-9 app. I.

182. One American supplier representative stated his company incurred costs of about \$400,000 a year to maintain a one-person office in Japan. Another firm estimated costs of \$100,000 merely to translate its product proposal into Japanese. Participation in Track III procurement can require especially high investment (e.g. \$10 million), yet there is no guarantee that the supplier will realize a sale. A firm selected to develop a product under Track III is given no assurance that NTT will purchase the resulting equipment in sufficient quantity or price for the firm to realize a profit. Numerous U.S. business representatives have reported their companies investing up to three years and substantial financial resources to sell equipment to NTT and made little if any profit. *Id.* at 9-10 app. I. For specific instance of proposal and development costs see, *NTT Agreement Hearings*, *supra* note 177, at 53-57 (Statement of Charles Lecht, Chairman of Lecht Sciences Inc.).

183. Brock Statement, *supra* note 177, at 7-8.

184. *Id.* at 8. As added incentive to U.S. firms, NTT began to accept bids in English at

ter this point, NTT cooperation and commitment to the Agreement seemed to increase and U.S. firms indicated a growing optimism about prospects for future sales.

The U.S. Trade Representative deemed the renewal agreement an "unqualified success."¹⁸⁵ Based on advice from U.S. firms on improvements in the process, the renewal agreement incorporated all the modifications sought by the United States.¹⁸⁶ Continuation of the Agreement is important for a number of reasons. First, Japan's telecommunications market is the second largest in the world, and NTT procurement represents about forty percent of Japan's telecommunications market. Second, the Agreement offers a valuable opportunity for United States business to participate in Japan's telecommunications system by providing a previously nonexistent formal procurement process and equal market access, bringing the United States closer to its goals of freer trade and open telecommunications markets. Third, exposure to the development of Japan's high technology industries and standards for quality is beneficial for American firms in order for them to remain on the cutting edge of innovation.¹⁸⁷ NTT research in optical telecommunications, semiconductors, and computer science is at the very forefront of technology.¹⁸⁸ Without access to a source that will be shaping the future in world telecommunications equipment and services, United States companies are at a great disadvantage.¹⁸⁹ Additionally, it is vital to the U.S. economy to re-

their new New York office rather than only in Tokyo. Subsequent to renewal of the Agreement, and as further evidence of their commitment, NTT established a second U.S. office in Los Altos, California. This office, located in the Silicon Valley, is designed to support NTT procurement operations with high technology and software firms in the Western United States. These operations include accepting applications for procurement and consulting with those firms interested in selling to NTT. See, NTT Information Desk, Background Information on New California NTT Office (Available from NTT's Los Altos office).

185. Brock Statement, *supra* note 177, at 11.

186. The modifications sought and obtained were:

- (1) Access for U.S. firms to NTT's research and development activities on the same basis as Japanese firms;
- (2) A commitment to use Internationally accepted standard contract terms;
- (3) A commitment to protect proprietary information;
- (4) Agreement to set purchase specifications so as to maximize opportunities for competition; and
- (5) A commitment not to require joint development projects when U.S. firms can meet NTT need with products that are already available.

Brock Statement, *supra* note 177, at 10.

187. *NTT Agreement Hearings*, *supra* note 177, at 27-28 (Statement of Lionel Olmer).

188. *Id.*

189. *Id.* at 28. For an interesting perspective on Japan's superiority in telecommunication

duce its huge trade deficit. Part of the solution to this problem lies in increasing exports of U.S. high technology products and services.

2. Implementation of the NTT Agreement

The key to success of the renewed Agreement will be in the competence, initiative, and persistence of American companies. The United States Government also has a vital role to play in assisting American business by monitoring the progression of access to the Japanese market and by maintaining open lines of communication with NTT (i.e., expert level exchanges) necessary to developing long term commitments. The International Trade Administration (ITA) of the Department of Commerce is responsible for implementing the Agreement and acts as a liaison between NTT and United States industry.¹⁹⁰

Expert level exchanges have resulted in several important agreements. One such agreement is between the National Bureau of Standards and NTT.¹⁹¹ It provides for a one year period of mutual orientation of the staffs from two laboratories through an exchange of reports and on-site visits.¹⁹² Along the same lines, Commerce's NTIA, in conjunction with the FCC, agreed to a series of expert-level meetings with Japan's Ministry of Posts and Telecommunications, the ministry responsible for formulating Japan's international telecommunications policies.¹⁹³ Such reciprocal actions indicate Japanese willingness to share in an economic partnership with the United States in the interests of gaining greater technological advantage.¹⁹⁴

B. *The Telecommunications Business Law and the NTT Company Bill*

Japan's Diet,¹⁹⁵ in December 1984, passed two bills which the

innovation see Lecht, *The Chrysanthemum or the Sword*, COMPUTERWORLD, Mar. 5, 1984, at 49, 52 reprinted in *NTT Agreement Hearings*, supra note 177, at 70-71.

190. Olmer Statement, supra note 187, at 31. The ITA assists in disseminating prequalification announcements, distributes information kits on how to do business in Japan, handles telephone inquiries and written requests for help, and provides personal briefings and seminars for U.S. companies. In 1983, for example, American Express Co. was told by NTT that it would be required to change all of its telephone numbers in Japan if it bought a Rolm Corp. digital PBX. Through ITA's intervention NTT was persuaded to change the regulations, thereby allowing American Express to go through with its purchase without having to bear the additional expense of changing its numbers. *Id.* at 31-32.

191. *Id.* at 38.

192. *Id.*

193. *Id.* at 38-39.

194. Accord supra note 1 and accompanying quote.

195. The Diet is Japan's legislative body which consists of two Houses.

United States business community and government hoped would dismantle the remaining vestiges of protective Japanese telecommunications policy: The NTT Company Bill¹⁹⁶ and the Telecommunications Business Law.¹⁹⁷ These bills, effective April 1, 1985, are purportedly designed to introduce competition into the Japanese telecommunications market. However, many U.S. officials and critics believe the legislation represents a "major step backwards" in trade relations with Japan.¹⁹⁸

1. The NTT Company Bill

The NTT Company Bill transforms NTT from a public company to a privately-owned corporation. The move to privatize NTT is designed to accelerate Japan's emergence as an information society by introducing competition into its domestic market.¹⁹⁹ MITI has encouraged the privatization, realizing that NTT's monopoly status hampers innovation by reducing competitive market forces.²⁰⁰ However, both the Diet and the Ministry of Posts and Telecommunications share scepticism as to the telecommunications giant's ability to survive the initial stages of transition. Accordingly, the government has been given up to five years in which to sell up to half of the NTT stock it controls.²⁰¹ To remedy the inefficiency of NTT's cumbersome size, the immediate goal is to streamline NTT into markets concentrated on long-distance and higher-technology.²⁰² At first, NTT will not be broken up into regional companies.²⁰³ Eventually, "the electronic communications service business itself will be liberalized as well as the full usage of communications channels."²⁰⁴ This should lead to abolition of the types of restrictions encountered by Control Data and Tymshare in the 1970's.²⁰⁵ At the same time, the installation of standard telephone sets will also be opened to the public.

196. Nippon Telephone & Telegraph Company Bill, Nippon Denshin Denwa Kabushiki Kaisha Law, (1984) [hereinafter cited as NTT Company Bill].

197. Telecommunications Business Law (Unofficial Translation), 1 Japanese Legislation of Telecommunications (1984) [hereinafter cited as Telecomm. Bus. Law].

198. Rovit, *Special Report: Cellular Equipment Market Controversy*, TELECOMMUNICATIONS, Jan. 1985 at 32.

199. Phalon, *Letting go*, FORBES, Mar. 11, 1985, at 38.

200. PTC Conf. Paper, *supra* note 118, at 112.

201. *Letting go*, *supra* note 199, at 40.

202. PTC Conf. Paper, *supra* note 118, at 112.

203. *Id.*

204. Japan External Trade Organization (JETRO), *Your Market in Japan: Communications Equipment*, 4 Mini Report 3 (Sept. 1984) [hereinafter cited as JETRO Report 4].

205. See *supra* notes 109-13 and accompanying text.

From April 1985 onward, subscribers will be able to purchase any telephone set freely.²⁰⁶ Under previous regulations, the standard telephone set had to be one designated by NTT.²⁰⁷ For Japanese business, the result will be more sophisticated and lower cost systems for sending and receiving computer data.²⁰⁸ For U.S. companies, the change could mean unprecedented entry into Japan's \$3 billion telecommunications market.²⁰⁹

Initially, NTT stock will continue to be held entirely by the government, then up to 49% will be sold to the public.²¹⁰ The NTT Company Bill requires the government to retain one-third ownership.²¹¹ It also precludes foreigners or foreign companies from acquiring NTT shares, but companies with less than 50% foreign interest will be eligible for shareholding.²¹² Although "privatized," NTT's business endeavors will remain in the control of the Ministry of Posts and Telecommunications. Article 11 of the Company Bill provides that NTT shall formulate a yearly business plan which must receive authorization from the Minister of Posts and Telecommunications before commencement of the business year.²¹³ Article 15 provides that the Minister may, when necessary, issue to the Company orders necessary for "the supervision relating to its business activities."²¹⁴

One complaint from the United States Congress is that the Japanese largely ignored the procedures of the Standards Code in the process of privatizing NTT.²¹⁵ The Standards Code gives the United States an opportunity to comment formally on the standards drafting process. Although Japan promised to provide a nine week period for U.S. comment on the new standards, testing, labeling and certification requirements, the regulations were made available to U.S. firms only 16 days before they became final.²¹⁶ Related to this, is the continuing Japanese practice of drafting standards and technical regulations on

206. JETRO Report 4, *supra* note 204, at 3.

207. *Id.*

208. *A New Path Onto NTT's Turf for U.S. Giants*, *BUS. WK.*, Mar. 5, 1984, at 43.

209. *Id.*

210. PTC Conf. Paper, *supra* note 118, at 112.

211. *Letting go*, *supra* note 199, at 40.

212. *Id.*

213. NTT Company Bill, *supra* note 196, at 3, art. 11.

214. *Id.* at 4, art. 15.

215. SENATE COMM. ON FINANCE, *REQUIRING THE PRESIDENT TO RESPOND TO UNFAIR TRADE PRACTICES OF JAPAN*, S. REP. NO. 102, 99th Cong., 1st Sess. 6 (1985).

216. *Id.*

the advice of Japanese industries interested in excluding foreign competition for their own economic benefit.²¹⁷ Another concern is whether the policy goals of NTT Procurement Agreement will be implemented by the MPT once NTT is broken into smaller, non-governmental units.

2. The Telecommunications Business Law

The Telecommunications Business Law is designed to protect the interests of users and promote the welfare and convenience of the public.²¹⁸ It seeks to accomplish this by ensuring the sound development of telecommunications, the reasonable operation of the telecommunications business, and by securing consistent provision of telecommunication service.²¹⁹ This goal is to be achieved by increased levels of competition. The legislation permits foreign "private companies to set up and operate value added networks (VANs) using public [tele]phone lines."²²⁰ It also "authorize[s] large, nationwide networks to which individual consumers can buy access."²²¹ However, the MPT retains control of screening applications for VAN operations, which could preclude the entry of foreign competitors, depending on how the Ministry chooses to exercise its power.²²² The Business Law provides for "Fairness in Use,"²²³ that is, a "telecommunications carrier shall not discriminate unfairly in providing telecommunications service."²²⁴

The new legislation extends beyond the scope of both the NTT Agreement and the Government Procurement Code in that it establishes extensive guidelines for foreign competition to "set up" telecommunications businesses in Japan.²²⁵ To accomplish this, the Bill categorizes the telecommunications business into Type I and Type

217. *Id.*

218. Telecom. Bus. Law, *supra* note 197, at 1, art. 1.

219. *Id.* Article 1 states:

The purpose of this Law is, considering the public nature of telecommunications business, by ensuring the proper and reasonable operation of such business, to secure the consistent provision of telecommunications service, to protect the interests of its users, and thereby to ensure both the sound development of telecommunications and the convenience of the people, and to promote the welfare of the public.

220. *A New Path Onto NTT's Turf*, *supra* note 208, at 45.

221. *Id.* Under the former system NTT only allowed small private companies to build networks for their own use.

222. PTC Conf. Paper, *supra* note 118, at 113.

223. Telecom. Bus. Law, *supra* note 197, at 3, art. 7.

224. *Id.*

225. *Id.* at 4-16, arts. 9-28.

II,²²⁶ and sets forth the detailed requirements for obtaining permission to operate a telecommunications business.²²⁷ Any persons or business who intends to operate a Type I telecommunications business must obtain permission by filing an application with the Minister of Posts and Telecommunications.²²⁸ Permission will be granted only if an application for permission conforms to each of the following categories:

- i) Telecommunications service to be provided [is] . . . appropriate in light of the demand in the service territory.
- ii) The introduction of the telecommunications business [does] not result in a significant excess of telecommunications circuit facilities . . . in any part of the territory. . . .
- iii) The applicant [has] an adequate financial basis and technical capability. . . .
- iv) The plan of the telecommunications business [is] reliable and feasible.
- v) [T]he introduction of the telecommunications business [is] appropriate for the sound development of telecommunications in general.²²⁹

With enactment of the new law, some sources estimate that the annual growth rate for services to computer and telecommunications users will boost up to thirty percent from the ten to twenty percent present level.²³⁰ While there are concerns in Japan that United States experience in running networks could result in monopolization of the market, the new law limits foreign ownership/participation in VANs to thirty percent.²³¹ This reduces the threat of America's technological superiority. Other limitations, such as the denial of VAN licenses, would likely be placed on foreign competition if perceived as adversely affecting the welfare of the Japanese people.²³² Fear of these

226. *Id.* at 3, art. 6. Article 6 provides in pertinent part:

(2) Type I telecommunications business shall be that business which provides telecommunications service by establishing telecommunications circuit facilities (which mean transmission line facilities connecting transmission points with receiving points, switching facilities installed as inseparable units therefrom, and other facilities accessory to such facilities. . . .)

(3) Type II telecommunications business shall be any other telecommunications business than Type I telecommunications business.

227. *Id.* at 4-16, arts. 9-28.

228. *Id.* at 4, art. 9.

229. *Id.* at 4-5, art. 10.

230. *A New Path Onto NTT's Turf*, *supra* note 208, at 45.

231. *Id.*

232. *Id.* (Taken from statement of Japan's Prime Minister Nakasone to Diet committee in February 1984).

limitations does not, however, appear to be stopping the plans of large U.S. corporations. AT&T and IBM Corp. are two firms laying the foundation for major involvement in the Japanese telecommunications market.²³³

While the Japanese are touting the Telecommunications Business Law as a trade liberalization measure, some view it as a continuation of Japan's protectionist policies.²³⁴ The Law's "Disqualification for Permission" provision (Article 11), applicable to Type I business, seems to indicate the latter.²³⁵ It states that permission to operate Type I telecommunications business will not be granted to:

- iv) Any person who does not have Japanese nationality.
- v) Any foreign government or its representative.
- vi) Any foreign juridical person or association.²³⁶

This language is a strong indication that the Japanese government wants to restrict wholly or predominantly foreign entities from entering the Japanese market. These disqualifications do not, however, apply to Type II businesses.²³⁷ In addition to limiting the nationality of those individuals who may be certified for approval, the legislation creates a new, independent testing body which is dominated by Japanese industry. This restricts the ability of U.S. industry to "influence the critical rewriting of equipment standards as they are reissued as official [MPT] . . . standards."²³⁸ Other concerns of United States officials are that the Law requires unnecessary application information, "including confidential business data, and obligate[s] United States businesses to obtain prior approval at various

233. AT&T International is planning to establish a joint venture with twenty end-user companies in Japan to develop a nationwide value-added network by using AT&T's AIS/Net 100 operating system. The venture will be built around supercenters in which large scale computer, bulk storage sub-systems, and electronic multipurpose digital exchanges will store, convert, and transmit information to various users through one of the supercenters. Some of the companies AT&T is said to have approached are Asahi Shimbun (a leading newspaper publisher), Dentsu Advertising, the Industrial Bank of Japan, Itoh Yokado (a supermarket chain), Mitsui Bank, Mitsui Trading Co., and Sony. Meanwhile, IBM Japan has formed two joint ventures with Mitsubishi Corp. and Cosmo 80: AST and AST SOKEN. This group also plans to supply large scale VANs. Both companies are reportedly working closely with NTT in providing software to connect their network systems to those of NTT, as well as leasing communications lines from NTT. Kurita, *Two U.S. giants scramble for market share*, ELEC. BUS., June 15, 1984, at 60. GTE and General Electric Corp. have similar joint venture plans but on a less grandiose scale. *New Path Onto NTT's Turf*, *supra* note 208, at 45.

234. *See Special Report*, *supra* note 198, at 31-32.

235. Telecomm. Bus. Law, *supra* note 197, at 5, art. 11.

236. *Id.* at 5, art. 11(iv)-(vi).

237. *Id.* at 13-14, art. 26.

238. *Special Report*, *supra* note 198, at 32.

levels of the Japanese government."²³⁹ It is also argued that the legislation leaves NTT with control over approving digital equipment, and lacks the safeguards to prevent NTT from using its revenue to cross-subsidize service where it faces competition.²⁴⁰

Analysis of the various provisions of the Telecommunications Business Law is of questionable value. The real answers lie in how Japan's Ministries, namely the MPT, are going to implement the legislation to restrict or expand trade. Although it is early to draw well-founded conclusions, the general sentiment in Congress and among United States trade negotiators is that Japan remains committed to keeping its market protected from foreign competition. This sentiment has erupted into angry Congressional reaction to restrictive trade policies, some of which focus particularly on Japan.

C. Congressional Reaction

The Telecommunications Trade Act of 1985,²⁴¹ authored by Senator John C. Danforth, is intended to promote international telecommunications trade and foster the economic and technological growth of the United States telecommunications industry.²⁴² The Act seeks to reduce the trade deficit by (1) ensuring that countries abide by their commitments to open telecommunications trade;²⁴³ and (2) opening world trading in telecommunications products and services through negotiation and achievement of equivalent competitive opportunities for United States telecommunications exporters.²⁴⁴ The bill requires the United States Trade Representative to investigate and report on trade practices of foreign countries whose policies deny U.S. firms "competitive opportunities" equivalent to those available in the U.S.

239. L.A. Times, *supra* note 127, at 1, col. 1 (Statements of Lionel H. Olmer). According to Mr. Olmer, under the new telecommunications policy U.S. suppliers will still face: (1) a complex and discriminatory system for registering enhanced services; (2) layer upon layer of approving authorities (to approve equipment for network attachment), ministerial ordinances, guidelines, and directives; (3) technical standards not articulated in a clear and nondiscriminatory manner; (4) requests for confidential information before initial approval is granted; (5) a Telecommunications Advisory Council composed of members from Japanese industry without any foreign representatives. Schwartz, *Hits Japan's New Telecom Policy as Biased*, ELEC. NEWS, Mar. 18, 1985, at 58.

240. Schwartz, *supra* note 239, at 58.

241. S. 942, 99th Cong., 1st Sess. (1985). As of the writing of this Comment, the Telecommunications Trade Act received unanimous approval by the Senate Finance Committee.

242. *Id.* at § 2(b)(1).

243. *Id.* at § 2(b)(2).

244. *Id.* at § 2(b)(3).

market within six months of enactment.²⁴⁵ The bill specifies the President must then take action to remedy or offset such policies.²⁴⁶ If, after two years, a satisfactory accord has not been attained, the President must enact "retaliatory" measures against the particular nation.²⁴⁷

Another proposed bill advocates immediate retaliation against the Japanese by closing the U.S. market to all Japanese telecommunications equipment until the USTR can certify that U.S. products have equal access to the Japanese markets.²⁴⁸ Still others would impose a 20% across-the-board surcharge on all imports from Japan for three years.²⁴⁹ Critics of the Danforth bill believe that the primary cause of the trade deficit is the high value of the U.S. dollar, which decreases our competitiveness in international markets.²⁵⁰ Irresponsible borrowing and spending by the U.S. government has pushed up interest rates, drawn worldwide investment capital and, consequently, forced up exchange rates. They argue that the Danforth bill, in seeking to remedy the trade imbalance through opening access to foreign telecommunications markets, misses the mark.²⁵¹ The real issue here, it is argued, is the lack of access to Japanese telecommunications markets, not the imbalance of trade which is primarily due to automobile and electronics purchases from Japan. Therefore, the issue of access should be addressed with measures that are most likely to stimulate opening of the Japanese markets, and the deficit problem addressed through a fundamental change in fiscal policy.²⁵²

245. *Id.* at § 101(a).

246. *Id.* at § 102(a)(1). The President would be required to enter into negotiations to pursue the objectives of: (1) national treatment for U.S. products and services; (2) most favored nation treatment; (3) non-discriminatory government procurement policies; (4) reasonable equipment certification standards and procedures; and (5) elimination of non-tariff trade barriers. *Id.* at § 102(a)(2)(B). See also, Lipman & Kiddoo, *Int'l trade deficit, telecom markets and an angry Congress make a volatile mix*, TELEPHONY, June 10, 1985, at 38, 39.

247. Such retaliatory actions would include: (1) prohibiting U.S. government procurement of the foreign countries telecommunications goods; (2) imposing requirements for FCC registration or approval of foreign telecommunications equipment; (3) increasing customs duties; (4) terminating, withdrawing or suspending trade/tariff agreements; (5) implementing a "buy-America" policy. See *supra* note 241, at § 102(b).

248. S. 728, 99th Cong., 1st Sess. (1985).

249. S. 770, 99th Cong., 1st Sess. (1985).

250. REQUIRING THE PRESIDENT TO RESPOND, *supra* note 215, at 13-14 (Views of Senator John H. Chafee).

251. *Id.*

252. *Id.*

VI. CONCLUSION

The movement of Japan's telecommunications policy is, undoubtedly, toward market liberalization. Many of the trade impediments of the 1970's have been abolished. Japan's procurement of United States telecommunications goods has increased, and larger numbers of joint ventures between United States and Japanese businesses are assisting both countries in maintaining their lead as information-oriented societies. But the movement away from protectionism is slow; indeed too slow for United States officials attempting to break down the trade barriers. The cause of the problem is really twofold. One, Japan has historically been reluctant to import anything other than basic requirements. A substantial majority of its imports are in vital resources such as food, oil, and raw materials. Not having the good fortune of a fertile, resource-laden land, a sense of economic vulnerability understandably lies at the root of Japan's stubbornly restrictive economic policies. Two, the United States Government has exacerbated its trade problems by rampant borrowing and spending, resulting in an overvalued dollar and a serious erosion of competitiveness in world markets.

National sovereignty is dependant upon economic strength. The ability to store, process, and transmit information is increasingly becoming a source of worldwide economic power. Thus, the United States and Japan have a critical mutual interest in maintaining their leadership as the world's two most technologically advanced nations. Japan refuses, however, to risk a potential loss of independence by endangering the strength of an industry as vital to the country's future economic welfare as telecommunications. Unfortunately, this posture is in diametric opposition to Japan's articulated policy of reciprocal and worldwide liberalization of trade. Ideally, freer trade would enable both countries to work together, utilizing each other's knowledge, toward a goal of more rapid technological advancement. Trade barriers impede this advancement. Foreign firms have a natural market in Japan. Without access, the economic stimulus of mutual requirement vanishes. For now, however, the Japanese feel that the long run interests of their country are served by protecting their information industries from unfettered foreign competition. Deeply ingrained cultural values are not simply cast aside in the name of enhanced economic relations. Although Japan's Prime Minister favors freer trade, he must work within the constraints of a system which delegates much decision-making power to the appropriate ministries.

The decisions of the Ministry of Posts and Telecommunications have, overwhelmingly, been protectionist-minded.

While the telecommunications and computer industries have developed at a break-neck pace in the last twenty-five years, we are still at the dawn of a new era. The Information Age is one whose ultimate potentials are hardly foreseeable today. Thus, it may be wise for the Japanese to proceed with caution when considering the future prosperity of their nation. However, the danger inherent in Japan's trade position lies in the perception that a huge export surplus is a sign of strength. This high dependence on the export market leaves Japan vulnerable to retaliatory protectionist measures. Domestically, pressure continues to rise for Congress to take stiff retaliatory action unless Japan adopts quick and effective measures designed to trim its massive annual trade surplus with the United States.

The issue of telecommunications trade with Japan is much broader than it appears at first blush. Remedies transcend the trade relationship between the two countries, and are closely interrelated with the problems of the United States' budgetary and global trade deficits. The United States may have no choice but to regulate Japan's access to the United States market. Import surcharges or reciprocal access regulations could speed the Japanese trend toward liberalization. But retaliatory measures which may assist U.S. business in gaining access to the Japanese telecommunications market do not effectively address the more significant issue of the trade imbalance. A solution to this larger problem lies in devices which make American exports more competitive in the world outside Japan. Price reductions can be accomplished through a limitation on United States spending, domestically and abroad. The implementation of a fiscal policy designed to dramatically reduce the federal deficit, by cutting government spending, is a better solution than mere retaliation against those profiting from our macroeconomic policies.²⁵³

Robert Jesuele